CALIFORNIA BAR PAST EXAMS

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 3

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved "as quickly and quietly as possible." Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her "associate." Todd denied possessing, selling, or even using drugs. Todd said he was "set up" by undercover officers. After Todd left the office, Zelda told Alice that if Todd's story was true, the prosecution's case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could "take it from here" and gave her a check marked "Consultation Fee, Betty's Case."

Alice entered an appearance on Todd's behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: "Look, I'm innocent. Don't I have any other choice?" Alice, cognizant of Betty's wish to get the matter resolved, told Todd she thought it was Todd's best chance. Based on Alice's advice, Todd accepted the prosecution's offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility? Discuss.

ANSWER A TO ESSAY QUESTION 3

Alice's Professional Responsibilities

Who does Alice represent?

Despite the fact that Betty, Alice's friend, requested that Alice represent her son in a "possession of cocaine with intent to distribute" matter, it should be noted that Alice's client in this situation is Todd. Todd is legally an adult, and it is Todd whom Alice has a professional relationship with – not Betty. Therefore, this could create potential conflicts for Alice.

Duty of Loyalty

An attorney owes his client a duty of loyalty. This duty arises in situations where the interests of a third party, the client or the attorney, might materially limit, or adversely affect the attorney's ability to effectively represent his client. When there is a possibility that this may occur at some point during the course of the representation, it is called a potential conflict of interest. When the conflict does in fact exist, it is called an actual conflict of interest.

In situation where this arises, under the ABA, an attorney should not undertake (or continue) representation unless (1) he reasonably believes the [sic] he can effectively represent his client despite the potential conflict of interest, or that an actual conflict of interest will not adversely affect his representation; (2) disclose the conflict to his client; (3) obtain the client's consent; and (4) the consent must be reasonable (in the opinion of an independent outside attorney). California has stricter requirements, requiring that the attorney obtain the client's consent in writing.

Betty's Involvement

Under the facts of this case, a potential conflict of interest exists. For starters, Betty is a friend of Alice's. This could affect Alice's judgment. However, if she reasonably believes that it would not, and meets the other requirements, this should be acceptable.

Second, Betty informed Alice that she "wanted to get the matter resolved "as quickly and quietly as possible'." This definitely creates a potential conflict of interest, since Alice does not know at this point what it is that Todd wants to do. She should have consulted with Todd, and informed him that his mother wanted to have the matter resolved quickly. Furthermore, she should have obtained his consent to continue with the representation.

Third, she is asking Alice to recommend to Todd to go to a drug rehabilitation center. As mentioned above, this also creates the potential for a conflict of interest, since she is unaware of what Todd wants at this point. Again, she should have disclosed this to him during their meeting, and obtained his written consent.

Lastly, Betty is paying Alice for her representation of Todd. This creates a potential conflict of interest, since a third party is paying for a client's legal fees. Alice should have informed Todd of this and obtained his consent. Furthermore, Alice must keep in mind that despite the fact that Betty is paying for Todd's legal fees, it is Todd who is her client. Alice should have also pointed this out to Betty at the time, so that all parties understand their relationship to another.

Actual Conflict of Interest

The duty to disclose to a client a conflict of interest and to obtain that client's consent is a continuing duty, and the duty of loyalty requirements must be met each time a conflict arises, before the attorney should continue representation. After consulting with Todd, Alice should have realized that an actual conflict on [sic] interest existed. Betty desired to have the matter resolved quickly. Todd, Alice's client, on the other hand insisted that he was "set up" and was innocent. The two interests are incompatible, since pleading innocent to such a charge would prolong the process of resolving the matter. Alice should have again disclosed her conflict of interest to Todd. Furthermore, Alice should have withdrawn from representation if she did not believe she could effectively

represent Todd or if she had failed to disclose the conflict and obtain his consent.

Todd's Guilty Plea

Alice's violation of her duty of loyalty to her client culminated in her advice that Todd accept the guilty plea. Clearly, Todd did not want to accept the plea, as he maintained his innocence. However, Alice, in attempting to comply with Betty's wishes, insisted that he accept it, informing Todd that it was his "best chance." Her actions were unacceptable and violated her professional responsibilities to Todd as an attorney. She should be subject to discipline and Todd would have a good chance at success if he were to sue her for malpractice.

Duty of Competence

A lawyer also owes his client a duty of competence. This duty requires that the lawyer have the legal knowledge, the skills, the preparation, and thoroughness necessary for effective representation of his client. If a lawyer does not have experience in a certain field of law, he can still undertake representation if he can learn the necessary knowledge within a reasonable time that does not cause delay to the client, or if he associates with an attorney that does have such experience.

Here, the fact that Alice had never handled a criminal case before would not necessarily preclude her from taking the matter, if she reasonably believed she could prepare herself for effective representation, or if she associated herself with someone who had such experience. Here, Alice associated with Zelda, an experienced criminal lawyer. Zelda assisted Alice in interviewing Todd. However, Alice should have made clear to Todd that Zelda was there merely to assist, so as to not lead him to believe that he was forming the same attorney-client relationship with Zelda as he had with Alice. While obviously, an attorney-client relationship had been formed between Zelda and Todd, the parties should have been clear that Zelda's scope of representation was limited to assisting in preliminary matters.

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda

informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

Duty to Maintain the Proper Scope of the Relationship

In an attorney-client relationship, a client is the one that makes the substantive decisions regarding, among other things, whether or not to plead guilty. The attorney is the one who makes the decisions regarding procedural matters, such as which witnesses to depose, etc.

Here, the decision of whether or not to plead guilty to the simple felony possession was Todd's. Alice breached her duties owned to him, when she encouraged him to take the plea. While it was true that it was Todd that made the final decision, this was not an informed decision, but rather Alice's will. Thus, she improperly made a decision as to a substantive issue of Todd's matter.

Duty to Render Competent Advice and to Pursue Matter Diligently

A lawyer also owes his client a duty to render competent legal advice. If she is unaware of the current state of the law, she should research it. Furthermore, a lawyer owes his client a duty to pursue the matter zealously and diligently.

Alice breached all of these duties she owed to Todd. First, she failed to give him competent legal advice. She informed him that pleading guilty to the charge was his "best choice" without really understanding criminal law, or considering his options. Instead, she based her decision on Betty's wishes to resolve the matter "quickly and quietly."

Furthermore, she did not pursue his matter zealously, but instead, pursued it according to Betty's wishes and not Todd's interests.

Duty of Confidentiality

A lawyer also owes his client a duty of confidentiality. This duty requires that an attorney not use or reveal anything relevant to representation of a client without his consent, regardless of whether or not the client asked him to keep it confidential, or whether the attorney believes it would be harmful to the client or cause him embarrassment.

While the facts do not necessarily suggest that Alice breached this duty, Alice should be careful that she not reveal anything relevant to Todd's representation to any other party (excluding her agents assisting her in representation) INCLUDING BETTY. It is likely that Betty would like to know the progress of Alice's representation, however, Alice cannot divulge this information since Todd, and not Betty, is her client.

Fiduciary Duties

A lawyer also owes her client certain fiduciary duties, relating to among things, the fees of representation. Under the ABA, an attorney's fees must be reasonable. A lawyer is allowed to split fees with another attorney as long as he obtains his client's consent, and the fee is proportional to the amount of work done. In California, an attorney's fees must not be unconscionable. Furthermore, the lawyer can split fees with another lawyer, [as] long as he obtains his client's written consent. Unlike under the ABA, there is no proportionality requirement and referral fees are acceptable as long as it does not increase the overall fee.

Here, Alice has paid Zelda a consultation fee for assisting her in interviewing Todd. Before paying Zelda, however, Alice should have gotten Todd's written consent. If she had done so, then the payment to Zelda would be appropriate under the ABA if it proportionately represents the amount of work Zelda did in the interview. In California, upon consent, such a payment is acceptable regardless of the amount of work Zelda did, as long as it does not increase the overall fee.

Duty to Communicate with the Client

A major theme running through all of Alice's breaches also constitutes a breach in it of itself – Alice failed to communicate with Todd. Alice failed to communicate with Todd her conflicts of interest, her inexperience in the field of criminal law, and the options he had at plea hearing.

Duties Owed to the Court and Third Parties

Alice not only breached some duties to Todd, but she also breached duties owed to the court and third parties. Alice was not candid with the court, when knowing [she] allowed Todd to submit a guilty plea which she knew did not represent Todd's wishes, but rather those of her own and Betty. Furthermore, she breached her duties of dignity to the profession, in that she allowed herself to continue representation despite the countless conflicts of interest and breaches on her part.

ANSWER B TO ESSAY QUESTION 3

Question 3

Duty of Confidentiality

The duty of confidentiality arises any time a person seeks legal representation and discloses confidential information in the course of establishing an attorney-client relationship. The duty of confidentiality extends to all communications between the attorney and her client, whether or not the client has asked that they be kept confidential or whether or not use of them will damage the client. The duty of confidentiality attaches when a client seeks legal representation, whether or not it attaches. The duty of confidentiality extends to any information obtained in representing a client –whether from the client or her agents or other parties.

The facts are silent as to whether Betty thought she was entering an attorney-client relationship with Alice when she sought representation for her son, Todd. Perhaps Betty's statements to Alice were made in confidence, friend-to-friend. If so, then Alice likely did not even owe a duty of confidentiality to Betty at all. However, if Betty was impliedly seeking legal counsel from Alice—either erroneously thinking that Alice 's relationship with Todd would extend to her, or seeking approval of her goals for the litigation as a separate attorney, then an attorney-client relationship attached. If it is the case that Betty was seeking legal representation for Alice or reasonably thought a relationship attached to her, then Betty's communications with Alice that she wanted the matter resolved "as quickly and quietly as possible" and that she wanted Alice to recommend an in-patient drug rehabilitation treatment program to Todd were confidential information that Alice could not use in any way in her representation of Todd.

If Alice violated her duty of confidentiality to Betty, she is subject to discipline and civil liability.

Duty of Loyalty: Potential Conflict

The greatest duty that an attorney owes her client is to act with great loyalty. An attorney's duty of loyalty to a client supercedes her duty to all other people. If an interest of another client, the attorney, or a third party stands in the way of this duty or threatens to materially limit the representation of a client, then an actual or potential conflict of interest exists and the duty of loyalty is in danger of being compromised.

When Alice agreed to represent her friend Betty's son on criminal drug charges, she faced a potential conflict. First, Betty was seeking representation on behalf [of] her son, who was not at the meeting. Alice likely wanted to do a good job for her friend who was in a tight spot and she also likely felt that it was important to protect Betty's reputation as a prominent real estate broker in the area whose reputation likely matter[ed] to the success of her business. When approached by Betty, Alice should have realized that a potential conflict existed between her representation of her friend's son, Todd, and Betty both paying for the representation and attempting to direct the representation, as well as the feelings of loyalty that one feels toward a friend.

With the existence of this potential conflict, Alice should have determined whether she thought she could have provided Todd with effective representation, and whether or not Betty's payment for the services and influence as a friend and person seeking to direct litigation would materially limit her representation of Todd. Perhaps Alice could have provided adequate representation to Todd if she had explained to Betty that Todd would be the client and made each person's role in the litigation and representation clear. It seems that even if Alice tried to make Betty's limited role very clear, it would have been very difficult for Alice to honor Betty's wishes to get the matter resolved "as quickly and quietly as possibly" and to recommend an in-patient drug rehabilitation program and at the same time to reach a conclusion that would be the one that Todd wanted from the litigation. The potential conflict between the two parties is obvious. Alice likely should have realized that her effective representation of Todd would be materially limited by her friendship with Betty and Betty's payment for the services.

Even if Alice did reasonably believe that she could provide Todd with representation that would not be materially limited by Betty's influence, payment for the services, or friendship, Alice still breached the duty of loyalty. In addition to determining whether she believed she could provide Todd with adequate representation despite the existence of the potential conflict, Alice also should have (1) disclosed the actual or potential conflict to Todd, (2) received consent from Todd (in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent – written or otherwise – from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney

would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the potential conflict that existed. Alice is subject to discipline and civil liability.

Duty of Loyalty: Actual Conflict

An attorney also has a duty to keep her guard up for evolving conflicts of interest that arise as representation continues. While it is clear that Alice should not have taken on Todd's representation without adequately disclosing and obtaining reasonable consent regarding the potential conflict between Betty and Todd, she should have handled the actual conflict that arose later in the litigation differently.

When the prosecutor offered Todd one year of probation if he underwent a one-year period of in-patient drug rehabilitation, Alice should have realized that any recommendation she made to Todd about the program was an actual conflict. Alice was right to ask Todd what he thought about the program as an alternative to not reducing the charges. However, Alice responded to Todd's uncertain inquiries about what he should do by honoring Betty's wishes. Alice compromised her duty to Todd, which should have come before any other duty to any other party concerned in the matter. She recommended a course of action to Todd that Alice knew Betty wanted: a quick, hassle-free resolution with an in-patient drug rehabilitation program.

When Alice realized the actual conflict existed, she should have reevaluated whether or not she could continue the representation of Todd. In the unlikely event that Alice thought she could still proceed with the representation of Todd, Alice should have disclosed the actual conflict that existed, sought consent from Todd (in writing in California), and proceeded only if she determined that consent was reasonable. It seems that few disinterested attorneys would find consent reasonable in this instance, as Todd's interests in his liberty and having a guilty plea entered on the record against him was materially adverse to his mother's interest in a speedy resolution and getting Todd into an in-patient drug treatment program.

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained

from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

As discussed above, if Betty was seeking an attorney-client relationship with Alice when she sought representation for Todd (not knowing that the relationship would only extend to Todd), Betty disclosed confidential information that would make it impossible for Alice to provide adequate representation to Todd while ignoring Betty's wishes. By acting on the information that Betty provided to Alice, Alice breached her duty of loyalty to Todd, her duty of loyalty to Betty if a relationship attached, and her duty of confidentiality to Betty by acting on information she gave Alice rather than Todd's wishes.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the actual conflict that arose during the course of litigation. Alice is subject to discipline and civil liability.

Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

The duty of loyalty also provides that the client must make all decisions regarding substantive rights, including such decisions as whether or not to testify in criminal prosecution or whether to accept or reject a settlement offer. Alternatively, the attorney makes decisions regarding procedure or legal strategy. Alice in effect usurped Todd's ability to decide whether or not to accept the prosecutor's "settlement" offer for a plea bargain. While at first blush it seems that Alice did allow Todd to make the decision as to whether he should accept the plea agreement, she did not provide him with all of the necessary information he needed to make that choice. Alice did not disclose that she was giving him advice based on his mother's wishes, rather than what Alice thought was the best possible choice for him.

Thus, Alice breached her duty of loyalty to Todd by not allowing him to make an informed decision as to his substantive rights. Alice is subject to discipline and civil liability.

Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the

client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

Under both standards, Alice's paying of Zelda with the check marked "Consultation Fee, Betty's Case" was improper. While it may have been reasonable, neither Betty nor Todd consented and the fee was not proportional to the work done because Zelda did no more than sit in on one meeting with Todd. Under California law, the fee was likely not unconscionable (the facts are silent here) and it is not certain from the facts whether the overall fee was increased in order to cover the split. However, it is fatal that the fee split was not disclosed in writing to Todd or Betty and no consent in writing from either was obtained.

Thus the fee splitting with Zelda was improper. Alice is subject to discipline and civil liability.

Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less on[e] that involved a serious drug felony. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

While Alice was prudent in seeking help from Zelda, she only sought her help with respect to the first interview with Todd. Zelda only informed Alice that "if Todd's story was true" the prosecution had a weak case. However, Alice did not use Zelda to further inquire what kind of situation Todd would face if his story was not true. Zelda did not have the adequate knowledge to handle such a case. While consulting Zelda was proper, she should have sought more help from her in representing Todd, and she should not have shown herself as the only defense counsel on the case. In addition, she should have disclosed to Todd and Betty that she would need to employ Zelda's help to get familiar enough to take the case and obtained their consent to using Zelda (in California, in writing).

Alice is subject to discipline and civil liability for her breach of the duty of competence to Todd.

Diligence

Finally, Alice has the duty to zealously pursue [the] case to completion for client's best interests. She did not do this when she breached her duty of loyalty to Todd by honoring Betty's wishes over his. She did not use diligence is [sic] advocating zealously for what was best for her client. When she knew that Todd was unsure about what to do when the prosecution offered a plea bargain and when he insisted on his innocence, Alice should have zealously pursued whatever cause or goal Tood wanted rather than what Betty wanted.

Alice is subject to discipline and potential civil liability for breach of her duty to treat Todd's case with due diligence.

Duty to Communicate

Alice also has a duty to communicate with her client, keeping them abreast of the developments in his or her case. Alice should have kept in constant communication with Todd both inside and out of court about Zelda's involvement or lack thereof in the case, the actual conflict that emerged, and her inability to advise Todd adequately about the plea agreement.

Duty of Candor/Truthfulness, Fairness, and Dignity/Decorum

Alice owes a duty of candor and truthfulness to all third parties and to the court and her adversaries to state the law truthfully and pursue her representation of

clients with honesty and integrity. When the actual conflict between Betty and Todd arose during Alice's representation of Todd, she should have sought withdrawal of her representation of Todd from the court. In addition to being honest with her client and notifying him of the actual conflict that existed, Alice also should have been up front with the court and the prosecutor that she was unable to properly and adequately advise her client on the option of the plea agreement in exchange for one-year probation that included a year-long in-patient drug rehabilitation program.

ESSAY QUESTIONS AND SELECTED ANSWERS

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QUESTION 4

In 1995, Lawyer was hired by the City ("City") as a Deputy City Attorney to handle litigation, bond issues, and zoning matters. In 1998, she was assigned by the City Attorney to perform the preliminary research on the feasibility of a new land-use ordinance. Subsequently, the City Attorney retained outside counsel to draft the ordinance, which established new zoning districts and created a wetlands preservation zone restricting development in designated areas.

In 2000, Lawyer resigned from the City Attorney's office and became employed as an associate attorney in W & Z, a private law firm. In 2002, W & Z was retained by Developer to represent it in connection with a condominium project in City, and Lawyer was assigned to the matter. Developer's project was within the wetlands preservation zone, and City had denied Developer a permit for construction of the project on the basis that the newly enacted ordinance would not allow it to be built as planned. Developer requested that Lawyer file a lawsuit challenging the validity of the wetlands provision of the ordinance as applied to its project.

Association, an organization of City landowners, independently approached Lawyer and requested that she file a lawsuit on its behalf challenging the validity of the wetlands provision of the ordinance. Developer encouraged Lawyer to represent Association, since a lawsuit by Association would put pressure on City to reach a compromise concerning Developer's project. Developer told Lawyer it would pay half of Association's legal fees.

What ethical issues confront Lawyer and W & Z? Discuss.

Answer A to Question 4

1. LAWYER'S DUTY OF LOYALTY/CONFIDENTIALITY TO FORMER CLIENTS

Lawyer ("L") was retained by City as a Deputy City Attorney for 5 years. L thus owes a duty of confidentiality to City as his [sic] former client. The duty of confidentiality means that L may not use or disclose any confidential information obtained through the representation of City in any matter. The duty of confidentiality is broader then [sic] the attorney client privilege because it covers communications from any source, and it is imposed regardless of whether the attorney is being compelled to testify.

Here L has resigned his [sic] position with City, but he [sic] is now employed by W & Z. He [sic] may not represent clients for W & Z in a manner that uses information obtained through his [sic] representation of City. Therefore by being assigned to Developer's case L should consider whether his [sic] duty of confidentiality to City is implicated.

The duty of confidentiality is designed to foster the full, open and candid communication of clients with their attorneys. If L violates this duty owed to his [sic] former client City, he [sic] will be subject to discipline.

2. W & Z'S DUTY OF CONFIDENTIALITY TO L'S FORMER CLIENT -- IMPUTED DISQUALIFICATION

Here the issue of confidentiality arises again because if one lawyer employed by a firm is unable to take on the representation because of a conflict of interest or confidentiality problem with a former client, the disqualification is imputed to the entire firm and no lawyer in the firm may take on the representation.

Here however, L's former client is a government employer. Because the government has a strong interest in employing qualified attorneys, special rules have been created to allow firms to represent clients against the government even if one of the attorneys in the private firm formerly represented the government.

If a lawyer is employed by a firm and has confidential information regarding a government matter obtained through previous representation of the government, the firm may properly represent another client against the government if:

1. The lawyer who previously represented the government is completely screened from handling any portion of the representation against the government;

2. The lawyer who previously represented the government shares in NO PART of the fees produced from the representation of a client against the former government client; and
3. The firm notifies the government of the possible conflict of interest so that the government can ensure that proper preventative measures are taken.

Therefore, if [sic] W & Z may properly represent developer if L is properly screened off of the case. Here, however, L has actually been assigned to the case of Developer against the City. Therefore the proper screening techniques have not been used. This will be improper for both L and W & Z if L formerly represented the City on a "matter" concerning Developer's case.

Does Developer's case involve a "matter" on which L formerly represented the City?

Although L formerly represented City, if L has no confidential information regarding the current pending representation against City, neither L nor W & Z would be disqualified. L will be deemed to have confidential information if L represented City on the same "matter" the current representation now involved.

Unlike the prosecution of a criminal, the drafting of regulations, ordinances or codes will not be considered a matter that would disqualify L from representing a private sector client against City. Part of L's duties were litigation though, so it is possible he [sic] could be deemed disqualified. Moreover, the private sector client is directly asserting a direct claim attacking the validity of the rules, precisely the work that L was performing for City. However L performed only preliminary research on the feasibility of the proposed ordinance; the actual drafting was performed by outside counsel. Therefore, even if this was considered a matter for which L could be disqualified, a strong argument exists that L probably did not obtain any confidential information.

Therefore L probably is not disqualified, but L must encourage W & Z to notify the government regarding the proposed representation to see whether City has any objection to L's participation in the case. If City does not object (L and W & Z should get consent in writing) then L may represent Developer so long as he [sic] does not use any confidential information obtained from City. If City does object, then L must be completely screened from the case, and take no part in the representation, and must receive no portion of the fees paid by Developer.

3. L'S DUTY OF LOYALTY TO CURRENT CLIENTS - - MAY L REPRESENT ASSOCIATION?

If it is proper for L to represent Developer ("D"), then L owes D a duty of zealous loyalty. This loyalty may not be compromised by an [sic] conflict of interest that L might have personally, economically or professionally. No lawyer may represent a client in any matter that is directly adverse to the interests of another current client.

Here Association ("A") has asked L to represent it in a suit challenging the validity of City's ordinance (all of the above discussion regarding loyalty and confidentiality to former clients applies to A). L is presumably already representing D in a suit regarding City's ordinance. Therefore A's proposed representation falls precisely within a matter that involves the subject matter of a current client.

Dual representation, or representation of two clients involving the same or similar subject matter may be permissible if:

I. The lawyer subjectively reasonably believes that the representation of both clients may be undertaken without compromising his professional judgment or threatening his zealous representation of either client;

II. Objectively, a reasonable uninvolved lawyer would agreed [sic] that the representation of both clients may be undertaken without compromising professional judgment or threatening zealous representation of either client; and

III. Both the current and future client consent after full disclosure and consultation of the possible conflict of interest. In California the consent must be obtained in writing.

Here L may subjectively believe that it is reasonable to represent both clients. Both D and A are challenging the validity of City's ordinance. Therefore the goals appear to be the same. As noted by Developer, A's suit may actually pressure City into settling his claim early. However, L must be extremely careful, because it is very, very likely that a conflict that does not currently exist may arise later in the representation. If the City wants to grant a special use exception or a variance to D, in order to make his suit go away, but leaving the ordinance intact, then D and A's interests are materially adverse and dual representation is improper.

An objective uninterested lawyer may agree dual representation is proper, depending

on D and A's final goals. It is likely that a third party lawyer would disagree.

Therefore L must fully advise D and A of the possible conflict, especially the likelihood of a waiver, variance or special use exception for D. If both clients consent (in writing in CA) after full consultation, and both the objective and subjective tests are satisfied, then L may undertake the representation. However it appears in this case that such representation would be inappropriate.

4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS

In addition to the duty of loyalty implication discussed above, dual representation presents a confidentiality issue because L will necessarily obtain confidential information from both D and A if he [sic] undertakes dual representation. Therefore in the event that an actual conflict of interest arises later in the representation, then it would be improper for L to continue representing either D or A, because he [sic] has obtained confidential information that could potentially be used against the former client. Therefore the only proper remedy would be to withdraw, and it could possibly present substantial prejudice to withdraw late in the representation.

W & X are also prevented from continuing the representation of either D or A if L would be, because of the imputed disqualification rules. There is no screening procedure available for representation of current private sector clients with actual conflicts of interest.

The fact that L was approached by A independent of his [sic] employment with W & X will not allow W & X to represent D. L's employment with W & X prevents either L or W & X from representing D and A if the interests are adverse.

5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

Payment of a client's legal fees by a third party is proper only where the payment is consented to by the client, where the lawyer reasonably believes that the payment by a third party will not affect his independent, professional judgment, and so long as no confidential information is disclosed to the third party paying the fee.

Here D has offered to pay half of A's legal fees. L may only allow this arrangement if A consents, and if L reasonably believes that his decisions will be completely unaffected by D's payment. L must zealously, competently and single mindedly represent A if he takes on the representation. L must not make decisions on A's behalf, while considering the fact that L is paying part of the fee. Moreover L must not disclose any of A's

confidential information to D even though D is paying part of the fee.

Here, because of the possibility of an actual conflict between D and A, D's payment of A's fees is probably inappropriate.

Answer B to Question 4

Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W & Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

A. Lawyer for the Government Now in Private Practice

The Model Rules provide that a lawyer who has worked personally and substantially on a matter while working for the government shall not represent that matter in private practice. The issue, therefore, is whether Lawyer worked personally and substantially on a matter involving City's ordinance respecting the wetlands preservation zone.

It does not appear that Lawyer worked personally and substantially on the wetlands preservation zone ordinance. The facts provide that the city attorney merely asked Lawyer to do the preliminary research for the project, and that outside counsel actually drafted the ordinance. Conducting this preliminary research would probably not qualify as "personal and substantial" involvement.

Furthermore, the drafting of the wetlands ordinance does not qualify as a "matter" under the Model Rules. A "matter" involves an actual dispute between parties. Drafting an ordinance is not a "matter" because it does not involve a dispute between ascertainable parties.

Thus, because Lawyer did not work personally or substantially on any "matter" and [sic] there is no conflict between her employment with the City and her representation of Developer or Association's matters challenging the ordinance.

Duties of W & Z if there is a Conflict

Even assuming there is a conflict under the Model Rules between Lawyer's representation of Developer & Association challenging the ordinance and her employment with City, W & Z may still take on the representation if Lawyer is not the individual representing the parties.

Conflicts of an attorney in a firm are imputed to the entire firm. However, if an attorney

in a firm worked personally and substantially on a matter while employed with the government, the firm may take steps to prevent the conflict from becoming imputed to all other attorney[s].

The Model Rules provide that a firm in this situation can prevent imputation by screening the ex-government attorney from the matter, not sharing any fees from the matter with that attorney and notifying the government employee. If W & Z thus screens Lawyer from its representation of Developer, did not share fees with lawyer and notified City, they could represent Developer even assuming there was a conflict. However, because Association approached Lawyer personally and not W & Z, Lawyer may not be able to represent Association if there is a conflict.

However, because as explained above there should be no conflict between Lawyer's representation of Developer & Association and her work on the zoning ordinance for City, W & Z should be able to keep lawyer on the case.

Conflict Between Developer & Association

If an attorney's representation of a client may interfere with her representation of a present or former client, a potential conflict of interest is presented and the attorney must take appropriate measures to avoid such conflict.

Association approached Lawyer and asked her to represent them in a matter that would involve similar issues as her representation of Developer. Although both Association and Developer are seeking the same result — a declaration that the ordinance is invalid — potential conflicts may still arise. For example, Lawyer may learn information during her representation of Developer that may be pertinent to her representation of Association. However, an attorney's duty of confidentiality to her client would prevent attorney from disclosing such information during her representation of Association. Because an attorney also has a duty of loyalty to her client to always represent her client's best interests, her inability to use this confidential information could create a potential conflict with her duty of loyalty to her other client.

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts to both Developer and Association and obtains their consent, she should be able to represent both clients

under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

Thus, if Lawyer obtains the written consent of both Association and Developer to represent them both on a similar matter, the Model Rules and California Rules would permit such representation.

Payment of Fees By a Third Party

An attorney's duty is to her client and not any third party. If a client's fees are being paid by a third party, a potential conflict of interest is presented between the interests of the third party and the client.

Here, Developer has offered to pay half of the attorney's fees of Association because he believes that Association's case will advance his cause. However, accepting payment from Developer for Association's fees presents a conflict for Lawyer. Developer may attempt to direct the course of Lawyer's representation of Association in order to protect his own interests. However, taking direction from a client would violate Lawyer's duty of loyalty. Lawyer should probably not accept Developer's offer to pay Association's attorney's fees.

However, if Lawyer believes that accepting payment from Developer will not interfere with her representation of Association, she may be able to accept the payment after explaining the potential conflict to both parties. Lawyer should explain to Developer that she represents Association's interests in her representation of Association, and that Developer may not influence this representation. She must also explain the potential conflicts to Association. Under California Rules, she must obtain both parties' consent in writing. However, because she would be accepting payment from a current client in her representation of a second client, this consent may not be reasonable under the Model Rules.

Whether or not Lawyer accepts payment for her representation of Association from Developer, if an actual conflict arises during her representation of Developer and Association, she must withdraw from representing one or both of the clients in order to satisfy her ethical duties.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 5

Lawyer is an in-house attorney employed by ChemCorp, a corporation that manufactures chemicals.

Smith is a mid-level employee whose job is to ensure that ChemCorp's activities comply with applicable governmental safety regulations. Smith asked to meet with Lawyer on a "confidential basis." At their meeting, Smith said to Lawyer:

> "I think ChemCorp might have a serious problem. Last year I inspected a ChemCorp facility and discovered evidence of dumping of potentially toxic chemicals in violation of ChemCorp's internal policies and applicable governmental regulations. I told my supervisor about it, and he told me he would take care of the problem. My supervisor asked me to say nothing about the situation so they could avoid any legal hassles. I did not disclose the matter in my inspection report, despite internal policies and governmental regulations that require disclosure. I have discovered that the dumping is continuing, and I am very concerned about possible health threats because the dump site is located near several private residences and a river used for drinking water."

1. What ethical issues arise at the point at which Smith first asked to meet with Lawyer and later during their conversation? Discuss.

2. May Lawyer independently disclose the problem relating to the dumping of potentially toxic chemicals to governmental authorities? Discuss.

Answer A to Question 5

① Duty of Loyalty

As counsel for ChemCorp ("CC"), Lawyer owes a duty to act in good faith and in the Corp's best interests. This duty prohibits Lawyer from accepting representation that will result in a conflict of interest with another client. When such a situation arises, Lawyer may only accept the representation if he reasonably believes the potential conflict will not impact his ability to effectively represent each client, if he discloses the conflict to each client, if he gets consent from each client, and if the consent is reasonable. Consent is virtually never reasonable if each client's interest is opposed to one another.

Here, as soon as Smith asked Lawyer to speak on "a confidential basis," Lawyer should have told Smith that as in-house attorney to CC, he could not represent him in matters personal to him if they opposed CC's interests. Therefore, Lawyer should have advised Smith that he could not keep the conversation confidential if it related to his job at CC, and if it did, Smith should seek separate counsel.

However, if Smith advised Lawyer that he only wanted to talk in order to help the Corp to stay out of trouble, there was no loyalty issue in talking to Smith. The problem only arises once it becomes clear that Smith is primarily concerned about his own personal legal troubles stemming from the incidents.

Either way, Lawyer should have immediately warned Smith of these concerns and told him that it would be impossible for him to represent Smith at the same time he represented CC. Lawyer owed a duty of loyalty to CC which prohibited him from taking on another representation adverse to its interests.

Representation of Corp.

As Smith told Lawyer about the wrongful activity CC was engaged in, Lawyer, as in-house counsel for CC, owed a duty to go to the Supervisor and discuss the matter with him. If Supervisor either admitted to the wrongful activity or said that he was ordered to do so, Lawyer must continue to ascend the hierarchy of the Corp until he speaks with person making the decision. Lawyer's only duty runs to CC itself, so if he is ever told to sit back and permit the wrongful activity to continue, he must go directly to the Board of Directors and advise them that CC is violating the law and that it is within their best interests to stop.

Withdrawal

If Lawyer eventually discovers that CC's Board refuses to stop dumping illegally, the Lawyer may withdraw from his representation of CC. Permissive withdrawal is acceptable when the representation becomes financially burdensome to Lawyer, when the client has in the past engaged in a crime or fraud by using his services, when the client acts in a way

repugnant to him, or when the client refuses to stop engaging in conduct that the Lawyer tells him to stop doing. Withdrawal is mandatory if the client is presently using the Lawyer's services to engage in a crime or fraud. In such a case, the lawyer might have to make a "noisy withdrawal" by disclaiming work he prepared that furthered the crime or fraud.

There is no evidence here that CC is using Lawyer's services to further its illegal dumping scheme. Therefore, Lawyer need not resign.

However, if Lawyer goes to the Board, advises it to stop dumping, and it refuses, the ABA Rules would permit Lawyer to withdraw from its representation of CC. This is a relatively drastic measure, however, that should only be taken once Lawyer has done further investigation concerning Smith's allegations and the Board's knowledge of the illegal conduct.

After Smith Completed his Statement

At this point, Lawyer should again advise Smith that he owes a duty to the Corp, such that he cannot keep this information confidential. He should again advise Smith to get separate legal counsel if he is concerned about his civil or criminal liability. His interests are adverse to CC because Smith wants to end the dumping and possibly publicize CC's conduct, while CC wants to keep its conduct quiet. Therefore, under no circumstance should Lawyer give Smith any advise [sic] other than to seek separate counsel.

2. Duty of Confidentiality

While a lawyer owes a duty to disclose physical evidence of a crime that is in his possession, he must not disclose, use, or reveal any information relating to a representation, unless client consents.

Because Lawyer attained information highly relevant to his role as CC's counsel, he must not disclose the problem to the government, unless an exception to the duty of confidentiality applies. It is irrelevant that the source was a mid-level employee because Lawyer's duty extends to information attained from any source. He cannot tell this to the govt. because the dumping relates to his representation of CC.

Exceptions

A lawyer may only violate the duty of confidentiality if the client consents, if he's ordered to disclose information by law, if he does so to defend himself in a malpractice action or a suit to recover legal fees, or (under ABA Rules) to prevent a crime involving imminent death or serious bodily harm. The last exception is the only one that is arguably applicable here. It must be noted that the California Supreme Court has not found such an exception under its state law. While the CA evidence code has such an exception, the vitality of this exception is unclear in CA. Even if it did apply, it probably wouldn't apply here. Although the dumping creates a severe risk of serious bodily harm or even death, the risk is not of

an imminent nature. While others would argue that the harm from the toxic chemicals is an ongoing one, this exception is designed to deal with a case where an individual's safety is in danger from more obvious, and less latent, danger. Therefore, the duty of confidentiality prevents Lawyer from disclosing this information to the government.

Attorney-Client Privileges

The A-C privilege prevents the lawyer or client from having to disclose confidential communications discussed during the legal representation. The A-C privilege, however, has a wider crime-fraud exception, that would not require Lawyer to volunteer Smith's allegations, but would require him to disclose them if ordered to do so, since a crime is ongoing.

Answer B to Question 5

1. Ethical Issues Arising From Lawyer (L)'s Meeting With Smith (S)

Duty of Loyalty to S

A lawyer owes a duty of uncompromised loyalty to his client which forbids him from taking actions which might create competing obligations except in specifically enumerated situations. An attorney representing a corporation is in a particularly precarious position because his duty of loyalty runs to the corporation, and not to any individual employees.

When a lawyer's duty of loyalty might be compromised by a conflicting obligation, he is said to have a potential conflict. In such a situation, an attorney must make a reasonable determination that he can continue to effectively represent his client in the face of such a conflict, disclose the potential conflict to his client, and obtain the client's objectively reasonable written consent to the situation. On the other hand, when the attorney's obligations are in present competition, he is said to have an actual conflict. In this situation, the attorney must either decline representation, advise separate legal counsel, or withdraw.

Here, Smith (S) asked Lawyer (L) to meet on a "confidential basis." L should have immediately been alerted to the potential conflict between his duties to Chem Corp (C), and any duties that might arise with respect to S based on the conversation. Thus, before allowing S to confide in him at all, L should have fully informed S that L was not his personal lawyer, and instead owed obligations to C. By failing to do so, and allowing S to confide damaging information to him, L created an actual conflict, which will likely require him to withdraw from his representation of both S and C, lest L breach his newly-arisen, ongoing duties of confidentiality and loyalty to S. L will have a duty to withdraw properly by giving both S and C timely notice of withdrawal, and returning all papers to them in a timely fashion.

Duty of Confidentiality to S

An attorney owes an ethical duty of confidentiality to his client which requires him to maintain inviolate all information he obtains that is related to his representation of that client. The ethical duty is broader than the attorney-client privilege, which is an exclusionary rule of evidence forbidding the government from compelling a lawyer to reveal any communication made by the client to the lawyer in furtherance of the provision of legal services. Rather, the duty of confidentiality forbids the attorney from revealing anything related to his representation of a client, from whatever source that information is derived, unless the client consents to disclosure, disclosure is necessary to prevent a crime (see below for further discussion), or to establish a personal defense.

Here, L became ethically obligated to keep confidential the conversation he had with S by allowing S to meet with him on a "confidential basis" and confide in him regarding crimes that he had committed. S informed L that S himself had violated company policies and

govt. regulations by failing to disclose the substance of his investigation in his inspection report, and may therefore have subjected himself to criminal or civil liability, and workplace censure for his failure to do so. Since S likely would not have confided in L unless he believed L was, for the purposes of the conversation, his attorney, L has incurred a duty of confidentiality to S by failing to properly inform him of his (L's) loyalties.

Duty of Loyalty to C

As discussed above, L owes a continuing duty of loyalty to C. As soon as L was put on notice that his loyalty to C might be compromised, he should have disclosed the conflict to C's Board of Directors and sought their consent to meet with S. By failing to do, L breached his duty of loyalty to C, and set himself up for the ripening of an actual conflict that would require him to withdraw from his representation of C, lest he breach his newly–arisen duties to S. Now, L cannot properly and effectively represent C, because to do so would require that he breach his duty of confidentiality to S by revealing the damaging information S provided to him during their confidential conversation. As such, L must withdraw by giving C timely notice and promptly returning all papers, so as not to compromise his duty of loyalty to C or S.

Duty of Competence to C

An attorney owes a duty of competence to his clients which requires that he behave with legal skill, knowledge, thoroughness, and preparation reasonably necessary for effective representation. The duty of competence entails both a duty of an attorney to communicate with his client, and a duty to diligently and zealously pursue his representation to its completion.

In this case, L's duty of competence to C would require a number of actions which he likely has conflicted himself out of by meeting confidentially with S. A competent lawyer would thoroughly investigate S's factual claims – that a C facility was engaged in illegal dumping activities, and was put on notice of their discovery when S spoke to his supervisor – as well as the legal implications of any illegal dumping and the alleged cover-up. Moreover, a competent attorney would communicate his findings to C's board, so that C could make a fully-informed substantive decision as to what course of action would be most appropriate. However, to do any of these things that a reasonably competent practitioner would do would require L to breach his duties of confidentiality and loyalty to S, which he is ethically forbidden from doing.

Duty of Confidentiality to C

Because L owes a continuing duty of confidentiality to C, he will not be permitted to reveal anything related to his representation of C gleaned from his conversation with S. The ethical duty of confidentiality is a broad proscription applying to all information from whatever source derived, and since S's statements related to C's representation of C in that they might implicate C in a criminal or civil fraud, L cannot breach his duty of

confidentiality to C by revealing them.

Duty of Not Assisting in Crime or Fraud

To the extent that L would be required to assist either C or S in perpetrating a continuing crime or fraud, he would have an ethical obligation to terminate his representation to prevent his services form being used in such a manner. However, it is unclear whether any alleged crime or fraud continues to be perpetrated after L's conversation with S.

② May L Independently Disclose Information About Dumping?

Duty of Candor

As an attorney, L owes a duty of candor to the public and the legal system which requires him to produce evidence when he is reasonably certain that the evidence is the fruit or instrumentality of a crime. Here, however, L has not received any actual evidence, but only a confidential communication from his client concerning alleged illegality. Thus, L will not be ethically obligated to produce any evidence of alleged wrongdoing.

Duty of Confidentiality

Whether L may independently disclose the problem of C's alleged illegal dumping is another problem altogether, which will depend on which jurisdiction L is in.

Under the ABA Model Rules, an attorney is permitted to disclose otherwise confidential information in order to prevent immediate death or substantial bodily harm. Here, it is unclear whether S's revelation suggests any immediate danger, since S only opined that there were "possible health threats" because the dump site was located near private residences and potable drinking water. However, L could make the case that such dumping does pose an imminent threat because contamination will almost certainly lead to death or serious bodily injury, and is ongoing. Thus, in an ABA MR jurisdiction, L may be permitted to disclose the dumping.

In California, on the other hand, no exception to the ethical duty of confidentiality has been carved out for warnings of death or substantial bodily harm. The California Evidence Code does not explicitly include such info as being within the scope of the attorney-client privilege, but thus far, the courts of California have yet to recognize an exception for death/bodily harm like the ABA. Thus, if L is an attorney in California, he will most likely be forbidden from breaching his ethical duty of confidentiality to C & S by revealing information about dumping to government authorities.

Finally, under the Restatement of Law Governing Lawyers, L would be permitted to reveal confidential information not only to protect against death or bodily harm, but to prevent significant monetary loss. Since the dumping by C could arguably lead to significant monetary losses for either the government or private individuals, L might be permitted to

reveal the dumping in a Restatement jurisdiction.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 California Bar Examination and two selected answers to each question.

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Question 3

Two years ago, Lawyer represented Sis in her divorce. Last week, Sis made an appointment with Lawyer to assist her father, Dad, with an estate plan.

Sis brought Dad to Lawyer's office. Dad was 80 years old, a widower, and competent. In Sis's presence, Dad told Lawyer he wanted to create a will leaving everything he owned to his three adult children, Sis, Bob, and Chuck, in equal shares. Dad's assets consisted of several bank accounts, which he held in joint tenancy with Sis, and his home, which he held in his name alone. Sis then asked Dad whether he wanted to do something special about his house. Dad thanked Sis for asking, and told Lawyer that he wanted Lawyer to draft a deed that would place his house in joint tenancy with Sis.

At the conclusion of the meeting, Lawyer told Sis and Dad that his customary fee was $750 for drafting such a will and deed. Sis gave Lawyer a check for $750 in payment drawn on her personal account. Lawyer then drafted the will and deed as directed.

What ethical violations has Lawyer committed, and what should Lawyer have done to avoid those violations? Discuss.

Answer A to Question 3

The lawyer here has violated a number of ethical rules, as follows:

A. Duty to Identify & Disclose Conflicts Before Undertaking the Representation & Obtain Consent

Here, a potential conflict is presented at the very initiation of L's representation, when Sis (not Dad) first made the appointment and brought her father to see L.

The ethical rules (RPC) provide that a potential conflict arises when the lawyer's representation of one client may be materially impacted or limited either by his own interests, the interests of a former client, or other factors. In this situation, the lawyer may proceed only if he reasonably believes the representation won't be affected, and the client (or potential client) consents after full disclosure.

Relatedly, a lawyer can't take on representation that is or may be mat[erial]ly adverse to a former client in the same or a substantially related matter, absent full disclose [sic] and consent of the former client.

Thus, here both provisions are triggered:

(1) The representation of Dad to make a will is potentially adverse to Sis, L's former client. There is a risk to Dad that L's former relationship with Sis could affect his independent judgment. If L reasonably thought it would not, he still needed to fully disclose this conflict to D and obtain his written consent. Logically, to do that, L would have needed to exclude Sis from the discussions (see discussion later conc[ernin]g allowing Sis to be present, which raises other ethical issues).

Whether L also had to get Sis's consent, as a former client, depends on whether the prior represent of Sis is viewed as related to L's current representation of Dad. This test looks at whether there is a potential that the lawyer may have gained confidential information from Sis that could impact his representation of Dad, and also whether Sis and Dad are "adverse" in the current represent.

To be prudent, L should have also obtained Sis's consent to the representation of Dad.

B. Duty of Confidentiality & Preservation of Attny-Client Privilege

L also violated ethical obligations in proceeding to discuss the representation with Dad, while Sue [sic] (a third party) was present. This had the potential effect of disclosing client confidences to Sue [sic], and waiving the privilege. (Note that the attorney-client privilege attaches to initial consultations).

The facts suggest that there was some ambiguity concerning Sis's role. If Dad in fact desired to have Sis present during the discussions, to assist him, that would be permissible (assuming L disclosed ramifications) and there may have been a way to allow that without effecting a waiver. On the other hand, it appears Dad was competent, so there arguably was no need to have Sis present. Regardless, L needed to raise these issues with Dad at the outset, including a discussion of who was the client (Dad) and of the attorney-client privilege, and the possible impact of allowing Sis to "sit in" on the consultation on waiving any privilege. L also would have needed to discuss the fact that because Sis was an interested person in his estate distribution, the potential conflict of interest between Dad & Sis weighed in favor of excluding Sis from the consultation.

Initially, it appeared that Dad wanted Sis to share = with other siblings, so the conflict may have been less apparent. However, once she attempted to influence a disposition to herself, L was obligated (even if not before) not to continue with the consultation in Sis's presence (because at that point her interest conflicted with the client's objective of = distribution.

C. Duty as Advisor and General Duty of Competence

L also violated his ethical obligation to ①be competent in his representation, ②to fully advise the client, ③to act consistent with the client's objectives; and ④to exercise indep. judgment and not let a third pty improperly influence his judgment.

Here, L knew that the client's objective was, as stated, to leave everything to his children in = shares. The final result, contrary to that objective, was that he drafted a will and deed that did no such thing, but in fact conformed to the instructions of a third party, Sis.

L also acted incompetently in failing to explain to Dad what would need to be done to achieve Dad's objective. L would have needed to discuss how the bank accounts were titled (in jt. T w/ Sis) and determine whether that was consistent with Dad's objective of = division, and if not, to discuss options for those accounts that would ensure their distribution on Dad's death =, rather than all to Sis as a Jt. tenant. [This assumes Dad was true owner of funds]. Similarly, L failed to adequately explain the implications to Dad of placing a deed in Jt. T w/Sis on the house (that she would take sole ownership on Dad's death), to make sure that Dad fully understood and appreciated the consequences of holding title in that form, and that this form of title was consistent w/Dad's (not Sis's) objectives.

Finally, in simply acting as a scrivener for Sis's instructions, L failed to exercise independent judgment and improperly allowed his judgment to be influenced by a third party (and one with objectives contrary to the client's stated objective).

D. Duty of Loyalty; Acceptance of Pymt from 3d.

L also violated his duty of loyalty to the client, acted acted [sic] improperly in accepting payment from Sis. The RPC state that a lawyer should not accept payment from a third party for services to a client, unless the third party does not influence the lawyer's indep. judgment, and the client consents after full disclosure.

Here, there was no "informed" consent. Although Dad was present when Sis paid, L did not explain to either of them that he was working solely for Dad, even though Sis was paying. Furthermore, here it appears that there was an actual conflict, prejudicial to the client, in that L acted according to Sis' objectives and did not properly counsel Dad on his options.

E. Fee

A lawyer's fee must be reasonable in light of the services performed. Here, lawyer charged a flat fee of $750. Assuming this amount was reasonably related to the services performed, including their complexity, the lawyers' experience, & fees charged by others in the community for similar work, it would be proper even though in the nature of a "flat" rather than hourly based fee. California does not require fee agreements to be in writing unless amt is greater than $1000.

Summary of Options and What L Should Have Done

In summary, L violated ethical duties by undertaking representation when there was a conflict of interest, without disclosure and consent; by allowing Sis to "participate" when her interests conflicted with Dad's; by failure to adequately advise Dad and to act competently in achieving Dad's objectives. (And other viols. as stated above.) He should have:

① Made full discl. to Dad of past relat. with Sis, & got written consent assuming L reasonably believed he would not be influenced by Sis.

② L should not have conducted the initial consultation in Sis's presence, and at the least needed to fully advise & disclose to Dad the implications re: the attorney-client privilege, & Sis's conflicting & potentially conflicting interests w/Dad.

③ L should have fully explained to Dad the options and acts needed to achieve his objectives, including the consequences of jtly titled accounts/property.

④ L should not have accepted Sue's check without full discussion & disclosure.

④a L should not have let his judgement (apparently) be influenced by Sis.

⑤ Arguably, L should also have obt. Sis' written consent to repres. of Dad b/c both representations related to "property."

Answer B to Question 3

3)

I. Duty of Loyalty to Client

Lawyer had a possible and actual conflict of interest with Sis and Dad. Sis had worked with Lawyer in the past and she arranged the meeting. However the purpose for the meeting is for Dad to create a will. As such, the current client is Dad. Lawyer should have clearly indicated upfront that Dad was the client and that he would zealously advocate for him. Also since Sis paid the bill, [sic].

A lawyer has a duty of loyalty to his clients. He must not act if there is a conflict of interest - either potential or actual - unless he reasonably believes he can effectively represent the client. He must also inform the client of the potential conflicts and the client must consent in writing. A reasonable lawyer standard will also be applied to determine that he could fairly represent the client.

Here there are a few potential conflicts. Sis was an old client. She has an interest in the dealings with Lawyer and Dad. Lawyer must disclose the previous relationship without revealing any confidential information of the dealings with either Sis or Dad. A lawyer can represent an old and a new client as long as the matter is different. Since Sis brought Dad, consent would have been confirmed by Sis but Lawyer should have got the consent in writing. He also should have clearly indicated to her that Lawyer was representing Dad and not her for this matter even though she was paying the bill.

Dad, however, should have been informed of the potential conflict and given consent in writing. The potential of conflict is apparent in drafting a will where one of the takers under the will is present. Here Sis was involved in the meeting to discuss how the assets would be distributed. As such, Dad should have been informed upfront of the potential conflict with Sis and given his written consent. As the meeting progressed, it became apparent that there was an actual conflict and Lawyer should have again informed and received consent from both Sis and Dad. The assets that were being distributed involved several accounts that Sis held in joint tenancy with Dad. Dad indicated that he wanted to leave everything to his children. That would mean that something may have to be done with the accounts in joint tenancy which would affect Sis's interest.

Sis also prodded Dad about the house. This may be considered undue influence on her behalf and Lawyer should have been aware of that. He should have informed Dad have [sic] the various actions who could take with the house rather than just let Sis make the suggestions.

At this point he should have recognized that he could not adequately represent Dad with Sis present.

II. Duty of Confidentiality

Lawyer has a duty of confidentiality to both Dad and Sis. Any discussions that occurred during the meeting would be held in confidence. Since Sis was present, Dad did not have the opportunity to talk freely with his lawyer. Although he was not likely going to have to disclose any confidential material, it would have been in his client's (Dad's) best interest to have a confidential meeting without Sis present to disclose how he wanted the estate distributed.

III. Fiduciary Duty

Fee discussion upfront

Any discussion of fees should be held upfront. Lawyer did not tell Dad and Sis the fee for his services until the end of the meeting. This should be okay if there was no fee charged for the preliminary discussion. The fee must be reasonable. In California, the fee must not be unconscionable. He also must be clear of any extraordinary costs that he may be aware of that mean a higher fee.

Payment by Sis

Lawyer had a duty to inform Sis that although she was paying the bill, she was not the client and that Dad was. Lawyer should have also told Dad that Sis was paying the bill but that he was the client. He should have gotten this consent and understanding in writing.

IV. Competency

Lawyer has a duty of competency to zealously represent his client's desires. In dealing with Sis and Dad together he could not competently represent Dad. Drafting a will for distribution among three children is difficult. Dad specifically stated that he wanted to distribute his estate to all three children equally. In allowing Sis to have the house put in her name as joint tenant, Lawyer was violating the duty to adequately and competently represent his client Dad and his best interests. He should have had a separate meeting with Dad to ensure that all assets were accounted for and distributed according to his wishes.

V. Duty of Fairness to Third parties - Sis, Bob, Chuck

In addition to his client, Lawyer owes a duty of fairness to third parties. Here specifically those who would take under the will - Sis, Bob, and Chuck. During the course of conversations with Dad and Sis, it should have become clear to Lawyer that Sis was going to get all the property and Bob and Chuck would receive the short end of the stick. He owed this duty of fairness to ensure that Dad's will did reflect his desires and his estate went to all three equally.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

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Question 5

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to "pass the word around that I have opened a solo practice specializing in personal injury law."

Lawyer's brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another's wrongdoing, Bert gives them Lawyer's business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him $500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul's behalf against Dinoworld. Dinoworld's attorney immediately filed an answer to the complaint. Lawyer and Dinoworld's attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer's brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special "passholders-only" event at Dinoworld, at which Dinoworld's CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld's finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

Answer A to Question 5

5)

Duty of loyalty: special concerns for prior government lawyers

A lawyer has a duty of loyalty to her client. This includes a duty to avoid conflicts of interest. Under the ABA rules, a lawyer who was a previous government lawyer, must avoid working on the same matter in private practice as she worked on as a government lawyer unless there is informed consent from the client and agency. In California, there is no such general rule; however, the rule does apply to former prosecutors representing defendants. There does not appear to be any conflict here, regarding Lawyer's new work. First, she is going into personal injury law. Therefore, she is unlikely to work on the same matters as she worked on as a prosecutor. Second, there are no facts in this problem that show any conflict of interest has arisen. Therefore, Lawyer has violated no rules, but she must be careful to avoid conflicts of interest.

Duty to profession: Lawyer's request of family and friends

Previously, lawyers were not permitted to advertise their services because it was considered unprofessional. However, the United States Supreme Court has since held that lawyers have a constitutional right to engage in truthful, non-misleading advertising. A lawyer may not, however, solicit clients in person or hire others to do so as her agents if she has no prior relationship with the person she is soliciting.

Here, Lawyer asks her friends and family to pass on the word that she has opened a solo practice. This does not appear to be direct, in person solicitation or requesting her friends to solicit. Rather, it appears to more [sic] just "getting the word out," which is really the same as advertising. She is simply letting her friends and family know, so that they can let others know, about her practice. There does not appear to be anything misleading about what she is asking them to do. They are not expected to make any representations about her practice, only to let people know that the practice exists. Therefore, this appears to be proper.

Duty to profession: getting clients from hospitals

In California at least, it is presumed to be misleading advertising to advertise at a hospital. Here, the facts show that Bert works as an emergency room clerk at a hospital, and that there, when he admits patients, he advertises Lawyer's business by giving people her business card. This is presumptively misleading because people are in an especial vulnerable state when they are very sick or injured. Therefore, Lawyer would have to somehow overcome the presumption that she has mislead [sic] people by advertising her services at a hospital.

A lawyer must also not use cappers to do what she could not do. As noted above, in person solicitation of people with known legal problems when there is no prior relationship with those people is prohibited, and it is prohibited if someone else does it for the lawyer as well. A lawyer cannot avoid the rules by having someone else do the act. Here, the facts show that Bert is soliciting clients for Lawyer; he is acting as a capper. He is suggesting that the injured people "talk to her about filing a lawsuit." This is direct solicitation. There is no evidence that Lawyer previously knew the people he is soliciting. The fact state [sic] that he does this "whenever he admits patients," which implies that Lawyer does not know any of the people solicited. This is improper solicitation, so the Lawyer has breach [sic] a duty to her profession.

Duty to profession: Sharing fees with non-lawyers

A lawyer cannot pay a fee to a non-lawyer to refer him. All a lawyer can do is pay regular costs for advertising or join a referral service.

Here, the facts state that "each time" Lawyer is retained after Bert refers someone, Lawyer takes Bert out to lunch and gives him $500. This is improper. First, it is improper because Bert is not a lawyer. He works as an emergency room clerk at a local hospital. Second, the lunch and the $500 are evidently consideration for his referral. Lawyer may argue that Bert is her brother, and that she is simply taking him out to lunch to be with him, and that there is nothing usual [sic] about a sister taking her brother out. However, the correlation of the lunches with the referrals would belie this assertion. Additionally, the brother-sister relationship does not explain the $500. No facts indicate that Lawyer should have any motive for giving Bert the money except that he made the referral. Therefore, this practice is improper and violates Lawyer's duty to her profession.

Duty of Competence

A lawyer owes her client a duty of competence. This means she must keep the client informed, and act with the legal knowledge, skill, thoroughness and preparedness necessary for the work. Here, the facts show that after being retained by Paul, Lawyer filed a personal injury action on Paul's behalf and that she and Dinoworld's attorney arranged for a deposition. Assuming all proper consultation with Paul regarding the filing of this suit, there does not appear to be any violation here. As long as there was a basis for the suit, Lawyer did the proper research before filing it, and Lawyer prosecutes it faithfully and vigorously, there is no violation of the duty of competence.

Duty of Loyalty: trip to Dinoworld

A lawyer has a duty of loyalty, including a duty to avoid making her client's interests adverse to her own personal interest.

Here, the facts show that after filing a lawsuit against Dinoworld, Lawyer accepted a special "passholders-only" invitation to the amusement park. This may or may not be a conflict of

interest. On the one hand, it seems like Lawyer is accepting personal benefits from Dinoworld. The facts imply that the ticket was free, but it sound [sic] like the ticket came from her brother-in-law. But Lawyer is getting a benefit from Dinoworld. She is receiving a special tour and is permitted to enjoy herself at Dinoworld's invitation. Arguably, this places her personal interest adverse to her client[']s. Lawyer would probably argue that this was a one-time event, and that it is not the sort of event that would compromise her representation with her client. This is probably true. However, on the whole, this action creates an appearance of impropriety, which a conscientious lawyer should avoid. Probably, Lawyer should have informed her client of her intent to go to Dinoworld and gotten Paul's informed consent. Then, Lawyer would not be putting Paul in a position where he could potentially question her loyalty and there would be some question as to whether he should trust her. Whether or not this was strictly a violation of the rules, probably not. Whether Lawyer could have avoided even the appearance of a problem, she could have, and probably should have proceeded accordingly.

Duty to Opposing Parties: duty to avoid deception

A lawyer has a duty of fairness to opposing parties. This involves avoiding making material misstatements of fact or omission where there is a duty not to omit.

Here, the facts state that at the event, Lawyer declined to wear a name tag and avoided introducing herself. This makes it sound like she was being deliberately deceptive as to Dinoworld's CFO, that she did not want him or her to know who she was. This is material omission. The CFO probably would have been more on guard about answering Lawyer's questions, or he or she would not have answered them at all, if he/she was aware who Lawyer was. Her efforts not to introduce herself seem to be motivated by a desire to ask the CFO questions and receiving unguarded responses. Therefore, she is deliberately deceiving the CFO in order to receive information. Lawyer will argue that she did not want to introduce herself or wear a name tag because she was simply trying to enjoy a day at Dinoworld without the lawsuit becoming the focus of the event. She will argue that this was to avoid any conflicts. However, this assertion is countered by her decision to ask the CFO questions. The facts that she chose to ask questions speaks to her motive not to wear a name tag. Therefore, Lawyer violated her duty of fairness to opposing parties in failing to identity herself.

Duty to 3d parties: Duty not to speak with parties represented by counsel

A lawyer had a duty not to speak to someone she knows is represented by counsel without the counsels' permission. When the "person" is a corporation, it is less clear who the lawyer may or may not speak to. This is because corporations tend to have many employees, some of who would be considered the "client" and others who would not. To determine who[m] is covered by this rule, who is the "client" of the other lawyer, courts look at the nature of the employee. People who (1) regularly consult with or supervise; (2) people who can bind the corporation with their statements; and (3) people whose statements may be imputed to the organization are considered the client, and a lawyer

must not speak with those people without the corporation's counsel's permission.

Here, the CFO is probably the "client" for purposes of this rule (and probably for most other purposes as well). The CFO is the Chief [F]inancial [O]fficer, and the person whose deposition will be given within the next 90 days. As the CFO, this person is the corporation's agent. This person's statements can be imputed to the organization, and this person can bind the organization. The CFO is one of the "highest" people in an organization. Therefore, Lawyer has a duty not to knowingly speak with him because Dinoworld has an attorney. The facts state that Lawyer and Dinoworld's attorney decided mutually that Lawyer could depose CFO within the next 90 days. This facts [sic] shows two points: first, it shows that Lawyer knows that Dinoworld is represented by counsel and that the CFO is a person who can bind the corporation. Otherwise, she would not want his deposition. Second, it shows that she did not have consent to speak with CFO. If she has consent to speak with him outside of the deposition, there probably would not have been a reason to schedule the deposition. Additionally, it is reasonable to assume that Dinoworld's attorney would want to be present when the CFO was giving information so she could properly prepare him/her. She would not want him/her to talk unwittingly to opposing counsel. Finally, no fact states that any permission was given. Therefore, Lawyer violated a rule by talking to the CFO without his/her attorney's permission.

Answer B to Question 5

1. Duty of dignity to legal profession

– Solicitation –

Neither a lawyer nor his agents may approach a party for potential representation in person, by telephone or in real time electronic manner for the purpose of pecuniary gain if that party is not an existing client or relative.

Here, Lawyer (L) through her brother Bert (B) contacted clients in person upon their arrival at a local hospital. In California, such activity is presumed to be improper solicitation. It is solicitation in violation of ethical rules in California to approach an injured person while they are in a vulnerable state. When an individual is being admitted to the hospital for injuries they are clearly vulnerable and solicitation is impermissible.

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

Thus, although L herself is not approaching these accident victims while in a vulnerable state, her agent B is and that is impermissible and an ethical violation.

– Referrals –

Payment to another by a lawyer for referral of a client is not permissible. Referral payments are an ethical violation.

Here, L pays B $500 each time L is retained by someone referred by B. B also gets lunch. This is especially improper because B is an emergency room admitting clerk and not a lawyer.

Thus, L is also in violation of the no referral rule.

– Advertising –

Generally, advertising of a lawyer's services is permissible if it is not false or misleading. All advertising must be labeled as advertising and at least one person responsible for the ad must be identified. General written advertising is also permissible (like direct mail).

Here, L's request of her friends and family to "pass the word around" could be advertising. This is problematic because it is not labeled as advertising or doesn't appear to be and it is unclear who is responsible for it.

Most significantly, L asks her friend[s] and family to pass the word that she is "specializing in personal injury law." Traditionally, the only specializations that were recognized were patent and admiralty law. However, certain other specialties are recognized if they are approved and if the lawyer is certified by the appropriate organization approved by the ABA or state.

Here, nothing indicates that L has received any special certification for her "specialty" in personal injury law.

Thus, this "ad" by her friends and family is both false and misleading. Therefore, L is in violation of the duty to advertise truthfully.

2. Duty of Candor/Fairness

A lawyer is also bound by a duty of candor and a duty of fairness to both the court and the other side or opposition.

– Represented Person –

One of the major issues of fairness and candor is to the other side and involves speaking to individuals who are represented by counsel without getting permission.

Here, L went to Dinoworld and approached Dinoworld's CFO. Without identifying himself, in fact purposely concealing his identity, D spoke with the CFO about finances and made notes about the conversation.

What makes this a problem is that L knew CFO was represented by counsel because L had already spoken with CFO's attorney about the deposition of CFO.

Thus, L had a duty to get permission from Dinoworld's attorney before speaking to anyone associated with Dinoworld, including the CFO. So, L knowingly spoke with a represented individual before obtaining permission from the attorney and thus violated her duty of fairness.

In conclusion, L is in violation of her duty to the dignity of the profession because of her solicitation, advertising and referrals. Also, she violated her duty of fairness by talking to a represented person without permission.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

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Question 4

Ann represents Officer Patty in an employment discrimination case against City Police Department ("Department") in which Patty alleges that Department refused to promote her and other female police officers to positions that supervise male police officers. Bob represents Department.

At Patty's request, Ann privately interviewed a male police captain, Carl, who had heard the Chief of Police (Chief) make disparaging comments about women in Department. Carl told Ann that Chief has repeatedly said that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise any male officer. Carl met with Ann voluntarily during his non-work hours at home. Ann did not seek Bob's consent to meet with Carl or invite Bob to be present at Carl's interview.

When Bob saw Carl's name as a trial witness on the pretrial statement, he asked Chief to prepare a memo to him summarizing Carl's personnel history and any information that could be used to discredit him. Chief produced a lengthy memo containing details of Carl's youthful indiscretions. In the memo, however, were several damaging statements by Chief reflecting his negative views about female police officers.

In the course of discovery, Bob's paralegal inadvertently delivered a copy of Chief's memo to Ann. Immediately upon opening the envelope in which the memo was delivered, Ann realized that it had been sent by mistake. At the same time, Bob's paralegal discovered and advised Bob what had happened. Bob promptly demanded the memo's return, but Ann refused, intending to use it at trial.

1. Did Ann commit any ethical violation by interviewing Carl? Discuss.

2. What are Ann's ethical obligations with respect to Chief's memo? Discuss.

3. At trial, how should the court rule on objections by Bob to the admission of Chief's memo on the grounds of attorney-client privilege and hearsay? Discuss.

Answer A to Question 4

As Patty's attorney, Ann has a duty of confidentiality, loyalty, fiduciary responsibility and competence to her. This means that she must work hard on her case and follow up any possible leads that Patty may give her and follow up on any reasonable requests made by Patty. As an attorney, however, Ann has a duty of candor, fairness and dignity to the court, her adversary and the public. Because Ann knew that the Police Dept. (PD) was being represented by Bob (B), she was aware that any contact with a police officer could possibly be a violation of these duties. She could have a potential conflict because at minimum, the appearance would be that she was doing something unethical or wrong, even if she wasn't. She could have an actual violation of these duties if she were, in fact, having ex parte communications with a represented adversarial party.

Ann could argue that B represents the PD in general, but not Carl personally, & therefore she was w/i her right to contact him. The PD will argue that because Carl is a police captain, he is in a position of authority that someone would naturally look to for advice & information. Further, a police captain is in a position to make decisions that could bind the PD organization & his decisions could affect the PD. Because there is no one single individual to look to as being the defendant, you must look to those individuals who appear to represent the organization, can bind the organization by their decisions, has [sic] a leadership position & would be someone that one would look to for answers. Carl meets these qualities and therefore Ann violated her ethical duty to not have ex parte communication w/ a represented party. She should have gotten Bob's permission to speak w/Carl[.]

The PD could also argue that Carl is the equivalent of an agent & Ann will also need to obtain Bob's permission to talk w/any agent or employee of a business that may have information about the case & who's [sic] answers & information could be of detriment to the organization or bind the organization to a particular thought or conduct. Again, because Ann did not get Bob's permission to talk to a person who she knew was represented by counsel, she violated the ethical rules.

Although Patty asked Ann to talk with Carl, Ann cannot blindly follow the requests of her client if the requests would be illegal or aid or further an illegal act or if they would violate an ethical rule. A duty of competence is not outweighed by her duty of fairness & dignity to the court and her adversary.

2. Ann's ethical obligations with respect to the Chief's memo

As previously discussed, Ann has an [sic] duty of fairness, candor and dignity to the court, her adversary & the public. This means that she is not to use or benefit from or seek out any evidence which she knows is illegally or fraudulently obtained or to which she knows is clearly a mistake and privileged information. If an attorney knows or has reason to believe that any evidence or property that comes into her possession has been obtained

thru illegal means or fraud, she has a duty to turn it over to the authorities or the court. She cannot destroy the evidence nor can she instruct her client to destroy it. She also has an obligation not to use the information.

Here, after reading the memo[,] Ann clearly saw that the material was confidential attorney[-]client information. She could also tell that it was a document that was made in the course of litigation and therefore work product. She therefore had a duty to turn the memo over to either Bob or the Court immediately.

Ann also has a duty of competence to Patty, however. If she had information that could aid Patty in her case, she had a duty to follow up on it. The balance against the privileged information and her duty to Patty, however, is a difficult position for Ann. The memo gives her information about Carl which will give her an idea as to how much she can rely on his credibility and will give her damaging proof and admissions to the Chief's discrimination against females that all but proves her case. Despite the importance of the memo to her case, however, Ann is not entitled to benefit from another party's mistake and the confidential work product. She violated her duty of Fairness & Candor by reading and keeping the memo, as well as her duty of dignity to the court.

3. Bob's Objections to the Admission of the Memo

An attorney has [a] duty of Confidentiality to his client. This means that any information that he obtains during the course of his representation must be kept confidential, no matter how or when the information was obtained. It exists whether the client specifically asked him to keep it confidential or not and whether or not the release of information would harm or embarrass his client. The attorney[-]client privilege protects an attorney from divulging any confidential information about his client to anyone else, including the court, unless the client consents, the information is with regard to an imminent danger of serious bodily injury or death (although CA does not specifically provide for this) [,] the court orders the information be disclosed, the attorney is defending himself in a malpractice or bar complaint charge or bringing an action against his client for payment of services or seeking an ethical opinion.

Here, Bob has a duty of confidentiality to the Chief under the same analysis as he would be to Carl as previously discussed. The Chief can be considered his client because of his role in the PD, as discussed previously about Carl. Bob has a duty to keep the memo confidential because he asked Chief to write it, it's information central to the case and obtained while he represented the PD.

The document can clearly be categorized as confidential information bet/ a client and attorney. As such, the court cannot order that it be disclosed and used without the consent of the PD, as only the client can consent to it be[ing] used. Ann cannot force Bob to disclose the attorney[-]client priv[i]lege.

The memo can also be considered work product because it was made at Bob's request in anticipation of litigation. Such work product is protected by attorney[-]client privilege and cannot be disclosed w/o one of the previously discussed conditions being met. Chief is clearly not going to consent, Ann cannot order the disclosure, there is no threat to anyone[']s safety or life, there is no suit against or on behalf of Bob and he's not seeking a legal opinion. The court should exclude the memo on grounds of attorney[-]client privilege.

Hearsay

Hearsay is any out out [sic] court statement that is being offered for the truth of the matter asserted. Hearsay is not admissible unless there is an exception.

The memo is hearsay because it is a statement by Chief made out[-]of[-]court and Ann wants to use it to prove that Chief and PD discriminate against women. It also has info about prior bad acts of Carl, which are not admissible to show that he did something wrong on this occasion.

If Chief testifies, this information is w/o his knowledge and he could potentially testify about same. Ann could argue that the memo is a stmt of a party opponent and therefore admissible. Ann could argue that the memo is an admission of fault by Chief & therefore also admissible. If a party makes an earlier out[-]of[-]court admission, it can be an exception to the hearsay rule and admissible.

Ann could also argue that the memo is a statement against interest made by Chief when he knew he was being sued. If a person makes [a] statement against his pecuniary interest, it is deemed reliable and admissible hearsay. The negative comments about women could clearly be construed as against his interests.

Chief could also argue that the memo contains prior bad acts about Carl[,] which is inadmissible character evidence. A party cannot offer evidence of prior bad acts to show that the person is guilty of the current act. Further, the issue of character cannot be admitted unless the suit itself deals with a person's character or it goes to their credibility. Then, the only thing they can discuss is the w's opinion about their reputation for truthfulness in the public. There is no evidence of that here at this time. Further, prior bad acts are only admissible in a criminal case to show motive, intent, mistake of fact, identity and common scheme or plan. It does not apply to civil cases.

Because the memo is protected confidential attorney[-]client privilege, it should be excluded. Even though Ann can show that there are several applicable exceptions to the hearsay rule, the ultimate test is whether the probative value of the memo outweighs the prejudicial affect to the PD. Here, the prejudice is high and the memo should be excluded.

Answer B to Question 4

4)

Question 4

1. Ethical violations by Ann (A) for interviewing Carl (C)

Ann's interview of Carl raised several ethical concerns:

Duty Regarding Communications with Parties or Employees of Parties Represented by Counsel

In the instant circumstance, C is an employee of an organization, the Department, which is represented by attorney Bob (B). The issue is whether it is permissible under the rules of professional conduct for A to interview C without notice t[o] B or representation by counsel.

To begin with, a lawyer may not have communications with a party who is represented by counsel when the counsel is not present or aware of the communications. In situations where, as where [sic], as here, a lawyer seeks to have communications with an employee of an entity represented by counsel, the lawyer must obtain consent from the organization's counsel if: 1) the employee works regularly or at the behest of counsel, 2) the employee has authority to bind the organization, or 3) the employee's actions may be imputed to the organization.

Here, since C is a police captain, he likely has sufficient seniority to bind the Department or for his actions to his actions [sic] to be attributed to the Department. Therefore, it was improper for A to interview him without the consent of Bob (B), who is counsel for the Department. A's actions were improper under the rules of professional conduct, regardless of the fact that C met with A voluntarily and after work hours.

Morever, where a party is not represented by counsel and it appears that person should be, it is the duty of the lawyer to so advise that party. Thus, A should have advised C that he ought to have the benefit of counsel in his communications with her.

Duty of Fairness to Third Persons

Furthermore, A likely violated her duty of fairness to third persons by interviewing C without notice to B or without the benefit of representation by counsel. In this situation, C acted at his peril and may well face negative consequences at work for his actions. In light of this risk, A should have advised C that he ought to have the benefit of counsel in his communications with her. By failing to advise B in this manner, A's conduct violated her ethical obligations.

2. A's Ethical Obligations Regarding the Chief's Memo

To begin with, the memo contains sensitive material that is protected both by the attorney-client privilege and work product privileges.

Attorney-Client Privilege

The attorney-client privilege applies to confidences between a client and counsel in the course of representation. The attorney-client privilege is an evidentiary privilege. Under the evidentiary privilege, one may not be compelled to testify about a matter falling under the privilege. Here, the memo was made by Chief in response to B's request for the summary of certain information that could be used to discredit C. As such, the communication is one between Chief and his lawyer B and falls within the attorney-client privilege.

Work Product Privilege

The work product privilege applies to all material made in anticipation [of] or preparation for litigation. Here, the memo was prepared at B's direction to aid at trial: specifically to discredit a potential witness. As such, the memo falls under the work product privilege.

Duty to Return Material Mistakenly Delivered

A lawyer is under an ethical duty to return material mistakenly delivered to her. Here, the memo was inadvertently delivered by B's paralegal, and B promptly demanded its return, leaving no doubt in A's mind that it was accidentally delivered to her. Moreover, the material clearly contains sensitive material that falls under the attorney-client and work product privileges. The sensitive nature of this material also should have alerted A to the unintentional delivery of this material to her. Since this material plainly was not intended for delivery to her, A is under an ethical obligation to return it.

Duty of Zealous Representation and Diligence

A lawyer has a duty to zealously and diligently represent her client. Absent the applicability a specific rule requiring an attorney to return material mistakenly delivered to her, A would be under a duty to use such material in connection with her obligation to zealously and diligently represent her client. However, in this circumstance, the rule requiring an attorney to return mistakenly delivered material trumps the duty of zealous representation and diligence.

3. Objections to Admissibility of Memo

a. Objection based on attorney-client privilege

As discussed above, the memo initially falls within the scope of the attorney-client privilege.

Waiver?

The issue is whether the accidental disclosure of the memo to A constitutes a waiver. In general, a privilege is waived if it is disclosed to a third-party. Here, if the disclosure were intentional, there is no doubt that a waiver would apply. However, in the instant circumstance, the disclosure by the paralegal was accidental and B promptly sought the return of the material. Moreover, A is under an ethical duty to return the material in all of the circumstances. In light of the accidental nature of the disclosure and the applicable ethical duty for A to have returned the material, a court would likely rule that a waiver has not occurred and allow the protection of the attorney-client privilege to remain intact.

b. Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the memo can be said to constitute double hearsay: the memo is itself an out-of-court statement and it contains references to some things that the Chief said out of court: to wit, that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer. As double hearsay, an exception to the hearsay rule must apply for each level of hearsay.

Admission

The Chief's statements may be admissible, despite the hearsay objection, because it [sic] can be viewed as an admission. The very essence of the plaintiff's claim is that women are discriminated against. All of Chief's statements that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer amount to admissions of discrimination. As an admission, the memo can clear both levels of hearsay. Therefore, the court could overrule a hearsay objection on this basis.

Offered Not for the Truth But for The State of Mind

A can argue that the Chief's statements are being offered not for the truth of the matters Chief allegedly said, but rather to show his state of mind. This argument can be

an additional basis for allowing the chief's statements, but it does not solve the hearsay problem inherent in offering the memo, which is another out[-]of[-]court statement, being offered for the truth that Chief said such things.

No Business Record Exception

A business record exception can apply where a party makes a records [sic] in the regular course of business and is under a duty to record. Here, the business record exception would not apply b/c Chief had no duty to make the memo and it was made for litigation, not in the course of business.

No Official Record Exception

Similarly, the official record exception would not apply b/c Chief made the memo for litigation, and it was not made by an agency.

Conclusion

In conclusion, the memo may be admitted and not barred by hearsay b/c it is an admission.

ESSAY QUESTIONS AND SELECTED ANSWERS

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Question 3

Alice is a director and Bob is a director and the President of Sportco, Inc. (SI), a sporting goods company. SI owns several retail stores. Larry, an attorney, has performed legal work for SI for ten years. Recently, Larry and Carole were made directors of SI. SI has a seven-person board of directors.

Prior to becoming a SI director, Carole had entered into a valid written contract with SI to sell a parcel of land to SI for $500,000. SI planned to build a retail store on the parcel. After becoming a director, Carole learned confidentially that her parcel of land would appreciate in value if she held it for a few years because it was located next to a planned mall development. At dinner at Larry's home, Carole told Larry about the planned mall development. Carole asked for, and obtained, Larry's legal opinion about getting out of her contract with SI. Later, based on Larry's suggestions, Carole asked Bob to have SI release her from the contract. She did not explain, nor did Bob inquire about, the reason for her request. Bob then orally released Carole from her contract with SI.

The next regular SI board meeting was attended only by Bob, Alice, and Larry. They passed a resolution to ratify Bob's oral release of Carole from her contract with SI. Larry never disclosed what Carole had told him about the proposed mall development.

Three years later, Carole sold her parcel of land for $850,000 to DevelopCo, which then resold it for $1 million to SI.

1. Was Bob's oral release of Carole from her contract with SI effective? Discuss.

2. Was the resolution passed by Bob, Alice, and Larry to ratify Bob's oral release valid? Discuss.

3. Did Carole breach any fiduciary duty to SI? Discuss.

4. Did Larry commit any ethical violation? Discuss.

Answer A to Question 3

1. Bob's oral release

Bob, a director of SI, entered into an oral agreement to release Carole, another director, from a contract into which she had entered with SI for the sale of land. The question is whether this release was valid.

Statute of Frauds

Contracts for the sale of land must comply with the statute of frauds, and modifications of such contracts must also comply with the statute. Here, the original contract was in writing, but Bob's release was oral. This statute requires a writing signed by the party to be charged. That requirement was not met.

However, courts have held that parties may rescind a contract without complying with the statute. This appears to have been such a rescission. Further, Carole's reliance on the release – by selling the land to another party – was probably sufficient to make the release effective.

Bob's authority to release SI

The release was valid only if executed by someone with authority to bind SI. On these facts, there is no indication that Bob had such authority.

The Board of Directors has the authority to oversee the management of a corporation and approve major business decisions. However, individual directors do not have such authority.

An officer or director may be given actual authority by the articles of incorporation or bylaws to engage in particular duties. Further, a board of directors can delegate certain responsibilities to a committee of directors (which can be a single director). There is no indication here, however, that Bob was delegated authority to enter into land sale transactions. Because these are significant business decisions, it would be inappropriate in any case to delegate them to a single director.

Finally, because making or rescinding land sale contracts is not one of the ordinary duties of a director, Bob had no implied authority as director to release Carole.

In his position as president, however, Bob may have had authority to execute the release. A president of a company may be given specific powers in the articles and bylaws. Again, there is no indication that Bob had such explicit powers. However, a president may also exercise implied or inherent powers necessary to do his job. A president would certainly have the authority to bind the corporation, for example, to ordinary services or employment contracts. Such authority is implied because it is necessary to exercise the

management powers of his job.

In this case, however, the land sale was a major capital investment. Such a major decision was probably not within the province of the president's authority and required Board approval. Therefore, Bob's release was probably not valid.

Board Resolution

The issue here is whether the subsequent ratification of the release was valid.

Quorum

Board actions are valid only if a vote occurs when a quorum of the Board is present. A quorum is normally defined as more than half the directors – in this case, 4 out of 7. Only three directors were present, however.

In its bylaws, a corporation can establish a smaller number for a quorum if it is more than 1/3 of directors. There is not indication, however, that Sportco had varied the normal rule in this case. Therefore, a quorum was not present and the Board's action was invalid.

Interested Director Transaction

As discussed below, this was an interested director transaction because Carole, a director, stood to profit from the sale of the land. Such transactions may be ratified only by a majority of non-interested directors. In this case, then four directors – a majority of the six non-interested directors – would have had to approve this transaction.

Further, to ratify an interested director transaction, the Board would need to know the facts of Carole's transaction in acco[r]dance with their duty of care. Here, Bob, Alice, and Larry did not know Carole's motives.

Because there was no proper ratification of an interested director transaction, the Board's action was invalid.

3. Carole's fiduciary duties

As a director, Carole had a duty of loyalty to the corporation. She had a duty to act in what she reasonably believed to be the corporation's best interest, and not to profit at the corporation's expense.

Here, Carole violated that duty in several ways. First, she used confidential information for her personal gain. This was a violation because she had a duty to keep confidences acquired in the course of her duties and not use them for personal profit.

Second, Carole usurped a corporate opportunity by selling the parcel to DevelopCo. Having learned that the parcel would appreciate in value, Carole had an obligation to let Sportco profit from that opportunity because it was part of Sportco's line of business – that is, finding suitable locations for its sporting good stores. Carole could only have taken advantage of the opportunity herself had she first offered it to Sportco & Sportco had turned it down. Here, however, Sportco was clearly interested in acquiring the land – since, after the land's value became apparent, Sportco brought it.

Finally, Carole's conduct in withholding her true motives from Bob was arguably fraudulent. Because of her fiduciary duty, Carole was obliged to disclose material facts. Carole's knowledge of the proposed mall development would certainly have been material in the Board's decision.

Carole also violated her duty of care as a Board member. She did not act in conducting the corporation's business affairs as a reasonably prudent person would in her own activities. Certainly passing up a valuable business opportunity that Sportco could have profited from was not prudent.

4. Larry's ethical violations

Conflict of Interest

Larry represented SI, not any individual director. By seeking Larry's legal advice on a personal transaction, Carole attempted to use Larry as her personal lawyer. This created at least a potential conflict of interest if Carole's interests should differ from SI's. In this situation, Larry could not represent Carole unless he informed both Carole & SI & both gave consent that an independent lawyer would find reasonable. By advising Carole without seeking such consent, Larry violated his duty of loyalty to each client.

Further, once it became apparent that Carole was seeking to profit at Carole's expense[sic], the conflict was direct. At that point, Larry should have sought Carole's permission to withdraw. Further, as discussed below he probably should have sought to withdraw from the Board as well. In failing to do so, he further violated his duty of loyalty.

Larry's Board Service

No per se rule exists barring a lawyer from serving on his client's board. However, such service may create problems with the duties of confidentiality and loyalty. Here, as a board member, Larry owed fiduciary duties to SI. He was therefore obliged to tell them material information he received relating to Carole's proposed rescission. He violated these by concealing the information. Further, he acted in Carole's best interest, not SI's, by voting to ratify the transaction. Larry should instead have disclosed the existence of a conflict (giving as little information as possible to avoid breaching his duty of confidentiality to Carole for all information arising out of the course of representation). He should then have sought to resign from the Board, and probably from representation of SI as well.

Duty of Loyalty

A lawyer has a duty to represent each client zealously & and put that client's best interests first. Larry did not do so in regard to SI because he did not advise SI how to enforce the contract with Carole – which would have been in SI's best interests.

Duty of Competence

A lawyer has a duty to thoroughly investigate his client's legal issues. Here, Larry failed to learn the facts of SI's transaction with Carole[.]

Duty of Communication

A lawyer must give a client the information necessary to make major decisions relating to the representation. Here, Larry withheld material information re: his consultation with Carole. SI needed this information in order to fully exercise its legal rights.

Because Larry could not fulfill duties to SI w/out breaching his duties of loyalty & confidentiality to Carole, he should have withdrawn from representation of both clients. In addition, he violated his board member fiduciary duties.

Answer B to Question 3

3)

I. Bob's Oral Release of Carole

Bob's Powers as President
A corporate officer, such as president, can only act under proper authority. In his capacity as president, Bob's release of Carole must have arisen under his express, implied, or apparent authority to bind SI.

Express Authority
A corporate officer acts with express authority to bind (unbind) the corporation when the board has formally conferred that authority to him. Here, the board did not not know abou[t] Carole's intention to be released from the contract. It neither held a vote nor a meeting to grant Bob the express authority to "bind" the corporation in this way. Thus Bob lacked express authority to release Carole from her contract with SI.

Implied Authority
A corporate officer has implied authority from the board to bind the corporation to relatively minor obligations that arise in the everyday course of business. Here, however, a sporting goods corporation had bought and was planning to develop a retail store on a parcel of land worth $500,000. SI only owned "several" sporting goods stores, so the addition of another one is a fairly important development. The facts suggest that this was a relatively major business initiative, and so would not fall within the scope of a corporate officer's implied powers. Thus, Bob as acting as president could not have released Carole from her contract under implied authority.

Apparent Authority
A corporate officer has apparent authority to bind (or unbind) the corporation when he is held out to a third party as having such authority, and the third party relies on that authority. Here, apparent authority is not likely, because Carole, as a board member would not precisely [sic] the metes and bounds of Bob's authority as president. She would thus not be able to claim detrimental reliance on Bob's release based on apparent authority.

Bob's Powers as a Director
Carol[e] might also claim that Bob released Carole from her contract based on Bob's position as a director. In order to bind a corporation, board action must consist of a unanimous vote of all members, or a majority of a meeting with quorum. Here, Bob acted unilaterally as a director; there was no meeting and no vote so he, acting as a single director, could not bind the corporation.

II. Validity of the Resolution Passed by Bob, Alice, and Larry

Quorum Rules for Binding Board Action

As mentioned, binding board action can only arise when there is a unanimous vote, or upon a majority of votes at a meeting with quorum. Here, SI's board has seven members, so quorum would constitute four members. Therefore, since quorum was not achieved, no business of the board meeting with only Bob, Alice and Larry could be binding.

Interested Directors

Even if there were additional board members at the meeting, only directors who do not have a personal interest in a transaction can be counted for quorum. Thus, any vote on whether to release Carole from the contract would have to exclude Carole, because she stood to gain considerably if the contract were released based on the appreciation of the land price. It is not clear if Larry should also be excluded. While he was privy to confidential information not shared with the other members of the board, he did not aim to materially gain from cancelling Carole's contract, unless Carole agreed to pay him. If so, then Larry should be excluded from any vote of whether to release Carole from her contract.

III. Carole's Breach of Fiduciary Duties to SI

Carole breached several fiduciary duties to SI.

Breach of Loyalty

Seeking Release from the Land Contract

A director owes a fiduciary duty of loyalty to the corporation, and must always act in the best interests of the corporation without regard for self-interest. Here, Carole sought release from a valid contract with SI for the land for $500,000. Her motivation in doing so was personal gain; after making the contract, she sought release from it because land prices were appreciating and she stood to gain a profit by retaining ownership of the land and selling to another buyer at a higher price. This behavior clearly contravened her duty of loyalty to SI, which was to obtain the land at the lowest possible price[.]

Since she breached her duty, Carole is liable both for any personal gain as well as material loss to the corporate [sic] as a result of her breach. Instead of selling to SI for $500,000, Carole sold the land to DevelopCo for $850,000; the resulting profit of $350,000 must be disgorged and returned to SI.

In addition, SI originally contracted to buy the land for $500,000 but ultimately paid $1 million. SI can thus recover the damages of $500,000 due to Carole's breach.

Not Disclosing Confidential Information of Land Appreciation

As part of her duty of loyalty to SI, Carole has a duty to communicate all information in her possession that could be used for the corporation's advantage. The fact that the land that SI had obtained via contract was appreciating in value was relevant to SI's business objectives, since it could have decided to keep the land and then sell it later for a substantial profit. Carole's withholding of this confidential information thus marked another breach in her duty of loyalty to SI.

Corporate Opportunity

Related to her duty to communicate information, under the duty of loyalty Carole must present any corporate opportunities to SI first, and can only pursue them upon the board's decision not to pursue them on behalf of the corporation. Here, Carole became aware of a corporate opportunity through obtaining information that the land she had sold to SI was going to appreciate because of the mall development. She thus had a duty to present this opportunity first to the board, and only pursue it if they refrained.

Carole might argue that this does not apply since SI is in the business of sporting goods, not real estate speculation, and that therefore the corporate opportunity did not lie within SI's line of business. Modern authorities, however, state that a corporation may take opportunities broadly defined, even those outside their traditional line of business. Here, then, Carole had a duty to inform SI of the mall development and likely appreciation in land values, and she breached that duty.

Breach of Duty of Due Care

A director owes a duty of due care to the corporation, and must make decisions in the best interest of the corporation as if it were her own business. Here, it was clearly a breach of the duty of due care for Carole to engineer a rejection of a land sale contract at a very favorable price to SI.

Business Judgment Rule

The business judgment rule will normally protect directors whose decisions, made in good faith and with good business basis[sic], nevertheless result in adverse consequences. Here, however, Carole's efforts to seek release from her contract were not made in good faith. She was self-interested and desired to retain the profit from land speculation to herself at SI's expense, and Carole thus cannot be protected by the business judgment rule.

IV. Ethical Violations by Larry

Representation and Service on a Board

Although it is discouraged, a lawyer is allowed to serve as a board member on an organization he represents if he can do so effectively and without jeopardizing his ethical duties to the client organization. Here, Larry performed legal services for several years for SI, which was his client. At the time he accepted his board position, because there was no apparent conflict with his duties as lawyer, this acceptance was permissible.

Duty of Loyalty – Conflicts between Clients
A lawyer owes a duty of loyalty to his client, and must act in his client's best interest. Here, Carole came over for dinner and sought advice regarding her plans to annul the contract. At the time, Carole informed Larry that she was seeking his legal advice, and a putative lawyer-client relationship between Carole and Larry formed.

A lawyer can take on a potential client conflict where 1) the lawyer believes he can reasonably and effectively serve all parties, 2) he informs each party, 3) each party presents written consent, and 4) that consent is reasonable. When Carole disclosed her plans, her interests became materially adverse to those of Larry's client, SI. At that point, Larry should have informed Carole that he could not represent her and urged her to seek independent counsel. His not doing so consti[t]uted a breach of his duty of loyalty to SI.

Duty of Communication
A lawyer has a duty to relay all helpful information to his client. Here, Larry learned that the land that SI had purchased was going to appreciate rapidly, and this information should have been related to his client. This duty, however, conflicted with his duty of confidentiality to Carole, which had attached because she sought legal advice from him. Though a close question, Larry's decision to honor Carole's confidence and not tell SI of the land value was probably correct.

Duty of Competence
A lawyer owes his client a duty of competence. Here, Larry did not disclose and breached.

Assistance in a Crime or Fraud
Under ethical rules, a lawyer must not assist a client in a criminal enterprise or fraud. Here, Carole approached Larry about cancelling the land sale contract because of Carole's desire to profit at the expense of SI. Larry's legal opinions led Carole to seek release from Bob, which involved breaches of fiduciary duties on behalf of Carole owed to SI. Larry might counter by noting that no actual fraud was perpetrated, since Carole never disclosed to Bob the reasons for seeking release. Nevertheless, Larry assisted in breaching a fiduciary duty, and thus breached ethical duties of his own.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Lou is a lawyer. While he was having lunch with a friend, Frank, he learned that Frank's sister, Sally, had decided to dissolve her marriage. At Frank's request, Lou telephoned Sally, told her that Frank had asked him to call, and offered to represent her. They set up an appointment for the next day.

During the appointment, Lou began the discussion by talking about his fee. Sally told Lou she had no money, but admitted jointly owning with her husband some art valued at $1,000,000. Lou agreed to accept a payment of fifty percent of any assets awarded to Sally in exchange for representing her. Lou and Sally memorialized the agreement in writing.

Over the next month, Lou found himself attracted to Sally and eventually asked her to go out with him. She accepted, and they began dating on a regular basis, including having consensual sexual relations with each other.

Soon after Sally filed for dissolution, her husband's lawyer called Lou and made a property settlement offer. Lou told the lawyer the offer was ridiculously low and he would not insult Sally by telling her about it. Sally learned about the offer from her husband. She thought it was a good offer and was incensed that Lou had turned it down. When she asked Lou about it, he told her he was looking out for her best interests.

What ethical violations, if any, has Lou committed? Discuss.

Answer A to Question 6

6)

Lou has potentially violated the ABA [R]ules of Professional Conduct and the model code of Professional Responsibility. He has potentially violated the California [R]ules of Professional Conduct, and where there is a distinction in the law, I will address it.

Here, Lou telephoned Sally at Frank's request to tell Sally that he would offer to represent her. The general rule is that an attorney may not instigate direct, in person solicitation for legal services unless they are talking to a former client or the person comes up to them. In this case, Lou was having lunch with Frank who asked him to call Sally because Sally is his [s]ister. While Lou did not directly make the contact with Sally in person, he is still not allowed to call Sally and offer her his services because they do not have a previous legal relationship. It is also immaterial that Lou told Sally that he is calling because her brother told him to. Lou should have told Frank that he cannot call Sally because it would be violating his ethical obligations. Lou could have told Frank to tell Sally to call him if she really needed help and was looking for legal representation. Thus, because Lou instigated client contact and solicited his services to Sally, he has breached his ethical obligations.

When Lou agreed to take 50% of Sally's assets she would be awarded after the dissolution, he is basically having an interest in the litigation. Generally, a lawyer may not have an interest in the litigation and thus, what Lou should have done is the following: 1. He should have given Sally consultation as to what fees are, 2. He should have given her informed consultation, 3. He should have given her the chance to see outside counsel if she wanted (in writing in CA), 4. He should have obtained her waiver or consent to this agreement (in writing in CA). However, a lawyer may have an interest in the litigation if, for example, it is a contingency fee arrang[e]ment.

Generally under the ABA rules, a lawyer may not engage in a contingency fee arra[n]gement with a client when the case is about a dissolution of marriage because it would violate public policy concerns. However, in California a lawyer may enter a contingency fee arrang[e]ment so long as the arrang[e]ment does not encourage the divorce. Since Sally is in need of a lawyer to have her divorce, it appears that Lou's representation is not encouraging the divorce. Thus, Lou should have given Sally consultation about the fee arrangem[e]nt, put the contingency in writing, he should have also told her and [sic] what his obligations are under his representation (written in CA), and he should have written what the amount of his services would be after he subtracts any court costs, and obtained her written consent to the arrang[e]ment. While the [sic] memorial[i]zed this arrangement in writing, Lou did not give Sally informed consent about the arrang[e]ment nor did he write down what his responsibility and liability is under his representation. Thus, Lou has breached his ethical obligations.

Lou agreed to accept 50% of any assets awarded to Sally in the divorce. A lawyer has a duty to not make his fee unreasonable or unconscionable. In this case, Sally had no money except she jointly owned art with her husband valued at 1 million dollars. Thus, taken into consideration that Sally and her husband may have a lot of money, some courts would find that 50% of Sally[‘s] divorce decree would amount to an unreasonable fee for Lou. Plus, it may also be uncons[c]ionable to take so much money from a client. In this event, what Lou should have done was determine what the normal percentage was for a contingency fee in the general area that he lived in. For example, he could have asked other lawyers and taken note of payment in divorce decrees. He should have also determined if this percentage would actually reflect the amount of work he would be doing. Additionally, Lou should also know that 50% may be too unreasonably high as his fee percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally’s assets as this is most likely far to[o] unreasonable and unconscionable.

Lou and Sally began a relationship during his representation of her case. Under the ABA rules, a lawyer may not engage in sexual relations with a client. However, in CA it is permissible so long as it does not affect the lawyer’s representation of their client. Here, they began dating regularly and had consensual sexual relations. One the one hand, while this is permissible in CA, it may have affected Lou’s duties as a lawyer because this is a divorce situation where Lou’s emotions may be entangled with the fact that his client is still married. Plus, Lou may be engaging in adultery since Sally only filed for the divorce after she started dated [sic] Lou, subjecting him to more potential ethical violations. Lou has a duty to place his client’s interest in front of his own and now Lou may be placing his emotional interests first. For example, when Husband’s lawyer called, Lou said that he would not take the property offer nor tell Sally about it because he did not want to insult Sally. Here, Lou may be protecting his relationship with Sally rather than being her loyal lawyer.

Also, when Sally asked Lou why he didn’t tell her about the offer, he said that he was looking out for her interests[,] which may not have been true. A lawyer has a duty of loyalty to their client to place their client’s interest first and Lou may have breached that duty by saying he was looking out for her interests when he was really looking out for his relationship with Sally. In this event, Lou should have consulted Sally about their potential conflict of interest (since Lou may place his interest in front of Sally’s best interest), he should have given her informed consent that he may not be able to put her interests first, and he should have asked her to seek another outside counsel’s advice (in writing in CA), then obtain her consent or waiver (in writing in CA). Lastly, if Lou could not reasonably represent her, he should have withdrawn from representation [so] as to not prejudice his client. For example, he could give Sally adequate time to find another lawyer and give her all the documents she would need to continue on her case.

Lou told Husband’s lawyer that he would not tell Sally about the settlement offer. Generally the lawyer is entitled [to] decide the technical and procedural decisions of a case while the client must decide on all the objectives and goals. One major goal is whether or not a client

wants to accept a settlement offer. Here, Lou had a duty to tell Sally about the settlement offer because it was her right as his client to know about it and decide if she should reject it or not. Lou cannot reject a settlement offer and since Lou rejected it, he has breached his duty to behave like a competent lawyer.

Lou did not tell Sally about the settlement offer. A lawyer has a duty to communicate with their client and tell them of all material aspects of their case, especially in a situation like this where Sally would have to know about the settlement offer. Here, Sally found out the settlement from her Husband, not her own lawyer. What Lou should have done is when he received the settlement offer, he should have consulted Sally as to its terms, explained the pros and cons of it and thus, allowed her to make the final decision. Then Sally could ask Lou want [sic] the best thing to do would be since Lou could give her consultation as to the legal implications of accepting a settl[e]ment offer. Yet, Lou just rejected the settlement and did not communicate any material terms of the settlement to Sally. Because Lou did not take these necessary steps, he has breached his duty as a lawyer.

Answer B to Question 6

6)

Applicable Law

An attorney in California is bound by the California Rules of Professional Conduct (RPC) and the California's Attorney's oath. The RPCs are similar but not identical to the ABA Model Rules[,] which govern a lawyer's ethical duties in the majority of jurisdictions. Because it is unclear in which state Lou is a lawyer this essay will apply the majority view of the ABA Model rules but also include distinctions in the California RPCs.

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this ca[s]e once Lou and Sally meet for their appointment a lawyer-client relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

Telephone Call To Sally
Breach of Duty of Candor to the Public and Dignity of the Profession

A lawyer owes a duty of Candor to the Public and a duty to act in a way that does not bring his profession into disrepute. These duties may be violated by in person solicitations for profit.

In Person Solicitation

The [C]onstitution guarantees the right to free speech. However, the Supreme [C]ourt has ruled that this right is limited in the context of commercial speech. Specifically, they have ruled that the [F]irst [A]mendment does not protect false, misleading or inherently deceptive speech. One category of inherently deceptive speech is live contact by a lawyer of a prospective client for profit. Therefore state bar associations can constituti[o]nally regulate this conduct.

Under the Model Rules a lawyer is prohibited from engaging in in person, live electronic or telephone contact, for profit, with a person that is not a lawyer or with whom the lawyer has no preexisting personal, legal, or family relationship.

Here Lou telephone[d] Sally[,] which qualifies as a live telephone contact. Furthermore, he offered to represent her in her action to dissolve her marriage for which he was planning on charging her a fee and make [sic] a profit as later evidence[d] by their fee agreement. Finally, Sally was not a lawyer and Lou had no preexisting personal, legal, or family relationship with Sally. Although Lou was asked to contact Sally by her brother

Frank, who was Lou's friend, this contact was not sufficient to qualify as a preexisting personal, legal or family relationship. In fact up unti[l] the time of the phone call Lou had no relationship with Sally and she had no idea who he was.

Therefore, by engaging in this live telephone contact, for profit solicitation Lou violated his duty of candor to the public and the duty he owes to the dignity of the legal profession.

What Lou should have done is tell Frank to have Sally call him to ask for representation. In that case Lou would not have initiated the contact and would not have violated any ethical duties.

Fee

Breach of Fiduciary Duty to Client for an Improper Fee

A lawyer owes a fiduciary duty to his client to charge a proper fee that conforms to all the requirem[e]nts laid down by the ethical rules.

Fees Generally

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money but her and her husband had $1,000,000 worth of art. This would mean that Lou's fee was at least $250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of $250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

A fee should be in writing under the Model Rules and must be written under the California RPCs unless it is for less than $1000, for a[n] existing client in a routine matter, exigent circumstances exist, it is waived, or it is for a corporation. This fee was in writing[;] thus in that regard it complied with the Model Rules and the California RPCs.

Therefore, because the fee is unreasonable it is an ethical violation. Lou should have charged a fee that was less than or around 33% or a fee that was charged for similar work in such a locality in order to have a reasonable fee.

Contingency Fee

A contingency fee is one that is a percentage awarded to the lawyer if and when the client prevails. A contingency fee must be in writing, must otherwise be reasonable, must

discuss how work not covered by the contingency fee will be paid, and must provide a formula for how the contingency fee was determined. Here the fee was in writing. However, the fee may not have been reasonable as stated above.

Furthermore, under the Model Rules a contingency fee may not be taken in a domestic relations matter. However, under the California RPCs a contingency fee may be used in a domestic relations matter as along as it does not incetivize [sic] divorce. Therefore, if Lou is in a state that applies the Model Rules this contingency fee is an ethical violation because it involves a domestic relations matter of a dissolution. However, if Lou is in California his contingency fee is likely not an ethical violation because he made the fee with Sally after she had decided to dissolve her marriage and thus did not incentivize [sic] her decision to seek a divorce.

Lou should not have charged a contingency fee if he was in a Model Rules Jurisdiction but rather should have found some other way for Sally to pay her fee, perhaps by asking Frank to loan her the money necessary.

Breach of Duty of Loyalty to the Client

A lawyer owes a duty of loyalty to their client. The lawyer must act with the utmost good faith and in a way she reasonably believes is in the best interests of her client[,] having no other considerations in mind. If the lawyer becomes conflicted and that conflict materially limits the representation the lawyer may continue the representation only if he informs the client in writing of the conflict, receives written consent that a reasonable lawyer would advise their client to give, and he reasonably believes that he can continue the representation without it being materially limited.

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases. Here Lou has taken an interest in the subject matter of the litigation because his fee is based on the amount and kind of assets he recovers for Sally in her divorce proceedings. However, this is clearly a contingency fee as it depends on assets actually being awarded to Sally in the divorce, thus it is contingent on Lou's success. Therefore, it does not breach Lou's duty of loyalty. However, because as stated above it is a contingency fee in a divorce proceeding it may not be a valid contingency fee if Lou is in a Model Rules jurisdiction. In such a jurisdiction the court may consider it an interest in the litigation rather than a contingency fee and therefore an ethical violation.

Therefore, the fee agreement breaches Lou's fiduciary duty to his client Sally and possibly his duty of loyalty to her as well.

Consential [sic] Sexual Relations
Breach of Duty of Loyalty to the Client

The duty of loyalty that a lawyer owes a client is laid out above.

Model Rules

Under the Model Rules a lawyer breaches the duty of loyalty by entering into a consensual sexual relationship with the client, regardless of its effect on the representation. However, the Model rules do allow preexisting consensual relationships to continue as long as they do not materially limit the lawyer's ability to represent the client. Here Lou and Sally's relationship began after the[y] entered into the lawyer[-]client relationship. Therefore, under the Model Rules Lou breached his duty of loyalty to Sally by entering the relationship with her.

Lou should have never entered consensual sexual relations with Sally nor even asked her to go out with him. If Lou had really wanted to date Sally he should have asked her to consent to his withdrawal as her lawyer and then started to date her.

California RPCs

Under the California RPCs a lawyer may enter a non preexisting consentual [sic] sexual relationship with a client without breaching the duty of loyalty as long as he reasonably believes the representation of the client will not be materially and adversely affected, the relationship is not in payment of any of the client's obligations to the lawyer, and the relationship is not entered into by the client because of duress or undue influence. Here there appears to be no evidence that the relationship was in part payment of the fee because the written fee agreement predated the relationship and was for a large amount of money[;] additionally there is no evidence of duress or undue influence.

However, there is evidence that the relationship materially and adversely affect[ed] the representation. Lou later received a call from Sally's husband[']s lawyer and turned it down and refused to communicate it to Sally because it was ridiculously low and he did not want to insult her. His motive in not wanting to insult her may have been do [sic] to their personal relationship. Furthermore, his failure to communicate the offer to her was a breach of his duty of care that he owed to Sally as will be discussed below. If his relationship was causally related to his breaches of duty of care then certainly the representation was materially limited by the sexual relationship. This is further reinforced by the fact that Sally learned of the offer and though[t] it was a good offer. Because the relationship was materially limiting the representation it violated the California RPCs.

Lou should never have entered the relationship with Sally and certainly should have withdrawn after his feelings for her began to limit his representation of her. Lou should certainly have received Sally's informed written consent as to the continued representation, however, once he rejected the settlem[e]nt offer it appears that the representation was

materially limited and he could not reasonably continue the representation. Therefore, at that point he should have withdrawn.

Failure to Communicate the Settlement Offer and Rejection Thereof
Breach of Duty of Care Owed to the Client

A lawyer owes their client a duty of care. This duty requires that the lawyer act with the skill, knowledge, thoroughness, and preparedness reasonably necessary to effectively carry out the representation. If Lou rejected the offer and it was a good offer then he may have violated the duty of care because a reasonable lawyer would at least entertain a decent offer and communicate it to their client. We do not know anything about the terms of the offer but we do know that his client Sally believed that it was a good offer. Because of this and because of his failure to communicate the offer to Sally, as discussed below, Lou violated his duty of care.

A Lawyer's duty of care includes a duty to communicate with the client. The duty to communicate requires that the lawyer keep the client reasonably informed about the representation and respond to the client's reasonable requests for information. Here Lou failed to communicate the settlement offer to Sally as communicated by Sally's husband's Lawyer. Failing to inform a client of a settlement offer is a failure to keep them reasonably informed about the representation because a decision whether to settle or not is one that is solely in the purview of the client and the client cannot make that decision unless they are informed of that offer. Furthermore, Lou knows that Sally's husband's lawyers [sic] is ethically prohibited from communicating with Sally because she is a party adverse in the matter whom the lawyer knows is represented. Thus Lou must have known that there was virtually no way for Sally to find out about the offer. Therefore, Lou violated his duty to communicate and thus his duty of care.

A Lawyer's duty of care also includes a duty of diligence. That is[,] the lawyer must diligen[t]ly and zealously pursue the interests of his client. Here by failing to communicate the settl[e]ment offer and thus possibly losing the ability to settle, Lou has violated the duty of diligence because a diligent lawyer would at least communicate the offer to his client and discuss it with them.

Scope of Representation

The objectives of the representation are decided by the client subject to the lawyer's advice on the ethical rules and other law. The means of the representation are decided by the lawyer. The Advisory notes to the Model Rules state that decisions regarding the settlement of a civil case are considered to be objectives. Therefore, the decision to settle or not was one that should have been made by Sally rather than by Lou and Lou violated his ethical duty by not communicating the settlem[e]nt to her and by deciding on his own that the offer was ridiculously low and an insult.

If Lou felt that the settl[e]ment was inadvisable he should have counseled Sally on that fact rather than withholding information. If he thoug[t] such action was repugnant he may have sought permissive withdrawal to end the representation. However, he did none of these things and therefore violated the Model Rules and the California RPCs.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

Tort claim

Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

Question 5

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and

operator of a business called Supply Source ("SS"), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry's law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over $1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than $1.25 per widget, she said, ". . . and, if you get more than $1.25 each, we'll talk about how to split the excess." Larry replied, "Okay," and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for $2.50 each. Ben paid Larry $250,000. Larry then sent Marla a check for $100,000 with a cover letter stating, "I have sold all of the 100,000 widgets to Ben. Here is your $100,000 as we agreed."

When Marla learned that Ben had paid $2.50 per widget, she called Larry and said, "You lied to me about what you got for the widgets. I don't think the deal we made over the telephone is enforceable. I want you to send me the other $150,000 you received from Ben, and then we'll talk about a reasonable commission for you. But right now, we don't have a deal." Larry refused to remit any part of the $150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.

2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Answer A to Question 5

5)

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between $1.00 per widget and $1.25, and then a portion of the proceeds above $1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for $2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promissee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promissee[,] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than $500 are also subject to the statute of frauds. If a contract for goods in an amount greater than $500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the "goods prong" of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry's role was that of a finder or marketer whose responsibility it was to find a buyer for Marla's widgets. He was incented [sic] to find a high price because he was entitled to keep anything over $1.00 per widget, and then a portion of the proceeds above $1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry's expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman's purchase price. Thus, the contract is more akin to that of finder who never "owned" the goods.

Ethical Violations

Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry's law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he entered into a business arrangement. When a lawyer enters into a business arrangement

with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advice [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

Answer B to Question 5

5)

(1) Enforceability of the contract between Larry and Marla

Applicable Law: If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

Offer: The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over $1.00, up to $1.25. However, there was no certain price term since Marla stated that any excess over $1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over $1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than $1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over $1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

Acceptance: Marla's offer to Larry was probably a unilateral contract, that is, one

that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least $1.00 per widget and giving Marla $1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

Consideration: Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

Statute of Frauds: The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least $500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

Quasi-Contract

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be $25,000, but could include a reasonable amount for the remaining $125,000 over the agreement terms.

Conclusion:

There probably is an enforceable contract under which Larry can keep $25,000 and a reasonable amount of the additional $125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

(2) Possible ethical violations committed by Larry

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

Duty of Loyalty - business transactions with clients:

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

Duty to act honestly, without deceit or misrepresentation: A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the $100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

Conclusion:

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.

California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 5

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her $1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered $15,000 to settle the case without conceding liability. By this time, Lawyer had advanced $5,000 in litigation and living expenses, and Client had incurred $5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Answer A to Question 5

Question 5

The issue is whether lawyer has committed any ethical violations in his representation of Client, either under the ABA Code ("Code"), the ABA Model Rules, or the California rules of professional responsibility. Based on the facts provided, Lawyer has committed a number of ethical violations, each of which will be discussed in turn.

Contingency Fee Agreement

In general, a lawyer is prohibited from taking a proprietary interest in the case he is working on. However, all 3 bodies of law discussed above recognize contingency fee agreements, or agreements in which the lawyer and client agree that the lawyer's fee will be paid out of any recovery the client receives. Lawyer and Client had such an agreement in this case.

Under the ABA Model Rules, a contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery and must state whether such expenses will be paid before or after the lawyer's percentage is calculated.

In addition, California law requires that the agreement state that the lawyer's percentage is negotiable, i.e. that it is not fixed by law, and that it state how other, non-covered expenses will be paid.

In this case, Lawyer and Client entered into a valid, written contingency fee agreement under which it was agreed that Lawyer would receive 1/3 of Client's recovery. Assuming that all of the above elements were also included in the agreement, it will be enforceable as a valid contingency fee agreement.

Expense Advances and Loans

Next, there is the issue of whether Lawyer violated any ethical duties by advancing Client's litigation costs and lending her $1000 in living expenses.

Under both the ABA Code and Rules and California law, a lawyer may advance an indigent client's litigation expenses, provided that the lawyer may later recover them as part of his contingency fee. In this case, therefore, Lawyer did not violate any ethical duties simply by advancing client's litigation expenses.

However, as stated above, the continency fee agreement must include how all expenses will be paid, and whether they will be paid, and whether they will be paid before or after the lawyer's percent is taken. Here, Lawyer and Client orally agreed on the advance, and it is not clear when it was to be repaid - before or after Lawyer's fee was deducted. Failure

to reduce this agreement to writing with precise terms therefore constitutes a violation of Lawyer's ethical duties.

The ABA Code and Rules prevent lawyers from making loans to their clients in excess of litigation expenses. However, California permits lawyers to make such loans, so long as the payment is actually a loan that must be repaid and not an outright gift. Additionally, the lawyer and client must enter into a written loan agreement, signed by both parties.

Here, Lawyer's loan of $1000 for living expenses would be banned under the ABA Code and Model Rules. Although California law is more permissive with respect to loans, Lawyer's actions would also constitute a violation of California's rules of professional responsibility, as he did not ensure that the loan agreement was reduced to writing and signed by Client. Furthermore, as with the litigation expenses, it is not clear whether Lawyer's loan will be repaid before or after his 1/3 of the recovery is calculated.

Lawyer's Assurance to Physician - Duty of Communication

Lawyers owe a duty of communication to their clients, according to which they must relate information about a case's progression and status to the client on a periodic basis so the client can make informed decisions regarding the case.

Here, Lawyer made a side agreement with Physician by sending Physician a letter stating that he would receive full payment from the recovery in the case. Lawyer did so without Client's knowledge or consent. Because this is an important matter that ultimately affects the amount Client will receive to compensate her for her injuries, she should have been informed of this agreement. Therefore, Lawyer violated his duty of communication by failing to disclose the contents of the letter to client first.

And again, because the agreement with Physician addressed the payment of expenses out of client's recovery, it should have been included in the terms of the contingency fee agreement.

Duty of Due Care/Competence

An attorney also owes a duty of competence, which means he must act with the care, skill, preparation and diligence of a reasonable practitioner under the circumstances.

Here, the facts state that the case would not settle for the amount Lawyer initially forecast due to Defen[d]ant Driver's strong case. If Lawyer was negligent, or failed to adequately investigate the case before arriving at his initial estimate, and if that error harmed his initial negotiating position, he may be found to have violated the duty of competence as well.

Duty of Loyalty

A lawyer owes a client a duty of loyalty, according to which the lawyer must act solely to further the client's best interests. He may not sacrifice the client's interests to his own or to those of a 3rd party.

In this case, the facts suggest that Lawyer pressured Client into accepting the settlement offer, even though she was reluctant to do so at first. Indeed, Client had already incurred $10,000 worth of expenses, and the offer was only for $15,000. Lawyer appears to have convinced her to accept by taking her out to dinner, engaging in sexual relations with her, and renegotiating their oral contingency fee agreement.

The facts also suggest that Lawyer's interests in so doing were not solely to ensure Client received the largest possible award, but also to ensure that he too would recover his expenses.

Under these facts, therefore, it appears Lawyer has violated his duty of loyalty to client by using undue influence to ensure that he is able to recover his continency fee, regardless of how much is left over for Client.

Consensual Sexual Relations

The ABA Code and Model Rules expressly forbid lawyers from engaging in consensual sex with their clients. California, by contrast, allows such relations where the Lawyer and Client are involved in a preexisting sexual relationship and where the nature of their personal relationship will not affect the Lawyer's care, judgment, skill, etc.

Here, Client and Lawyer engaged in consensual sex after drinking two bottles of wine with dinner. This would be grounds for an ethical violation under the ABA Model Rules and Code.

Under California law, the answer is slightly less clear. There is no indication that Client and Lawyer had a previous relationship. Furthermore, as discussed above, the circumstances indicate that Lawyer was using sex as a means to exert undue influence over client's decision to accept the settlement off[e]r. The presence of wine certainly doesn't help Lawyer's case.

Therefore, Lawyer will likely be found to have violated California's rules as well by engaging in consensual sex with client.

Substantive Decisions

Clients have a right to make substantive decisions about their cases, while lawyers typically choose the legal strategy to be employed.

Here, Client had a right to decide whether or not to accept the settlement offer, as this was

a decision affecting her substantive rights. Lawyer's exertion of undue influence over this decision therefore violated her right[.]

General Duty of Good Faith

Finally, Lawyer will likely be found to have violated his general duty of good faith by failing to pay Physician after expressly agreeing to do so earlier, albeit without Client's knowledge or consent.

Answer B to Question 5

The question asks what ethical violations the lawyer in this fact pattern may have committed. There are five events which might have given rise to ethical violations by the Lawyer (L): 1) The agreement to advance legal and living expenses; 2) The letter to the Physician (P); 3) Sexual relations between L and Client (C); 4) The settlement offer agreement decision by C; and 5) Failure to pay P.

1. Agreement to advance expenses

The issue is whether the lawyer committed any ethical violations regarding the advances from L to C. Under ABA rules, a lawyer may advance litigation expenses to clients unable to afford such expenses, but he may not advance living expenses for fear that a lawyer is buying a client. Under CA rules a lawyer may advance both legal and living expenses, but the lawyer must get any loans to a client in written form with the client's knowing consent that such funds are loans that must be paid back. Further, the advancement of legal expenses in both CA and ABA must be contained in the writing of any contingent fee agreement.

Here, the lawyer advanced living expenses[,] which is strictly forbidden under the ABA, so he could be subject to discipline. Also, the expense arrangement was oral[,] not in writing, so in CA, the lawyer has also violated the ethical code re: loans to clients.

In addition, in any contingency fee agreement, it must be explained in the writing whether the lawyer's percentage is pre- or post- expenses. On these facts, it is unclear whether L put such arrangement in the writing. L should be subject to discipline[.]

2. Letter to Physician (P)

The next issue is whether L committed any ethical violations re: his letter to P that P's fee would be paid out of the accident recovery. L potentially violated his duty of loyalty to C, his duty to communicate to C, overstepped the proper scope of his representation of C, and his duty of confidentiality to C.

Duty of Loyalty

A lawyer owes his client a high duty of loyalty - the lawyer must act in accordance with the client[']s best interest. Here, L assured P that P would be paid out of the recovery of [the] case without informing C of such agreement. This action possibly created a conflicting duty on L because L had sent a letter to P which P may have relied upon and considered a contract or surety created by L. Since L's duty of loyalty to P extends beyond the representation, L created a potential conflict in that he may have been personally liable if C did not pay P and hence he would have an incentive to ensure payment even if C had a good faith reason not to pay P. This potential conflict could have been overcome if

contin[gen]cing in the representation would have been reasonable (likely on these facts since there is no indication that C was not going to pay when the letter was sent) AND if L had gotten C's informed consent under ABA and written informed consent under CA.

Duty to Communicate

A lawyer also has a duty to keep a client informed about his representation, particularly of important points regarding the representation.

Here, the agreement with P was of great interest to C since the amount that P would receive was possibly a very substantial amount of any recovery that C could have expected. C was entitled to know from L that L had ensured the P that he would be fully compensated for treatment out of C's potential award.

Overstepping Scope of Representation

In general, clients are permitted to make any decisions regarding the ends of the litigation, while lawyers make decisions regarding the means of the litigation, such as legal strategy. Here, a decision regarding the use of any recovery funds are not clearly about legal strategy or means of representation, so the action of commit[t]ing C to payment of P is not clearly within the scope of L's duties. Although a lawyer is assumed the power to make an action on client's behalf necessary to the representation, this may be outside the proper bounds. At the very least, L should have gotten C's informed consent to enter into this agreement on C's behalf.

Duty of Confidentiality

A lawyer also has a duty to keep confidential any information related to the representation without client consent. The lawyer has the imputed authority to disclose any information reasonably necessary to the representation. Hence, although it is not clear whether he gave any confidential info related to representation to P, if he did give such information it would have been a breach of confidentiality to the extent it was not reasonably necessary to the representation of C.

3. Sexual Relations between L and C

The issue here is whether the consensual sexual relations between L an C violated any duties. Under the ABA standard lawyers are not permitted to engage in sexual relations with clients, consensual or otherwise, as presumptively creating a conflict between the lawyer and the client. In CA, consensual relations between lawyers and clients are discouraged, but permitted as long as no duress or illegality is involved. Here, sexual relations are stated to be "consensual", and so permitted under CA law, but still impermissible and a violation under the ABA.

4. Settlement Offer Agreement

The issue here is whether the L committed any violations in convincing C to enter into a settlement agreement with driver. The issues here are whether L acted improperly in convincing client and in counseling C not to pay P.

A client has the ultimate decision in whether or not to accept any settlement agreement as part of the ends of representation discussed above. However, it is appropriate for a L to persuade a client to accept a settlement as in her best interests as long as L is acting according to his duty of loyalty. The duty requires that L act in good faith with the client and make sure that the client's decision is informed and reasonable by apprising the client of her rights and what a settlement means regarding those rights.

Here, it is not clear whether the L is acting in the best interest of the client because of the guarantee that he made to P and because of his own interest in recovering expenses and his fee. However, if the L made a good faith evaluation about the merits and worth of the lawsuit, L may have satisfied his good faith determination.

There is a possibility, however, that the L did not obtain intelligent, knowing consent from C because L and C had been drinking. Any settlement decision should have been made when C was not impaired in judgment.

Counseling C to not pay P

In counseling C to not pay P, lawyer may have violated his duty of loyalty to client and his duty of loyalty to client and his duty of fair dealings and honesty to the public and to P.

Under duty of loyalty, a lawyer should not counsel acts that may subject a client [to] liability without a good faith belief that such decision is in client's best interest. Here, it seems as if L is more interested in getting expenses and fees than protecting C. L is liable for breaching his duty of loyalty to C.

In addition a lawyer has a duty of fair dealings and honesty to the public and specifically to P. A lawyer may not counsel criminal or fraudulent acts by their clients. Here, L has counseled C to break a contract with P, violating his duty to the public.

Finally, L has violated a duty of fair dealing to P since he has both counseled fraud and disbursed funds to C over which he knew P had a legitimate claim to and that C was preparing to violate. In addition L may be a surety for C's actions. L may be held liable for breaching his duty of fair dealing and fiduciary responsibility over settlement funds to P.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

Question 2

Rita and Fred wanted to form a corporation to be named “Rita’s Kitchen, Inc.” (RKI) for the purpose of opening a restaurant. They contacted 75 friends who agreed individually to become investors in RKI. Five of these investors also agreed to serve on the RKI Board of Directors with Rita and Fred.

Rita and Fred entered into a five-year lease with Landlord for restaurant space, naming “Rita’s Kitchen, Inc., a corporation in formation” as the tenant. They signed the lease as “President” and “Secretary,” respectively.

Rita and Fred retained Art as their attorney to form the corporation. They told Art that 75 of their friends had committed to invest and become shareholders of RKI. Irv was a duly appointed representative of the 75 investors. Rita, Fred and Irv met with Art, and they agreed that Art would represent Rita, Fred, and all the investors. After extensive discussions with Rita, Fred, and Irv about the operation of the proposed business, Art agreed to prepare the necessary documentation to incorporate RKI.

Later, outside of Irv’s presence, Rita and Fred asked Art to draft a shareholder agreement that would specifically designate Rita and Fred as permanent directors and officers of RKI and set Rita and Fred’s annual salaries at 12.5% of the corporate earnings. Without further discussion, Art properly formed the corporation. He then prepared the shareholder agreement, including the terms that Rita and Fred had requested.

The 75 investors each purchased their shares of stock and signed the shareholder agreement. RKI operated for one year but failed to make a profit. RKI ceased operations and currently owes three months of back rent under the lease.

1. Can Landlord recover the unpaid rent from Rita and Fred individually? Discuss.

2. Is the shareholder agreement valid? Discuss.

3. What ethical violations, if any, has Art committed? Discuss, including distinctions, if any, between the ABA Model Rules and California authorities.

Do not discuss federal and state securities laws.

Answer A to Question 2

2)

1. Can the Landlord recover unpaid rent from Rita and Fred individually?

Liability of Promoters on Pre-Incorporation Contracts

Until such time as a corporation complies with all formalities of incorporation and files its articles of incorporation, it does not have a separate legal existence, and cannot enter into contractual obligations such as a lease. Prior to incorporation, it is typical for the corporation's promoters and/or founders to enter into contracts on its behalf. Here, Rita and Fred entered into the lease with the Landlord on behalf of Rita's Kitchen, Inc. ("RKI"), which had not yet been formed. Under the law, a promoter remains personally liable on a pre-incorporation contract unless there has been a subsequent novation (ie., all parties agree to substitute the corporation for the promoters as the party liable on the contract whereby the promoters are thereafter relieved of further personal liability) or unless the contract is explicit in providing that the promoter has no personal liability on the contract.

Here, there has not been a novation to relief [sic] Fred and Rita of liability. However, they would argue that they entered into the contract on behalf of RKI, a corporation in formation, and signed as officers, and therefore made it clear that it was only the corporation and not them personally who would be liable on the lease. Their arguments would not likely succeed because the lease was not explicit in stating that they would not be personally liable thereunder. In the absence of such explicit language, the most likely result is that the court would hold that Rita and Fred as promoters are and remain personally liable on the lease. Therefore, the landlord should be able to recover the unpaid rent from either or both of them.

Indemnification from Corporation

Note also that it is not clear where RKI has ever ratified the lease. If no corporate action was taken to ratify the lease, then the corporation would not be liable thereunder, unless it silently took the benefits of the lease. Here, if RKI did not ratify the lease, it could still be held liable because it took the benefit of the lease without objection.

Note that although Fred and Rita would be held liable for the unpaid rent on the lease, they would have a claim for indemnification against RKI for any amounts that they had to pay personally to the landlord. They will not be able to recover, however, if the corporation does not have sufficient funds to pay.

2. Is the shareholders agreement valid?

As a general matter, shareholders of a privately held corporation such as RKI can and often do enter into shareholders agreements dealing with their rights and obligations as shareholders. These types of agreements commonly provide for matters such as transfer restrictions, rights of first refusal, put and call rights, "tags and drags", preemption rights and registration rights in the event that the corporation becomes public in the future.

Shareholders agreements can also provide shareholders with certain veto rights regarding the overall management of the company. In the context of a closely held private corporation, shareholders can also enter into a shareholders agreement whereby they become the directors of the corporation by agreement, thus doing away with the need to have a separate board of directors. In such situations, the shareholders step into the shoes of the directors and owe each other and the corporation duties as fiduciaries.

It appears that the shareholders agreement in question is problematic for two main reasons. First, it prohibits shareholders from exercising their rights as shareholders to be able to elect and fire directors. Secondly, it prohibits the directors from being able to exercise their responsibility for setting their compensation and the compensation of officers in accordance with principles of prudence and good faith.

Rights of Shareholders to Elect and Remove Directors

Shareholders have the right to elect and fire directors, both with and without cause. An agreement that prohibits shareholders from being able to exercise these powers would be contrary to public policy and likely unenforceable. At the very best, shareholders must have the authority to fire directors for cause (ie, breach of duty of care, duty of loyalty, etc.). To the extent that the shareholders agreement prohibits shareholders for exercising their powers as shareholders by giving Fred and Rita permanent directorships, it is invalid. While shareholders can agree as to the election of directors, directors cannot make themselves permanent and unremovable by way of a shareholders agreement.

Rights and Duties of Directors

A director is a fiduciary, and obligated at all times to act in the best interests of the corporation. A director has certain powers and obligations granted under the corporation's code and at law.

Right to Appoint and Fire Officers

The Board of Directors has the power to appoint and fire officers. The shareholders agreement is problematic because it usurps the authority of the Board to make this determination by making Rita and Fred permanent officers. Officers owe a corporation duties of care and loyalty, and cannot by agreement be made unremovable. At the very least, they must be removable for cause. Therefore, the provision in the shareholders agreement which makes Rita and Fred unremovable as officers is invalid.

Duty of Care and Business Judgment Rule

A director owes the corporation the duty to act as a reasonably prudent person in the management of his of her own affairs, in good faith and in the best interests of the corporation. In exercising his or her duty of care, a director can rely on the business judgment rule if he or she acted in a reasonable, informed manner, with due care and diligence, in exercising his or her judgment.

Duty of Loyalty

A director owes the corporation a duty of loyalty as a fiduciary to act in the best interests of the corporation and to avoid self-dealing to his or her own benefit and/or to the detriment of the corporation.

Breach of Duty of Care and Loyalty

Under the law, directors cannot, as a general matter, agree in advance as to how they will exercise their powers as directors. Here, the shareholders agreement in essence does just that – it provides that the directors (recall that the Board of Directors is made up of five of the investors, plus Rita and Fred) agree in advance not to fire Rita and Fred as officers. This the directors cannot do and, for this reason also, this provision is invalid.

This provision is also likely in violation of the directors' duty of care, because it is improper to agree to never remove officers, as there may be good reason and justification to remove Rita and Fred at some point in the future. Likewise, directors have the duty and obligation to set their own compensation and officers' compensation in accordance with reasonable, good faith parameters, taking into account the needs of the corporation and ensuring that they do not commit a waste of corporate assets in setting compensation. Agreeing in advance to what Fred and Rita's compensation is going to be - at 12.5% of corporate earnings - may constitute a violation of this duty, because it is unclear whether this figure will or won't be a reasonable and proper amount as the corporation moves forward.

Likewise, making themselves unremovable and giving themselves a fixed salary as a percentage of earnings, regardless of whether it is appropriate in light of the corporation's then financial circumstances, constitutes a breach of Fred and Rita's duty of loyalty to the corporation, as they are clearly putting their personal interests ahead of those of the corporation.

For all of the foregoing reasons, the provisions in the shareholders agreement are invalid.

3. What Ethical Violations has Art Committed?

An attorney owes his clients various duties under the applicable rules of professional responsibility. Chief among these is the duty of care, the duty of loyalty and the duty of confidentiality. One of the chief difficulties Art faces is that he has not separately addressed or differentiated between the different clients he represents. He has acted to incorporate RKI, and is arguably counsel to the corporation, whereby he would owe the corporation itself duties of care and loyalty. He is also apparently counsel for Fred and Rita in their personal capacities as incorporators and as officers of the corporation. Finally, he has acted as counsel for the investors in drafting the shareholders agreement. Art's main ethical violation stems from failing to differentiate between the potential and actual conflicting interests of his various clients and failing to advise them to obtain separate counsel as appropriate.

Duty of Care/Competent Representation

Art clearly acted as counsel for the investors by meeting with Irv and representing the investors' interest in drafting the shareholders agreement. In so doing, he breached his duty of competence to exercise the skill, knowledge and diligence that would be expected of an attorney practicing in his community. As discussed above, the shareholders agreements contain provisions that are not in compliance with applicable corporate law and corporate governance principles. Art should not have drafted an agreement containing provisions that are invalid and, in so doing, likely committed malpractice. Likewise, in his role as counsel for Rita and Fred, he should have advised them that the provisions that they sought would not be enforceable, and breached his duty to them in this regard also.

Duty of Loyalty

An attorney is obligated to act in the best interests of his client and cannot take on representation that will result in him not being able to properly represent a client on account of conflicting duties and obligations owed to other clients (for example, where one client's interests are adverse to another's). If an attorney is of the view that he can competently represent all of his clients, he is required to disclose to all that he is representing everyone's interests and to seek the written consent of each client to such joint representation.

Here, Art failed to obtain the written, informed consent all parties to his joint representation of each of them and, in so doing, breached his ethical obligations. Moreover, he failed to seek further consent when it became apparent that Fred and Rita's personal interests as officers (ie, to be permanently appointed and to obtain a guaranteed percentage of corporate earnings) came into conflict with the investors' interests as shareholders in maximizing the return on their investment and fully exercising their rights as shareholders. When it became apparent to Art that Fred and Rita's interests were different than those of the investors (ie, when Rita and Fred spoke to him outside of Irv's presence), he should have alerted them to the fact that he was representing the investors and the corporation and that he could not separately seek to represent their interests. He should have advised Fred and Rita to seek separate, independent counsel to negotiate their compensation and tenure packages with the corporation. Art also failed to alert Irv, as he was arguably required to do, of the validity and desirability (or lack thereof) that Rita and Art had requested. Art therefore failed to fulfill his ethical responsibilities to all clients involved.

Answer B to Question 2

1. Can Landlord recover unpaid rent form Rita (R) and Fred (F)?

Promoter Liability

A promoter is a person who works prior to the incorporation of an entity to secure contracts and services for the to-be-formed entity. A promoter has a fiduciary duty to the other promoters and to the entity to be formed. A promoter can enter agreements on behalf of the to-be-formed entity but can be subject to liability on those agreements.

Adoption and Novation

A corporation does not become liable on a contract entered by a promoter until it adopts the contract. A contract can be adopted expressly by the corporation agreeing to be bound or impliedly by the corp. choosing to accept the benefit of the promoter's contract. Here, there is nothing to indicate that RKI expressly adopted the terms of the lease entered into by their promoters - R and F. However, RKI did accept the benefit of the lease by using the space for its restaurant. Thus, RKI will be bound on the lease.

R & F are also bound

The corporation's act of adapting a contract does not absolve the promoters from liability unless there is an express provision in the contract or a novation in which the corp. and the other party agree that the promoter will not be liable. Here, there is nothing on the lease to indicate R and F would not be liable. It only says they signed as Pres. and Sec. of RKI, "a corporation in formation". Further, there is no evidence of an agreement or novation after RKI was formed absolving them of their liability. Thus, there is no novation and R and F will still be individually liable on the lease with Landlord for the unpaid rent because they were promoters who were not relieved of liability.

2. Is the Shareholder Agreement Valid?

To have a valid shareholder agreement, there needs to be approval from the shareholders. Here, we are told that each of the 75 investors signed the shareholder agreement. Thus, the shareholder agreement is presumptively valid but the terms of the agreement must be examined.

Election of Directors

Directors of a corporation are elected by shareholders at the corporation's annual meeting. Here, the shareholder agreement specifically designated R and F as permanent directors and officers of RKI. By having this provision in the shareholder agreement, the agreement purports to strip the shareholders of their ability to elect directors annually. In this regard, it is invalid.

Removal of Directors

Along with the ability to elect directors, shareholders also have the ability to remove directors with or without cause. The provision of this shareholder agreement indicates that

R and F would be permanent directors. Because shareholders have the ability to remove a director, no director can be permanent. Thus, to the extent the shareholder agreement purports to make R & F permanent directors, it violates the right of shareholders to remove a director and is invalid.

Shareholders Can't Have a Predetermined Agreement of How They Will Vote if Elected Officers [sic]

Shareholders may have agreements for how they will vote on shareholder elections but can't agree to how they will vote as directors. To the extent this shareholder agreement commits R and F along with the 5 other investors who agreed to serve on the RKI board to elect R and F as officers and to set R and F's annual salaries at 12.5% of corporate earnings, it takes away their ability to act in their fiduciary capacity as duly elected directors and is invalid.

Board Decides Its Own Salaries

A board of directors is charged with the management of the company and makes decisions for the company on things such as their salaries. Here, the SH agreements purports to set R and F's salaries. Because the board, and not the shareholders, have the power to manage the company, the shareholders cannot set director and officer compensation. To the extent the SH agreement tries to do this, it is beyond the shareholder's powers and invalid.

Board Elects Officers

Another power inherent in the board of directors is the power to elect officers. Shareholders may have the power to elect directors but they can't elect officers. Thus, to the extent that shareholder agreement elects R and F as permanent officers of RKI, it is invalid because the directors, not the shareholders, are responsible for electing officers.

Thus, while the shareholder agreement as signed by all shareholders is presumptively valid, it is invalid to the extent it improperly elects directors and officers, it does not provide for removal of directors, it binds shareholders to how they will vote as directors, and it improperly sets director and officer compensation.

3. Art's Ethical Violations

Who Does Art Represent?

The first issue in deciding whether Art (A) committed any ethical violations is to determine who Art represents. Here, Art was originally approached by R and F to form the corporation. Also, A met with R and F as well as Irv (I) who was the duly appointed representative of the 75 investors. After meeting with R, F, and I, A agreed to prepare the necessary documentation to incorporate RKI. As a result, A potentially represents R & F, Irv and two other investors, and RKI, the corporation he helped form.

Duty of Loyalty

An attorney owes his client the duty to exercise his professional judgment solely for

the client's interests. If the interest of the attorney, another client or a third person may materially limit the attorney's representation or becomes adverse to the client's interests there is an actual or potential conflict of interest. When an attorney is presented with a conflict, he can only accept or continue the representation if he reasonably believes he can effectively represent all parties, he informs each party about the potential conflict, and the client consents to the representation in writing.

Without consent, an attorney should refuse to take the representation or withdraw from the representation.

A representing R & F and Irv and the Investors

Here, A has a potential conflict by representing both R & F as well as Irv and the investors. While A can say that R, F, and I all had the same interests and wanted to incorporate RKI, because he was representing multiple interests, he needed to be aware of potential or emerging conflicts.

When R & F approached A to draft the shareholder agreement without Irv being involved, A should have been suspicious. When he learned that they wanted the agreement to designate them as officers and directors and set their salaries, their interests were potentially conflicting with I and the investors. At that point, A should have disclosed the proposal to Irv and obtained written consent from I to draft the agreement as requested by R and F. It is also unlikely that a reasonable attorney would believe he could adequately represent both R and F and the investors.

In any event, A should have sought written consent from Irv. Because he did not, he violated his duty of loyalty.

Duty of Confidentiality

A lawyer also has a duty not to reveal anything related to a client's representation without consent. Thus, A can argue that he couldn't tell Irv about his conversation with R & F outside of his presence without violating his duty of confidentiality to R & F. If this is the case, A should have withdrawn from his representation of Irv and the investors and advised them to seek independent counsel re: the shareholder agreement.

Duty of Competence

A lawyer owes his client the duty to use the legal skill, thoroughness, preparation, and knowledge necessary and reasonable for the representation. Here, A had a duty to competently draft the shareholder agreement. For all the problems pointed out above about the shareholder agreement, A violated this duty.

Duty to Communicate

An attorney owes his client a duty to communicate about the matters of the case. Here, A had a duty to tell Irv about the provisions he was drafting in the agreement. Again, A would claim he could not communicate this to I without breaking his duty of confidentiality to R & F. As mentioned above, this again meant A should have withdrawn from the

representation of at least Irv and possibly R & F and urged the parties to seek independent counsel.

Art's Defense

Art will argue that any potential problems were avoided because the investors signed the agreement with the term R & F requested. However, the ends do not justify the means. A had ethical obligations to his client during the representation that he breached. Their later approval of the agreement does not equal informed consent to his breaches throughout.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

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Question 2

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

> We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.

2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 2

1. Ethical Violations Committed by June in Disclosing Acme's Memorandum.

Duty of Confidentiality

A lawyer owes their client a duty of confidentiality. This requires the lawyer not to disclose any of the client's information learned or discovered during their representation of the client. The confidentiality also extends to information gathered about the client in preparation of trial.

June, in violation of her duty of confidentiality, anonymously disclosed the Acme memorandum (from Acme president to company drivers) to No Lead and the media. She will be subject to discipline due to her disclosure because the material in the memorandum was confidential, meant for Acme employees only, and was only to be used by June in her preparation for trial.

Consent

A lawyer may disclose confidential materials if the client consents (in California ["CA"] the consent must be in writing). Here, there was no consent given by Acme because they didn't know of June's intention to disclose the memo and probably would not have consented anyway.

Prevention of a Crime/Fraud

A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, a financial crime as well as a crime of bodily injury may be disclosed to prevent it from being committed. In CA, however, only a crime that would result in serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Here, the crime that was committed was transporting paint containing lead over a road abutting a public reservoir, a misdemeanor. This would not invoke the status of a financial or injury crime so as to warrant disclosure to a court or public agency.

Therefore, June breached her duty of confidentiality to Acme by disclosing the memorandum.

Duty of Loyalty

A lawyer owes their client a duty of loyalty. She must act in the client's best interests and put the client before herself in making decisions that would affect the client.

When an event occurs that would make it difficult for a lawyer to represent the client, putting aside their feelings or position, this is called a conflict of interest. If the conflict is occurring then it is an actual conflict of interest. However, if there is a possibility of a conflict, then it is a potential conflict of interest. If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of all the potential negative effects of the conflict, and the client consents to the conflict. In the case of a potential conflict, the lawyer may continue if they feel they can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA, [regarding] the consent for representation to continue after all conflicts, the consent must be in writing.

Actual Conflict of Interest

There is an actual conflict of interest due to the fact that June disclosed the memorandum intended for Acme company drivers. This is a breach of duty of loyalty because June has put her interest ahead of Acme's and has taken a position adverse to their interests by giving up confidential information of the company. In order for her to continue her representation, June must disclose that she was the one who put forth the letter to the media, explain all the negative repercussions of her continued representation (her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint), and obtain the consent of Acme officials. Although it is stated that Acme objected to June's withdrawal, the facts do not show that they were informed of the actual conflict, and, therefore, their objection to her representation may change after being informed of her breach of the duty of loyalty.

June is likely subject to discipline for her breach of the duty of loyalty.

Potential Conflicts of Interest

Intertwined in the actual conflict of interest with Acme are several potential conflicts of interest that will hinder June's future representation of Acme: her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. These will be disclosed in trying to obtain Acme's consent to continue her representation. But, it should be noted that these may very easily result in actual conflicts, and possibly may already be actual conflicts that breach her duty of loyalty, without Acme's consent.

Participation in a Consumer Advocacy Group
A lawyer is permitted to affiliate with a local consumer advocacy group to express their views and be an active member of society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result, which they should be aware of.

2. Arguments for Withdrawal by June.

Mandatory Withdrawal – Crimes
A lawyer must withdraw if their continued representation of the client will facilitate a continued crime committed by the company. Here, June is not participating in the crime, misdemeanor for transporting lead-based paint, despite the fact that she knows about it. Therefore, this would not be enough for her withdrawal from her representation.

She may, however, be required to notify the court of the crime if it pertains to a lawsuit in existence and her participation would lead to suborn perjury or false statements to the court. Here, however, the lawsuit is about an accident, not the transportation of lead-based paint, so June would not be able to disclose the misdemeanor to the court.

Mandatory Withdrawal – Conflict of Interest
As stated above, Acme and June have a conflict of interest. If she could not effectively represent Acme and if Acme will not consent to her continued representation in spite of the conflict, then June must withdraw from representation of Acme. Here, Acme objected to June's withdrawal even after the media and No Lead knew about the memorandum. This may hint that Acme may not consent to the withdrawal due to the fact that June has done substantial work on the case, which is about to go to trial.

Permissive Withdrawal
June's Interests
The court will permit an attorney withdrawal if their representation of their client is repugnant/disgusting to the lawyer. However, in assessing permissive withdrawal the court will weigh such factors as the interests of the court and the client before deciding.

On these facts, June is outraged by the practices and is clearly disgusted by Acme's transportation of lead paint. She feels so strongly because of her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. The court will take these into account in balancing them with the interests of Acme and the Court.

Acme's Interests
Acme's interests stem from the fact that June has done substantial work on the case, which is about to go to trial. This is a huge factor because Acme would be severely disadvantaged if they had to get new counsel to replace June at such a late stage in the trial process.

Court's Interests
The Court's interests are those of efficiency of the trail process, undue delay and fairness. Permitting June to withdraw would add more time to the trial process, which was about to happen. Also, the court might have to delay the case in order for new counsel to prepare adequately. And, if the trial commenced as scheduled with Acme obtaining new counsel, there is very little likelihood that they would adequately be able to represent their interests.

Therefore, unless Acme consents to the withdrawal by June, it is unlikely that she will be able to withdraw from her representation.

Answer B to Question 2

1. An attorney owes duties of Confidentiality, Competence, Loyalty and Fiduciary duties to her clients.

Duty of Confidentiality

Under the ABA Model Rules and the California Rules of Professional Conduct, the duty of confidentiality requires that an attorney preserve her client's confidences and not reveal any information regarding the client, regardless of its source. The duty of confidentiality attaches at the moment that an attorney-client relationship is formed; however, an attorney may also be prevented from revealing any confidences gained in consultation even if an attorney-client relationship does not result. Further, the duty of confidentiality endures after the attorney-client relationship ends. Finally, the client is the holder of the privilege.

In this case, June has breached her duty of confidentiality to Acme. June was reviewing Acme's records in preparation for trial and June found a memo that she subsequently and anonymously disclosed to a third party, No Lead. An attorney may reveal a client's confidential information where the client consents; however, there are no facts to suggest that Acme was aware of, or consented to, June revealing Acme's memo to No Lead. Under the ABA Model Rules, an attorney may reveal a client's confidential information if the revelation is necessary to prevent death or bodily injury. The California Rules permit disclosure only if the disclosure is necessary to prevent an imminent risk of death or serious bodily injury. Under both rules, the attorney must take steps before the disclosure is made. First, the attorney must notify her client that the behavior is illegal and/or dangerous. Here, Acme's letter, by its own terms, indicates that Acme was aware that the [behavior was] illegal. Second, the attorney must try to persuade the client from continuing to engage in or threaten the behavior. Here, June did not attempt to discuss Acme's policy with Acme before the disclosure. Finally, the attorney must tell the client that she intends to make the disclosure. Here, not only did June not tell Acme that she intended to make the disclosure, June made the disclosure anonymously in an attempt to hide the fact that she made the disclosure. Finally, California Rules permit disclosure only where there is an imminent risk of seriously bodily harm or death. In this case, the risk was not imminent because there was no increased likelihood that Acme's truck drivers would have the kind of accident feared in the next day, week, or month or even that the accident would ever happen. Because June disclosed a client's

information to a third party without the client's consent or a privilege to do so, June has violated her duty of confidentiality to Acme.

Duty of Loyalty

The duty of loyalty requires that an attorney be vigilant to potential and actual conflicts that will prevent or impede an attorney from fully representing her client's interests. An attorney may not represent clients with actual adverse interests because of the danger that the attorney will purposefully or inadvertently reveal or use confidential information gained from one client against the other client. Under California Rules, an attorney may represent clients with potential conflicts so long as the attorney believes that she can adequately and fairly represent the interests of both parties and both clients agree to the continued representation in writing.

Here, June represented Acme Paint Company stemming from an Acme truck accident with another car. The original cause of action was likely to be negligent driving and respondeat superior liability and June's representation was not likely to be very involved in investigating the dangers of lead paint. However, June was aware of Acme's business when she decided to get involved with No Lead. No Lead is a group which lobbies government agencies to adopt strict guidelines restricting the use of lead-based paint. June formed an attorney-client relationship with No Lead, undertaking legal research duties and advising No Lead on its tax status. While legal research and tax advice do not pose actual conflicts with June's representation of Acme at the outset of June's relationship with No Lead, nonetheless, there are potential conflicts because Acme makes paint that contains lead and No Lead is an activist group that targets the kind of business that Acme runs.

Because the interests of Acme were potentially adverse with the interests of No Lead, June was obligated to disclose the potential conflicts to both parties and obtain their written and informed consent to continue with the representation. In this case, June did not inform Acme of her affiliation with No Lead and she did not seek Acme's consent to continue the representation. The facts also do not state that June disclosed her relationship with Acme to No Lead. Because June continued to represent Acme and No Lead, whose interests were potentially adverse, without disclosure or seeking consent to the continued representation, June breached her duty of loyalty to Acme and No Lead.

Duty of Competence

An attorney owes a duty of competence to a client. A duty of competence means that the attorney will use her legal knowledge, training, and skill to diligently represent the client's interests. In this case, June was diligently preparing for trial when she discovered Acme's memo. Up to that point, June had not breached any duty of competence owed to Acme. However, once June discovered the memo, it is probable that June will no longer act in a diligent manner to pursue Acme's goals. Here, June was outraged by the content of the memorandum and

she subsequently breached her duty of confidentiality to Acme, acting on her outrage that was likely fueled by the injuries suffered by her niece. Since June was willing to engage in a breach of one of the most important duties that an attorney owes a client, confidentiality, as a result of the memo, it is doubtful that June will be able to set aside her feelings in any way that is sufficient to allow her to adequately and competently continue to represent Acme.

2. June's Argument for Withdrawal

An attorney may withdraw from representation where the withdrawal will not unfairly prejudice the client. An attorney must withdraw from representation where the attorney becomes aware of actual conflicts of interest or where the continued representation would foster the commission of a crime.

In this case, June will make several arguments for her permissive withdrawal. First, June will argue that the withdrawal is proper and should be granted because the goals of the client have become repugnant to her. June will argue that Acme paint contains lead and that Acme engages in transportation policies that are unsafe and present a risk of injury to the community. Further, June will disclose to the court that June has been personally touched by this issue where her three-year old niece suffered lead poisoning after coming into contact with lead paint. Because of the emotional reaction to her niece's injuries that stirred June to act by joining and providing legal services to a lead paint activist group, June can no longer separate herself from the issue in a way that would allow June to adequately represent Acme. The court will likely point out to June that Acme has asked her to represent them in an action that has nothing to do with lead paint content or safety issues where children are concerned. The court will also note to June that Acme is likely to be very prejudiced by her withdrawal from the case because the case is already at the stage of trial preparation. If Acme is forced to retain new counsel at this stage of litigation, Acme will be exposed to enormous costs relating to getting a new attorney familiar with the case sufficient to go into trial. Consequently, with only the argument that June now finds Acme to be engaged in activities that she finds repugnant, the court is not likely to allow her withdrawal and expose Acme to the costs of hiring a new attorney.

June may argue that she should be allowed to withdraw because Acme is engaged in an illegal activity. Here, Acme's memo states that Acme paints contain lead and that it is a misdemeanor to transport lead paint over roads abutting public reservoirs. The court is not likely to accept June's reason because, in this case, June's services are not being used to further a crime. The case that June is involved in may or may not involve an Acme truck on a road near a reservoir, but that fact would not change the underlying cause of action in the case from the most likely negligence claim. Thus, the court is likely to reject June's argument.

June will continue to argue that her withdrawal is now mandatory because she now represents two clients with adverse interests. Acme manufactures and delivers lead paint and No Lead is an activist group trying to influence legislation of Acme's activities. The court will point out that June is representing Acme in what is most likely a tort case where the elements of the cause of action that June is currently working with will likely have no reasonable relationship to the kind of paint that Acme makes or to the amount of lead contained in the paint. Further, June's activities for No Lead have consisted only of legal research and tax advice. It is unclear whether the legal research relates solely to the tax advice or covers questions relating to the amount of lead in paint; however, her research is most likely directed at influencing policies rather than researching tort claims relating to transportation of paint. As a result, the court is not likely to view the representation of Acme and No Lead as sufficiently adverse to allow June to withdraw at such a crucial time in the proceeding.

However, if June discloses to the court that June has become so emotionally involved in the issue that she can no longer adequately represent Acme as a company regardless of the cause of action, then the court will likely allow June to withdraw. The court will certainly allow June to withdraw if June discloses that she provided the confidential Acme memo to No Lead. However, if June discloses this information, Acme would also likely drop their objection to June's withdrawal. Even where the court allows June's withdrawal, June will be subject to ethical sanctions and she may even face malpractice liability for her work on Acme's case.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Albert, an attorney, and Barry, a librarian, decided to incorporate a business to provide legal services for lawyers. Barry planned to perform legal research and draft legal memoranda. Albert intended to utilize Barry's work after reviewing it to make court appearances and argue motions on behalf of other attorneys. Albert and Barry employed Carla, an attorney, to prepare and file all of the documentation necessary to incorporate the business, Lawco, Inc. ("Lawco").

Carla properly drafted all required documentation to incorporate Lawco under the state's general corporation law. The documentation provided that: Lawco shares are divided equally between Albert and Barry; Lawco profits will be distributed equally to Albert and Barry as annual corporate dividends; Barry is president and Albert is secretary.

Albert and Barry opened their business in January, believing that Lawco was properly incorporated. In February, they purchased computer equipment in Lawco's name from ComputerWorks. The computer equipment was delivered to Lawco's office and used by Barry.

Carla, however, neglected to file the articles of incorporation until late April.

In May, Albert, without consulting anyone, contracted in Lawco's name to purchase office furniture for Lawco from Furniture Mart. On the same day, also without consulting anyone, Barry contracted in Lawco's name to purchase telephones for Lawco from Telco.

1. Is Lawco bound by the contracts with:
    a. ComputerWorks? Discuss.
    b. Furniture Mart? Discuss.
    c. Telco? Discuss.

2. Has Albert committed any ethical violation? Discuss.

Answer question number 2 according to California and ABA authorities.

Answer A to Question 6

1A) Lawco's Contract with Computer Works

Status of the Corporation

The first defense Lawco might raise against enforcement of this contract is that while it was entered into by Lawco, Inc., no such entity existed at the time the contract was formed. They might argue that because no corporation existed, the corporation is not liable on the contract. There are three scenarios under which a corporation might be bound.

If the corporation is a de jure corporation, it has been validly created by observing the formalities of incorporation and receiving its articles of incorporation from the state. While the second and third contracts discussed below were entered into by a de jure corporation, this first one was not, as attorney Carla had neglected to file the articles of incorporation with the state until April, two months later.

A corporation is a de facto corporation where the formalities have been entered into, and the corporation had a good faith belief that it is a corporation, but the paperwork has not been processed and the state has not actually issued corporate status. A corporation can rely on its de facto status in such a situation to enforce a contract that it might not otherwise be able to enforce. Here, A and B both believed that Lawco had been properly formed, though it had not yet been so. If they wanted to enforce the contract, they would depend on their de facto status. If they are trying to avoid being bound by it the de facto characterization might be considered, but the doctrine of corporation by estoppel is probably more appropriate.

Corporation by estoppel results when a corporation holds itself out to the public as a corporation, acts as such, and enters into contracts under that banner, but is not actually a corporation at the time. Such an entity is estopped from claiming that it was not in fact a corporation when it entered into those contracts, as it benefited from claiming that it was.

Adoption of Pre-Incorp Contract

Even if none of the doctrines above are successful, ComputerWorks (CW) will argue that the contract was a pre-incorporation contract and that Lawco adopted it by accepting and using the computers that it delivered. It will argue that such actions demonstrate its intent to profit from the contract.

Quasi-Contract

If no contract is found, CW will argue that Lawco benefited from the use of its computers after holding itself out as ready to contract and that under the doctrine of quasi-contract, should not be unjustly enriched. Under such a theory, CW will receive the value conferred upon Lawco.

Sue A and B personally

If none of the above work, CW can sue whomever signed the contract (A, B, or both) and claim that it was a pre-incorporation contract which was not adopted by the corporation and hold them personally liable.

1B) Lawco's contract with Furniture Mart (FM)

As described above, Lawco was a validly formed corporation when it entered into a contract with FM for furniture. The issue is whether or not Albert, by himself, had authority to enter into such a contract, or whether B's consent was required. This issue is best analyzed under the law of agency.

Agency

If FM can establish that A was acting as an agent of Lawco when he entered into the contract, then Lawco will be bound. An agent can have actual or apparent authority.

Actual Authority

Actual authority can be either express or implied. Actual authority is express when the agent and principal have agreed that the agent will act on behalf of the principal in a certain capacity. Authority can be implied to the extent that an agent's express authority requires it to do certain other acts as a matter of course in order to perform its functions as an agent.

In this case, A entered into the contract with FM. Under the articles of incorporation, A is the secretary of Lawco. While there is no evidence of express authority for A to purchase for Lawco, a corporation is not an individual and so must act through agents by necessity. Lawco will argue that as a 50% shareholder, A needed to have approval of B in order to enter into a contract to purchase assets for the corporation and that he was not an agent. It is much more likely that B will possess actual authority than A will, and this argument will probably fail.

Apparent Authority

If the argument for actual authority fails, FM will argue that, instead, A had apparent authority to act for Lawco. Apparent authority is authority that results from 1) an agent's position or title with respect to the principal, 2) where the principal has held the agent out in the past as its agent and has not published the revocation of authority, or 3) the principal ratifies the agent's actions after the fact.

In this case, FM will argue that because of his position as secretary of the corporation, even if A did not have actual authority to contract, they relied on his apparent authority to do so as the secretary of the corporation. This will be a weak argument, as the secretary is not usually expected to enter into contracts for a corporation. Although the facts are silent as to what happened after the contracts were entered into, if Lawco accepted the benefits of the contract with

FM, they will also argue that Lawco ratified the contract entered into by A when they accepted the furniture and used it.

Lawco will argue that A's role in the corporation was a 50% shareholder and secretary. It will argue that there was no express agency agreement, nor did it ever act in a manner that might hold A out as its agent. Futhermore, A's shareholder status grants him no right to enter into contracts on behalf of the corporation as that is a job for the officers and directors. Finally, A's role as a secretary is to take notes at meetings, and perhaps oversee documents. It is not to make unilateral decisions for the corporation or spend money.

Unlike the situation of B below, FM will not have access to some of the more persuasive arguments of apparent authority. Unless there is some manifestation of express authority in the corporate records, absent a decision by the officers or vote of all shareholders, they will probably not be able to bind Lawco under A's contract, unless Lawco takes some action after the fact to ratify A's actions. They may, however, be able to go after A personally for any damages due to breach on a contract he signed as a purported agent.

1C) Lawco's Contract with Telco (TC)

As described above, Lawco was a de jure corporation when B entered into the contract with TC on its behalf. As above with A, the issue will be whether B qualifies as an agent who might bind Lawco as the principal. Unlike A, however, who was the secretary of Lawco, B was the president. The president arguably has actual or apparent authority to enter into contracts for the corporation where the secretary is less likely to have such.

The same principles will be applied as above, but in this case, the facts probably dictate a different outcome. The president of a corporation is arguably an agent thereof by [the] very nature of his position. FM will argue that for a necessary business expense of the corporation, like securing furniture, the president had actual or at least implied authority to secure them. They will argue that the corporation cannot act on its own and that its president is the obvious choice to enter into contracts on behalf of it. They will also argue that Lawco accepted the benefit of B's actions and that in doing so it ratified B's actions.

TC will have access to more persuasive arguments than FM had above due to B's apparent authority as president, and will have a much stronger case to enforce its contract against Lawco than FM did.

2) Albert's Ethical Violations

Albert's Duty Not to Aid in the Unauthorized Practice of Law

A has a duty not to help a nonlawyer practice law. The practice of law includes advising or counseling clients, as well as arguing before the court. In this case, the facts state that B's duties are to perform legal research and to draft legal memoranda. A intends to review this work and use it to make court appearances

and argue motions. While B's legal research is probably not prohibited, his drafting of legal memoranda may be. The fact that A intends to review this work and basically attach his name to it after verifying its contents makes it a close call. Law clerks are able to engage in such activity before graduating from law school and passing the bar as long as they are appropriately supervised. A will argue that B's work is almost identical to that of a law clerk and that with proper supervision there is no breach of his duty.

Albert's Duty Not to Go Into Business With a Nonlawyer

A has a duty not to incorporate with a nonlawyer when he plans to practice law. Lawyers are allowed to form partnerships with each other, but they cannot form partnerships or corporations with another type of professional or nonlawyer such as a CPA. Here, A will argue that the actuality of the relationship is exactly like a lawyer – experienced paralegal. He is mistaken, however, in that the liability of Lawco, the ownership interests, and the division of power between A and B are almost exactly equal. A should not allow himself to enter into a business transaction with a nonlawyer like B who may try to exert influence on his decisions in legal matters as a result of his partial ownership in the venture. The fact that B is the president and A is the secretary makes this arrangement particularly suspect. B arguably has a persuasive role in determining the direction of the venture due to his office. Furthermore, he is the face of the venture that is in its very name offering legal services, yet he is not himself a lawyer. A has violated this duty.

A's Duty Not to Share Profits with A Nonlawyer

A has a duty not to share profits with a nonlawyer in his practice of law. Lawyers may hire paralegals or research assistants for salary, but arrangements under which a nonlawyer is entitled to a preset ratio of the profits is forbidden. In this case, Lawco's articles provide that Lawco's profits are to be distributed equally to Albert and Barry as annual corporate dividends. The form the profit sharing takes is not nearly as important as the fact that it exists. A will not be able to hide behind the fact that the distribution scheme is couched in dividends rather than an outright sharing. A has violated this duty.

Answer B to Question 6

1A) Contract with ComputerWorks

In [order] for Lawco to be bound, (i) the corporation must be validly incorporated, (ii) the doctrines of de facto corporations or corporations by estoppel must apply or (iii) the contract must have been adopted by the corporation after incorporation.

Valid Incorporation

A corporation is formed when the incorporator validly complied with the requirements of the state's general incorporation law. This typically requires the filing of the articles of incorporation. Since the articles were not filed until April and the contract was entered into in February, Lawco was not validly incorporated at the time of the contract.

Generally, a corporation is not liable for contracts entered into before it was incorporated until it adopts the contract. It can adopt the contract through (i) express adoption, such as a writing, or (ii) implied adoption, which may be accomplished by accepting the benefits of the contract without protest.

De facto Corporation

ComputerWorks could argue that Lawco is still liable on the contract since it was a de facto corporation. A de facto corporation may be found where (i) there is a valid general corporation law, (ii) the incorporation made a colorable good faith attempt to comply with the statute, (iii) the incorporator was not aware that the attempt to comply with the statute was invalid and (iv) the corporation took some action indicating that it considered itself a corporation.

In this situation, Carla properly drafted all the required documentation to incorporate Lawco. The state does have a general corporation law. Albert and Barry entered into the contract with ComputerWorks believing that the corporation was valid. The corporation took an action typical of a corporation by purchasing computer equipment in the corporation's name and having the equipment delivered to the corporation's office and used by a corporate employee.

This question of de facto corporation will revolve around whether Carla's neglect in delaying the filing of the articles negates her "good faith, colorable" attempt to comply with the corporation statute. Since Carla is a lawyer and knew her job was to prepare and file all the documentation necessary to incorporate Lawco, it is likely that this is not a good faith, colorable attempt to comply with the statute, and there is no de facto corporation.

Corporation by Estoppel

ComputerWorks can argue that Lawco should be estopped from denying the corporation existed since it received a benefit under the contract and would be unjustly enriched if the contract were not enforced. ComputerWorks can argue that there was (presumably) a promise to pay. ComputerWorks can argue that Lawco received a benefit by accepting and using the computers. It would be unjustly enriched by retaining the computers without paying for them. ComputerWorks can argue that it was foreseeable that it would expect to be paid for the computers and it was reasonable that it should be paid for the computers.

Adoption of the Contract

Finally, ComputerWorks could argue that Lawco should be bound on the contract since it adopted the contract after formation. A corporation adopts a contract after formation when it impliedly accepts the benefits of the pre-incorporation contract after incorporation. Here, Lawco retained the computers and probably continued to use them after formation in April.

The result is that the court would likely find that Lawco adopted the contract, or if not, that it should be estopped from denying the contract.

1B) Contract with Furniture Mart

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Furniture Mart in May.

Express Authorization by Articles

Second, there is the issue whether Albert validly bound Lawco when he contracted in Lawco's name with Furniture Mart. Albert is the secretary of the corporation and is thus a senior officer. The articles of the corporation would likely delineate the powers of the officer, and so Albert may be authorized under the articles.

Implied Authorization under Agency Law

If not, Albert may also be authorized under general principles of agency law to bind the corporation. Generally, an agent may bind a principal if he has express authorization, implied authorization or apparent authorization to do so. There is no evidence that Albert received express authorization to enter into the contract.

Albert would have implied authorization if (i) it was customary for someone in his position to bind the corporation, (ii) he reasonably believed, based on past behavior and actions, that he had the power to do so, or (iii) it was necessary for the performance of his duties that he be able to bind the corporation. It is also necessary that Albert acted within the scope of the authorization.

Since it is probably necessary for Albert's position as secretary that he be able to bind the corporation on such routine contracts as buying office furniture, he probably had implied authority.

He may also have had apparent authority if (i) the corporation "cloaked" him with the apparent position of being able to enter into the contract and (ii) Furniture Mart relied on this position.

In conclusion, even though he did not consult anyone, it is likely that the contract is valid since Albert had implied and apparent authority to enter into the contract. Since the contract is valid, Lawco is bound on the contract.

1C) Contract with Telco

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Telco in May.

Please see part (1)(B) for detailed discussion of agency law. Below is the application of the discussed legal principles to this situation:

Express Authorization by Articles

As President, it is likely that Barry was expressly authorized by the articles to enter into routine contracts, such as the purchase of telephones, for the corporation.

Implied Authorization under Agency Law

If not, Albert may have validly entered into the contract by express, implied or apparent authority. The facts give no indication of express authority. However, it is probably necessary for the president of a corporation to enter into contracts for routine items, so he probably had implied authority. It is also perfectly reasonable for another corporation to believe that the president has the power to bind the company, so Barry definitely had apparent authority.

In conclusion, even though he did not consult anyone, Barry had apparent and implied authority to enter into the contract, and Lawco is thus bound by the contract.

2. Possible Ethical Violations by Albert

Unauthorized Practice of Law

An attorney may be disciplined for aiding a nonlawyer to practice law. The practice of law consists of making decisions which require the exercise of legal judgment by the lawyer. However, activities related to law, which do not involve the "practice of law," may be performed by any nonlawyer. Also, under the ABA Rules and California law, a nonlawyer may practice law under certain very specific circumstances. For example, under ABA Rule, a nonlawyer may practice law under the direct supervision of a practicing lawyer who is licensed in that jurisdiction.

Albert is an attorney, and he knowingly decided to incorporate a business in which Barry, who is not an attorney, would perform legal research and draft legal memoranda. Not only did Albert know that Barry would be doing these things, he intended to use Barry's work to make court appearances and argue motions. There is no mention of Albert supervising Barry or reviewing his work before using it. Therefore, Albert can be disciplined for assisting Barry in the unauthorized practice of law.

Partnering with Nonlawyers

A lawyer is permitted to partner with a nonlawyer in a business providing legal services. A lawyer may hire a nonlawyer to work in such a business as long as they are not practicing law in an unsupervised way.

Here, Albert, a lawyer, and Barry, a nonlawyer, incorporated to form a business together. The business was specifically to provide legal services. The shares of business would be divided equally between Albert and Barry. Therefore, Albert may be disciplined for partnering with Barry to perform legal services, in a corporation in which they have equal shares.

Splitting Fees with Nonlawyers

A lawyer is not permitted to split fees with nonlawyers, except in certain very specific circumstances, such as employee benefit plans. Albert could argue that he was not splitting fees with Barry, and that fees for his services would be paid to the corporation. However, profits are distributed equally to Albert and Barry as corporate dividends. Therefore, Albert would be disciplined for splitting fees with Barry since his argument that fees are not split is illusory.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

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Question 1

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of $5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a "paralegal" at a wage of $250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale's involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale $1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 1

In interactions with clients, an attorney owes a client four overarching duties: the duty of confidentiality, the duty of loyalty, the duty of maintaining financial integrity, and the duty of competence. In the practice of law, a lawyer also owes a duty of decorum to the profession. Attorney Alex's (A) actions in this matter raise issues under the duties of confidentiality, loyalty, financial integrity, and competence, as well as some question as to the duty of decorum to the profession. With these general principles in mind, each action will be analyzed individually.

Duty of Loyalty: Representation of Multiple Clients

An attorney owes a duty of loyalty to his or her client, to exercise his or her time and professional judgment and efforts solely for the benefit of that client, without any interference from outside loyalties of interests. This duty does not equate to an absolute prohibition or the representation of multiple clients, particularly in such matters as a business transaction; however, a lawyer generally must not accept the representation of more than one client if he believes their interests to be materially adverse or that any loyalties or interest might prevent the fair and competent representation of either or both clients. The ABA rules require that a reasonable attorney in [a] like situation would also believe in his ability to represent both clients without material adverse effect. California does not have this reasonable attorney standard.

Initially there do not appear to be direct conflicts in a matter regarding the construction of a partnership, so A's initial agreement to undertake the representation of both clients might be reasonable. However, one of the clients is a friend of A's from college, [a] potential source of loyalty that would potentially hinder the representation of Clare, should the interests ever diverge. Moreover, Booker, as a friend, sought out A as a new attorney for this representation, which might engender feelings of indebtedness to A that might hinder his representation of Clare. If Alex feels that he can competently represent both clients and there are no present conflicts, there is no violation under California law. However, under the ABA standard a reasonable attorney might not accept representation of multiple clients with the potential that he would feel more loyal to one than the other due to pre-existing friendship. Thus, there may be a violation under the ABA reasonable attorney standard.

In addition to only taking on the representation if the attorney deems he can properly represent both clients, the attorney has a duty to disclose the potential conflicts, including the potential that he will have to withdraw from the representation if a conflict arises. After this, the attorney must obtain the client's informed consent to the joint representation. California requires this consent to be in writing.

Here, it is unclear as to whether A discussed the potential of conflicts under this duty. The facts state only that the meeting was "brief" and that A agreed to represent both clients for a fee of $5,000. There is no mention of informing the clients or obtaining their consent. There is, further, no mention of a written consent. Thus, A has likely breached

both ABA and California rules regarding the representation of both clients by not informing them of potential conflicts and obtaining their consent. A should have made the potential conflict much more clear and obtained clear consent from both, in writing, to satisfy both standards.

Duty of Confidentiality: Representation of Multiple Clients

The ABA requires a lawyer not divulge any information obtained from the client in the course of the representation intended to be kept confidential. California has no on-point rule for confidentiality, aside from the lawyer's oath to 'maintain inviolate client confidences'.

Though not apparent from these facts, the representation of multiple clients may raise issues regarding the duty of confidentiality to each, because a conflict my only arise when one client discloses something to the lawyer. When the lawyer cannot make a due disclosure to the other client regarding the conflict without violating the duty of confidentiality, the lawyer must withdraw.

Duty of Competence

A lawyer owes a duty of competence to a client to exercise the amount of research and inquiry as well as to possess sufficient knowledge and skill regarding the matter to render competent services. If an attorney is not familiar with the subject matter of representation, he may still represent the client if he can do sufficient research to familiarize himself with the subject area and such research will not result in undue expense to the client or delay in the matter. An attorney may also elect to associate or solicit advice from an attorney with experience in the area.

Within this duty of competence is a duty of diligence to zealously pursue the matter to completion.

The facts state that A is a recently-licensed attorney and has no experience with forming partnerships—the subject mater of the representation. The facts also state that A spent only a total of two hours on the partnership matter, which included reading other partnership documents and his initial and final meetings with Booker and Clare. Given his status as a new attorney and his lack of experience with this subject area, it would appear A neither possessed the requisite knowledge and skill necessary to competently represent the clients in this matter, nor did he do sufficient research or training to make himself competent in the area.

A would likely argue that he remedied this shortcoming by hiring Dale as a "paralegal", who had decades of experience in the practice of law, including partnership formation. Had Dale been a duly licensed attorney, this may have been proper. However, because (as will be discussed below) only an attorney may engage in activities that call for the judgment, training, and skill of an attorney, hiring a paralegal with a good deal of knowledge may ameliorate this shortcoming to some degree, but it is unlikely that it totally accounted for it. This is primarily because the only way Dale could provide

sufficient help to remedy the violation of the duty of competence would be by violating the rule against the unauthorized practice of law.

Thus, it is likely that A also breached his duty of competence in the matter by accepting representation in an area he was not familiar with, not doing sufficient research, and not associating with a more experienced attorney who could function as an attorney. A should have either declined the representation, or undertaken steps to make himself competent in the matter, if possible, without undue delay or expense.

Financial Integrity: $5,000 fee

Under ABA rules, an attorney's fee for work must be reasonable in light of the skill, experience, time, degree of specialty, and difficulty required for the task. California merely requires that fees not be "unconscionable".

A $5,000 fee for setting up a partnership does not appear reasonable in light of the time, degree of specialty, skill, and difficulty of the task. The facts state that A himself spent only 2 hours on the partnership matter, including the initial meeting and a final meeting in which documents were signed. After paying Dale $1,000 for his work, this leaves a charging effectively a fee of $2,000 per hour. Given A's status as a new attorney and that lack of difficulty or specialty required in setting up a simple partnership agreement between a publisher and writer, the fee arrangement would appear to violate both the ABA standard of reasonableness and the California standard of unconscionability.

Additionally, California requires fee agreements to be in writing unless the situation constitutes an emergency, the client is a regular client, the client is a corporate client, or the fee is under $1,000. Here, there does not appear to be any emergency or exigency warranting an exception to the writing requirement. Though Booker and A were friends prior, A is a new attorney and there is no prior attorney-client relationship between the two. Thus, Booker would not qualify as a "regular" client. Booker is obviously not a corporate client and the fees are for $5,000.

Thus, A has violated the California rule regarding client agreements being in writing.

Financial Integrity: Fee Splitting

Whether or not A has also violated his duty of financial integrity to his clients depends in some part on whether or not Dale qualifies as an attorney or not, which will be discussed below.

Fee Splitting With Attorneys

If Dale qualifies as an attorney, under the ABA standard, A may split fees so long as the fee-splitting is proportional to the work done on the mater and the client consents. Here, A did notify both Booker and Clare about 'hiring' Dale, though it is not clear he notified them as to the $250 per hour salary. If he did notify them, there may not be a violation under ABA rules. However, if he did not, he may have violated the ABA rule, given he ultimately paid Dale $1,000 for his services. Dale may have also violated the proportionality rule, given that in this case, Dale should have received the bulk of the

fee, rather than simply $1,000 worth, given A's minimal work on the matter and Dale's four hours meeting with the clients and preparing the documents.

Under California law, an attorney may split fees with another if the split is reasonable. Here, there is likely nothing unreasonable about the arrangement, except that A took too much of the fee.

Fee Splitting With Non-Attorneys

The facts state that Dale is currently disbarred. This would make him a non-attorney and lawyers are prohibited from sharing fees with non-attorneys. However, attorneys may share fees with such personnel as paralegals and legal secretaries so long as the lawyer is ultimately responsible for the work done by the personnel. This latter issue raises the primary issue with the hiring and use of Dale's services: the duty not to assist in the unauthorized practice of law.

Duty Not to Assist in the Unauthorized Practice of Law

A lawyer has a duty not to assist in the unauthorized practice of law. The practice of law is defined as anything that would call for the judgment, reasoning, or skill of an attorney. Here A has hired Dale, a disbarred attorney, as a "paralegal". An attorney may hire a currently-disbarred attorney to do work [as] a paralegal or legal secretary, but, like with the work of a paralegal or legal secretary, the individual must not engage in activities that call for the special skills of an attorney and the licensed attorney, A, must be ultimately responsible for the work.

The fact state that A hired Dale, who spent four hours preparing the partnership documents and meeting with Booker and Clare about them. A paralegal may meet with clients to obtain information, but must not engage in explanations that require the judgment of a lawyer in so doing, such as explaining legal options or ramifications. A non-lawyer may similarly prepare documents to some degree, but generally not much more than in the capacity of a scrivener. Here it would appear that Dale functioned as an attorney for Booker and Clare in both meeting with them and preparing the partnership documents.

A's reasons for hiring Dale as a paralegal—for his experience in years of practice—would also be more germane to functioning as an attorney. Also, the fee of $250 an hour seems more akin to that of an attorney's fee than the fee charged for a paralegal in a simple matter by a new solo practitioner.

Moreover, A must ultimately be responsible for the work done by the non-attorney and, in this case, the facts do not make any mention of his review of the final version of Dale's preparation of the documents, only that he was present at the final meeting in which the documents were signed.

Thus, A breached his duty to the profession and the client not to assist in the unauthorized practice of law.

Answer B to Question 1

What Ethical Violations Has Alex Committed?

Duty of Loyalty

A lawyer owes his client the duty of loyalty. This duty requires a lawyer to work in the best interests of the client, and not for the lawyer's personal interest or for the interest of any third party.

Potential Conflict of Interest

When a lawyer is presented with a potential conflict of interest, the ABA Model Rules and California's ethical provisions differ slightly in terms of what a lawyer must do in order to undertake the representation. Under the Model Rules, a lawyer may undertake the representation of a client if the lawyer has a reasonable belief that there is no significant risk that a conflict of interest will materially limit the representation, and the client gives informed consent. CA rules do not have a "reasonable lawyer" standard, but rather state that a lawyer can undertake the representation if the client gives written consent.

In this case, Alex was contacted by Booker, who was a friend during college, to form a partnership between Booker and Clare. There are potential conflicts of interest present in this representation, because Alex agreed to represent Booker and Clare jointly. Because Alex may be tempted by his friendship with Booker to work to the disadvantage of Clare, he should have informed Clare of his prior relationship with Booker. Moreover, he should also have made clear whether he represents only Booker and Clare, or if he is also representing the partnership itself.

There are no facts, other than his prior friendship with Booker, to indicate that he would work to the disadvantage of Clare. Under the ABA rules, a reasonable lawyer under the circumstances would likely believe that he could undertake the joint representation of Booker and Clare without a material limitation. Thus, if Alex informed Clare of his prior relationship with Booker, she could likely still consent to the representation. Similarly, in California the decision to undertake representation was proper if Clare consented to the representation.

Duty of Competence

A lawyer owes his client a duty of competence, which means that the lawyer must exercise the ordinary skill, diligence, and zeal in representing his client that an ordinary lawyer would under the circumstances.

As part of the duty of competence, a lawyer must be knowledgeable regarding the subject matter of the representation. However, in both CA and under the ABA rules, a lawyer need not be an expert in all maters to undertake the representation. A lawyer without prior experience in a field of practice may still take a case so long as the lawyer

either 1) does the work to become educated and competent without any extra expense to the client or 2) associate with competent counsel, who can help assist the lawyer.

Here, Alex had no experience forming partnerships. Thus, Alex either had to do the work necessary to educate himself regarding the law of partnerships, or he could also associate with another counsel who had such knowledge. In this case, Alex did not educate himself, but rather hired Dales as a "paralegal". Dale had decades of experience in law practice, including the formation of partnerships. Thus, Dale was a person with the requisite knowledge and skill to form the partnership between Booker and Clare.

However, Dale was a recently-disbarred attorney. Thus, Dale was not a licensed counsel and Alex could not associate with him without violating another ethical duty – the duty not to engage in the unauthorized practice of law, discussed below. A reasonable lawyer under the circumstances would not have associated with a disbarred attorney in order to satisfy his duty of competence.

Alex may argue that he eventually became informed by reading the partnership documents in order to learn about partnerships. However, Alex spent a total of two hours on the case, including the initial meeting with Booker and Clare and a final meeting to have Booker and Clare sign the documents. While there are no facts to indicate the precise number of minutes Alex spent learning about partnerships, it is clear for someone with no prior experience handling the formation of partnerships, Alex's cursory review of the documents prepared by Dale could not have satisfied his duty of competence. Thus, Alex violated his ethical duty by failing to become informed regarding the subject matter of the representation.

<u>Fee Agreement</u>

Under the Model Rules, all fees must be "reasonable". Except in the cases of a contingency fee, an oral fee arrangement will not violate a lawyer's ethical duty per se. The courts look to several factors in order to determine if a fee arrangement is reasonable, including the lawyer's reputation, knowledge, skill, the fee customarily charged for such work, whether the work involved particularly novel claims, and, in the case of a contingent fee, the amount of recovery by the plaintiff.

In this case, a $5,000 flat fee is likely unreasonable under these circumstances. Alex had no prior experience handling partnership agreements, and thus his per-hour fee should not be too high. Moreover, Alex spent only two hours total in working on this case. A fee of $5,000 – or even $4,000 if Dale was paid out of this fee – for two hours of work. Thus, Alex essentially charged Booker and Clare a fee of $2,500 or $2,000 per hour to form the partnership. Formation of a partnership is a relatively simple legal process and does not involve any complex or novel legal argument. Alex also has no prior experience and thus had no reputation for being a particularly efficient partnership lawyer. Thus, on balance, Alex's fee arrangement violated his ethical duties to Booker and Clare.

In California, a fee must not be "unconscionable," which is to say that it must not "shock the conscience." A fee agreement must also be in writing, unless the fee is less than $1,000, the lawyer is representing a corporate client, or there is a long history between the attorney and client. On these facts, none of those exceptions apply. While Alex had a prior friendship with Booker, that is insufficient to constitute a long history of representation such that any fee arrangement would be understood by the client. The facts also state that Alex represents Booker and Clare jointly, rather than the partnership. Thus, the $5,000 fee had to be in writing, and Alex violated his ethical duty with respect to this fee arrangement in California.

Moreover, for the same reasons that make the fee unreasonable under the ABA rules, this fee would also likely be unconscionable in California. To charge a client over $2,000 per hour – especially by a recently-licensed attorney – would very likely "shock the conscience" of the court.

Fee Sharing

Similarly, under both California and the Model Rules, a lawyer cannot share any part of his fee with a non-lawyer. This is considered a duty to both uphold the dignity of the profession, and a duty to protect the public. The facts are unclear whether Alex paid Dale out of pocket, or whether Dale's $1,000 payment came out of the fee paid to Alex. If in fact, Alex planned to pay Dale his fee by deducting it out of the $5,000 paid to Alex, then Alex breached his ethical duty. Even if, however, Alex paid Dale out of pocket, this still violated his ethical duty because he did not inform his clients as to how costs would be handled in this mater. Rather, Alex simply charged a flat fee without any further disclosures.

Under the Model Rules, a lawyer may also not pay a "referral" fee to any other lawyer. That is to say that a lawyer may not only be paid a portion of a fee when the lawyer has actually done some portion of work on the case. It should be noted that in California, unlike the Model Rules, a referral fee is not a per se violation of ethical rules, so long as the arrangement is disclosed to the client and no extra amount is charged to the client.

Thus, Alex may attempt to argue that Dale's payment was a valid referral fee under California law. However, as noted above, Dale was a recently-disbarred attorney. Thus, he is considered a non-lawyer and, as such, cannot share in any part of the fee arrangement.

Unauthorized Practice of Law

Part of the lawyer's duty to uphold the dignity of the profession, and also his ethical duty to protect the public, prohibit a lawyer from assisting in the unauthorized practice of law. Such practice is defined as a non-lawyer doing something which requires exercising the judgment ordinarily required by a lawyer.

In this case, Dale – a non-lawyer by virtue of his being disbarred – prepared partnership documents at the request of Alex. There are no facts to indicate what Dale actually did in the four hours he worked on the case. However, while the filing of a partnership

document with the state would not likely require the judgment of a lawyer, the actual drafting of the documents would very likely constitute the practice of law. Dale would have had to make arrangements between Clare and Booker regarding the sharing of profits and losses, how they would be compensated in the event of a dissolution and winding up, whether either of them would enjoy limited liability, and various other important considerations. Such work would require the skill and exercise of judgment required by a lawyer. Thus, Dale was engaging in the unauthorized practice of law.

Alex, therefore, will have violated his ethical duty if he failed to supervise Dale in his work. A lawyer may delegate certain tasks to an employee, such as a law clerk or paralegal, but must always supervise such work. Here, Dale spent four hours on his own. Alex did not supervise Dale's work at all. Rather, Alex simply delegated the work to someone whom he knew was a disbarred attorney. Moreover, Dale had no paralegal training or certification. Thus, Alex could hardly argue that he delegated this work to a paralegal.

As such, Alex violated several ethical duties. First, he violated his duty of competence, because he failed to represent Booker and Clare with the ordinary skill a reasonable lawyer would have under such circumstances. Second, he violated his duty to uphold the dignity of the profession, because he permitted a non-lawyer to engage in the unauthorized practice of law and share in the fee. Third, he violated his duty of loyalty, because he delegated work [to] a recently-disbarred attorney, and thus put his clients' partnership in the hands of someone who had already been deemed by that state bar to be unfit to practice law. Finally, he violated his duty to the public, because he permitted someone automatically deemed incompetent (even though Dale clearly had the requisite skill) by virtue of the disbarment to continue in the unauthorized practice of law.

Duty of Confidentiality

A lawyer owes his clients a strict duty of confidentiality. Model Rule 1.6 prohibits the disclosure of any information "relating to the representation." California does not have any direct rule on point, but the Cal Business Code states that a lawyer must "protect inviolate" the confidences of his client.

Here, Alex disclosed to the State Bar that he had hired Dale to work on the partnership. This information would be confidential – and thus could not be disclosed – under both the Model Rules and in California. However, there are certain exceptions to the ethical duty of confidentiality. One such exception permits disclosure of certain information in order to obtain an advisory opinion from the state Ethics Board. Thus, if Alex was revealing this information to the Bar for the purposes of obtaining advice regarding his ethical duties, then such revelation was proper.

Therefore, on these facts, Alex likely did not violate his duty of confidentiality because he was probably attempting to obtain some sort of advice regarding how he should proceed regarding hiring Dale.

It should be noted that the related issue of Attorney-Client privilege is inapplicable here. The Attorney-Client privilege protects compelled disclosure of confidential communications between attorney and client made for the purpose of obtaining legal advice. If Alex had been called to testify regarding what he told Booker and Clare regarding the formation of the partnership, such information could not be revealed without waiver of the privilege by Booker and Clare.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Betty formed and became president and sole shareholder of a startup company, ABC, Inc. ("ABC"), which sells a daily on-line calendaring service. ABC retained Lucy, a lawyer, to advise it about a new trademark.

As ABC was very short on cash, Lucy orally proposed that, in lieu of receiving her usual $200 per hour fee, she could become a 1% owner of ABC. On behalf of ABC Betty orally agreed. Lucy performed 20 hours of legal work and received her ABC stock shares. Years later, Lucy would sell her shares back to Betty for $40,000.

While Lucy was performing legal services for ABC, she discovered certain representations by ABC that were false and misleading and caused customers to pay for services they would never receive. She reported her discovery to Betty, who told her to ignore what she had found. After Lucy finished her legal work for ABC, she reported the false and misleading representations to a state consumer protection agency.

Betty sold all of her interest in ABC, including the shares previously held by Lucy, and formed and became president and sole shareholder of another startup company, XYZ, Inc. ("XYZ").

After Lucy had finished her work for ABC and closed that file, she was retained by a new client, Donna, in a trademark dispute with XYZ.

What ethical violations, if any, has Lucy committed? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 1

Attorneys owe their clients the duties of confidentiality, loyalty, fiduciary responsibility, and competence. They owe the public and the courts the duties of candor and truthfulness, fairness, and the obligation to uphold the dignity and decorum of the legal profession. Here, Lucy's conduct implicates the duties of confidentiality, loyalty, and fiduciary responsibility.

1. Lucy & ABC's Fee Agreement

Lucy and ABC have entered into a fee agreement whereby Lucy will receive a 1% ownership interest in ABC as the fee for her legal services, rather than her usual $200 per hour fee.

A. Requirement of Written Fee Agreements

Fee agreements between lawyers and clients must generally be in writing unless the fee to be charged will be less than $1,000, the work is routine work for a regular client, the client is a corporation or business organization, or the circumstances of the engagement make a written agreement impractical or impossible. Here, the agreement between Lucy and ABC does not appear to have been reduced to writing. The facts indicate that Lucy orally proposed the terms and that Betty orally agreed to them. However, ABC is a corporation. Therefore, it falls within the exception requiring the fee agreement to be in writing. Accordingly, Lucy has not breached any ethical duty by entering into what appears to be an oral fee agreement.

B. Accepting Ownership Interest in Client's Business As Fee For Legal Services

When a lawyer holds an ownership interest in a client's business, the duty of loyalty is implicated. The duty of loyalty requires an attorney to put his or her client's interest ahead of his own. When a lawyer holds an interest in a business that is also a client, the lawyer must be able to separate his or her own interest from that [of] the business, and must be able to put the business' interest ahead of his or her own interest. Generally, a lawyer is permitted to accept an interest in a client's business as part or all of the fee for legal services. However, consent must [be] in writing and [must] obtain independent legal counsel before entering into the transaction.

In this case, it is not clear that there was any consent by ABC in writing. Moreover, it does not appear that Lucy advised Betty or ABC to obtain independent legal counsel with regard to the transaction, nor does it appear that Betty or ABC obtained such advice. Accordingly, Lucy has violated the rules of professional conduct.

C. Reasonableness of Fee

Under the ABA Model Rules, a lawyer's fee must be reasonable, taking into account a number of factors, including the amount of work required, the complexity of the matter, the lawyer's skill and experience and other factors. Under the California rules, a fee must not be "unconscionable" (that is, it must not "shock the conscience"). Here, Lucy's "normal" fee was $200 per hour. The facts do not indicate Lucy's experience or skill level or what type of matters she normally handled, but a $200 per hour fee would likely be considered to be reasonable. The facts do not indicate any value of ABC at the time of the fee agreement or at the time Lucy performed the services for ABC. However, Lucy sold her shares in ABC back to Betty for $40,000 "years later." Had the shares

been worth $40,000 or anywhere in the ballpark of $40,000 at the time of the agreement and the time Lucy provided her services, they would likely be considered both “unreasonable” and “unconscionable” under the circumstances. Lucy performed only 20 hours of work to obtain certain trademark advice. Although trademark advice may be a specialized field that might justify a “premium” fee, if Lucy were given stock worth $40,000 to perform 20 hours of work, she would be receiving the equivalent of $2,000 per hour for her work, a fee that would most likely be considered both “unreasonable” and “unconscionable.” Accordingly, unless the value of the shares grew significantly, the amount of the fee would be a violation of the rules of professional conduct.

However, it is not clear what the value was at the time the agreement was entered into or when the services were provided. The facts suggest that all 20 hours of service were provided before Lucy received the stock. If that is the case, and if the stock only had a value of roughly $4,000 at that time, then the fee was not unreasonable or unconscionable, and the amount of the fee would not be a violation of the rules.

2. Lucy’s Report of ABC to the State Consumer Protection Agency

Attorneys owe their clients a duty of confidentiality. The duty of confidentiality requires a lawyer to keep confidential all information provided to the lawyer for the purpose of rendering legal services. The duty of confidentiality is necessary to ensure complete candor between clients and their attorneys, so as to facilitate effective legal advice. There are certain exceptions to the duty of confidentiality, such as when a lawyer is accused of malpractice, or is required to sue to collect a fee. Moreover, a lawyer who becomes aware that his or her client intends to commit an act that will cause great bodily injury or death may under certain circumstances disclose confidential information. Under the ABA Model Rules, a lawyer who is aware that a client intends to commit fraud that will cause significant financial injury can disclose confidential information to the extent

reasonably necessary to avoid the fraud if the lawyers' services were used in connection with the fraud. Under the California rules, there is no similar exception for information related to fraud.

Here, Lucy became aware that ABC had made certain representations that were false and misleading that caused customers to pay for services they would never receive. Although Lucy learned of these false and misleading representations during the course of her work for ABC, there is no indication that Lucy's services were used as part of any effort to mislead consumers.

A. Lucy's Report to Betty

Lucy properly reported her discovery to Betty. Under the ABA Model Rules, when a lawyer working for a business organization discovers misconduct that might damage the organization, he or she has an obligation to report that misconduct up the chain of authority within the organization. Under certain circumstances the lawyer may also be able to report that misconduct to the SEC if the organization is a reporting company and the CEO/CFO/CLO fail to act upon receiving the information. California permits but does not require a lawyer to report such misconduct "up the chain" and prohibits reporting it outside of the company, although with regard to securities law violations, federal law may preempt California law.

B. Lucy's Report to the State Consumer Protection Agency

However, it was a breach of Lucy's duty of confidentiality to ABC to report the misconduct to the State Consumer Protection Agency. Under the California rules, there is no exception to the duty of confidentiality to report fraud. Even under the ABA Model Rules, the exception would not apply here. As indicated above, Lucy's services were apparently not used to make the misrepresentations. Moreover, Lucy discovered evidence of past

misrepresentations in which consumers had already paid for services they would not receive. Therefore, it does not appear that disclosure of those past instances of misrepresentation were necessary to prevent or mitigate any further fraud.

3. Lucy's Representation of XYZ

A lawyer's duty of loyalty prohibits the lawyer from undertaking matters in which he or she has a conflict of interest except under certain circumstances. When a new client seeks to engage a lawyer in a matter involving a former client, the duties of loyalty and confidentiality are involved. A lawyer must not use confidential information obtained in a prior engagement in the new engagement. Generally, a lawyer may not undertake to represent a new client if there is a significant risk that representation of another client might have a material impact on the lawyer's ability to diligently and competently represent the new client. If a reasonable lawyer could conclude that he or she could undertake the subsequent representation without impact on the lawyer's ability to diligently represent the new client, and that the representation of the former client will not result in the use of any confidential information obtained in the prior engagement, the lawyer may undertake the new engagement so long as both clients are informed and [provide] consent in writing. The California rule is similar, but does not have a "reasonable lawyer" standard and requires only disclosures, not a signed consent.

Here, after completing her work for ABC and closing her file on that matter, Lucy is asked to represent Donna, in a trademark dispute with XYZ. Lucy has not previously had any attorney-client relationship with XYZ. It is true that XYZ is solely owned by Betty, the former president and shareholder of ABC, Lucy's former client, but corporations are separate legal persons. It is clear that Lucy's prior client was ABC, not Betty. The facts indicate that Betty engaged Lucy "on behalf of ABC." Moreover, Donna's dispute is with XYZ, not with Betty (or ABC). If ABC had merged or consolidated with XYZ, or if ABC had sold assets

(particularly its intellectual property, including any trademarks that Lucy was involved with) then it might be possible that Lucy would be in possession of confidential information belonging to ABC/XYZ that might be pertinent to her representation of Donna in her dispute with XYZ. However, the facts do not indicate this is the case, and assuming that XYZ is a separate company from ABC, there is no conflict of interest that would result in any ethical violation if Lucy undertakes the representation of Donna.

Answer B to Question 1

Financial Duties

Lawyers are governed by professional ethics in their practice of law. Lawyers have several duties to their clients, the court, the public, and the profession. One duty lawyers have to their clients is in the realm of finances. Such duties include the amount of fees and how fees may be charged to clients.

Fees

The ABA requires that fees must be reasonable, taking into account the lawyer's skill level, the amount of work involved in a case or matter, and the novelty of the service being provided.

In California, fees must not be unconscionable. Also, fee agreements must be in writing, unless the services are for a routine matter dealing with a business client or the matter is handled in an emergency situation.

It is permissible for lawyers to accept stock shares from clients in lieu of money payment, but the deal must be objectively reasonable to the lawyer and fair to the client at the time that it is made. However, in business dealings with clients, lawyers must only engage in a transaction so long as it is fair to the client and the client is advised to seek separate counsel before proceeding.

Fee Amount

In this case, Betty, as sole shareholder and owner of ABC, needed legal counsel in starting her business. Since she was short on cash, she offered to pay Lucy with stock shares, which would make Lucy a 1% shareholder in ABC. Lucy's regular fee is $200 per hour and she ended up doing just 20 hours of work for

ABC. When Lucy eventually cashed in her shares, she earned $40,000. The issue is whether this would be reasonable at the time the company was started and the deal between Lucy and Betty was formed.

The amount that Lucy eventually recovered was 10 times greater than the fees she would have collected in her work for ABC. Since Lucy probably had some idea of what the stocks were worth at the time she made this fee arrangement with ABC, it turns on whether the stock returns would have been unreasonable had Lucy sold the stocks around the time she made this arrangement. It is likely that the ABA rules may determine that a lawyer receiving a $40,000 payment for $4,000 of work is simply unreasonable. However, since the standard is whether it was reasonable and fair at the time of the contract or arrangement, Lucy may be able to show the stock prices spiked unexpectedly and that she did not act unfairly or unreasonably here.

In CA, however, the standard is unconsionability. Since ABC was a startup company and offered an online calendaring service, there are no facts to suggest that Lucy's receiving 1% of the stock would amount to a windfall, or even an unreasonable fee amount. In the case the company failed, Lucy would have received very little or nothing for her services. Since Lucy didn't know that the fees would be so out of proportion to her normal fees, the fee arrangement probably would not be deemed unconscionable in California and therefore would be upheld.

Fee Agreement

The other issue is that the fee arrangement was oral. In CA, all fee arrangements must be in writing, unless there is an emergent or routine matter being handled by the attorney. Since ABC is a new client, we have no reason to believe this work was routine. Also, it was not an emergency since Lucy merely

was handling some trademark work for ABC. Lucy should have reduced this fee agreement in writing.

Lucy also should have advised Betty to obtain separate counsel since the fee arrangement is tantamount to a business engagement between Lucy and Betty. That way, Lucy would protect herself and follow ethical rules by ensuring that Betty knew her rights and was prepared to continue with the fee arrangement, having received independent advice on the matter.

Duty of Confidentiality

Lawyers have an ethical duty to maintain confidential all communications related to the representation of their client. The source of the information is irrelevant to this duty, and the duty extends to clients even after representation has ended.

Should a lawyer receive information from or about a client that the client will be engaging in activity that poses serious risk of death or bodily harm to another, the ABA allows the lawyer to report this to authorities, notwithstanding the duty of confidence. In CA, the act must amount to a crime. In the case of financial crimes or fraud, CA does not permit reporting to authorities. In the ABA, reporting is allowed only if (a) the lawyer's services are being used to perpetrate the crime or fraud, and (b) reporting would prevent the financial crime from occurring.

Here, Lucy obtained confidences in her representation of ABC that were related to the representation; therefore she has a duty to maintain those confidences unless she is excused from that duty.

False Representations to Customers

In this case, Lucy learns that ABC is making certain false and misleading representations that caused customers to pay for services they would never receive. Here, this would amount to a financial fraud or crime since customers will be wrongfully led to believe they are receiving something they are not, after they turn over their money. In CA, Lucy may not report this to authorities such as the police or the District Attorney. In the ABA, Lucy may only report this to authorities if her services are used to commit the wrong, and she believes reporting will stop it.

Lucy only performed trademark work, so the likelihood that she was assisting in this fraudulent activity is slight. However, Lucy may argue that, without the trademark, the company couldn't have started [the] business, so she is responsible for assisting. Lucy could prevent the crime if she told authorities and ABC was required to stop operations or refund customer funds.

Reporting Up and Reporting Out

The ABA authorities permit attorneys to report within the corporation to higher authorities if they suspect wrongdoing or fraud. The ABA also allows attorneys to report to outside authorities, such as the SEC, for securities violations or fraud within a corporation. In CA, again, only reporting within is allowed. Reporting out is not allowed in any case; however, if the federal law requires or allows an attorney to report, federal preemption means she cannot be held liable for that.

Here, Lucy reported up when she told Betty of her concerns. However, this was probably futile since Betty is the sole shareholder and president of the company, and told Lucy to ignore what she had discovered. Lucy then went to the State Consumer Protection Agency. In the ABA, this would be permitted. And, if it were a federal agency, Lucy would be permitted to report out if the agency so

required. However, in CA, Lucy is not permitted to report out to prevent financial crime. The ethical rules in CA prohibit Lucy from doing anything but discussing her concerns with Betty. Since the agency she reported to was state-governed, and not federal, Lucy will be subject to discipline for violating her duty of confidentiality to ABC and to Betty.

Withdrawal

If an attorney's services are used to perpetrate a crime or a fraud, they must make [an] attempt to withdraw from the representation; this is mandatory withdrawal. Permissive withdrawal means that Lucy could attempt to withdraw from the representation if she finds the client's wishes or activities to be morally repugnant. If Lucy withdraws, she must provide timely notice to Betty and must return all materials obtained during the representation. She also must not divulge any confidences since the duty of confidentiality persists indefinitely.

Duty of Loyalty

Lawyers owe their clients a duty of loyalty. This means that if there is a conflict with the lawyer and the client, a past client, or any third party that materially limits the lawyer's ability to effectively represent the client, she must not take the representation or withdraw from it. Some conflicts can be waived upon informed consent from the client. In CA, this consent must be in writing.

In CA, the lawyer must be able to effectively represent their client. The ABA requires that the lawyer "reasonably believe" she can effectively represent the client, notwithstanding conflicts. This is an objective test and the lawyer's actions will be judged objectively. Therefore, representation of one client that compromises the confidences of another may make consent impossible, and would make representing both parties unreasonable.

Past Client Conflicting with Present Client

If a lawyer has represented a client in the past who is now on the opposing side in litigation, representation of the new client may still be permitted if written consent is obtained from the former client, and the lawyer may represent each client effectively without compromising her duties of confidence and loyalty to both. However, if the subject matter of the litigation is similar to the past representation of the former client, this will be deemed unreasonable and therefore a non-consentable conflict.

Lucy's Representation of Donna

Lucy represented ABC on trademark work. ABC has been sold, but Betty, the essential founder and controller of ABC, has now started a new company, XYZ. The work Lucy performed for Betty is regarding the same matter currently at issue in her representation of Donna—trademarks. However, it may not be related to anything that Lucy handled for ABC in the past, and, so, even though it is the same nature of work, it may not directly relate to her work with ABC.

Now, Lucy seeks to represent Donna, her new client, in an action against XYZ. Since XYZ is essentially run by Betty, Lucy must get consent by Betty to represent Donna. However, Donna must also be informed about the conflict. Lucy knows confidential information regarding misrepresentations [of] ABC, and, therefore, Betty, has made in the past. Since she may not reveal this information to Donna, Donna cannot be informed fully about how Lucy's representation may harm her. She may not understand fully the reasons behind the conflict, and therefore, consent is not possible.

Since Lucy cannot obtain fully informed consent from Donna, she must not take Donna's case and should withdraw.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the $1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the $1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

Answer A to Question 1

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the emotion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the $1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the $1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she

came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

Answer B to Question 1

1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

Strict Liability – Ultrahazardous Activity

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

Absolute Duty of Care – Is the activity an ultrahazardous activity?

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid $1,000. Viewing the facts in a light most favorable to P, factual cause is met.

Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13th Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of $1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

2. D v. P and Art (A) – Malicious Prosecution

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 5) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for $1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her $1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to "teach D a lesson." P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the $1,000 was not a lot of money to her, but it would be a total loss of D's livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.

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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.

Answer A to Question 2

1. A's Ethical Violations

As an attorney, under both ABA and CA authorities, A has a blanket duty of fairness to the tribunal and opposing counsel and a duty to maintain the dignity of the profession.

Extrajudicial Statements

A lawyer has a duty to not make any extrajudicial statements which he knows or should know will be disseminated by means of public communication which have any likelihood of prejudicing the proceedings. The exceptions to this duty revolve around permitting extrajudicial statements that do not contain a substantial likelihood of prejudice. The exceptions include making statements regarding any information contained in public documents, the results of any hearing, routine booking information, scheduling of public hearings, or in the case of prosecutors, requesting the public to come forward with any information or evidence of the crime or to aid in apprehension, and to possibly warn the public of any reasonable danger presented by a criminal on the loose. Additionally, a lawyer may make an extrajudicial statement when it is reasonably necessary to rebut a violative statement made by opposing counsel.

Public Dissemination

Here, A held a press conference in which he stated that his client was unquestionably innocent and that P was only pursuing the case because he wanted to make a name for himself by prosecuting a well-known movie actor as part of his bid for District Attorney. First of all, A had to know that his statements would be disseminated by means [of] public communications. In fact, not only did he know his statements would be disseminated, he specifically intended that they be. That is why he called the press conference. He did so to get his message out to as many people as he could.

Likelihood of Prejudice

Moreover, these statements present a strong likelihood of prejudice to opposing counsel. By making such statements, it creates disdain in the public eye with regard to P's conduct. It makes the public believe that he is only acting for the personal gain of

becoming an elected official as opposed to acting in their best interest to get criminals off the streets. A jury is going to be more likely to side against P in any later trial because they believe he is only prosecuting D because of the personal motive. Moreover, by stating that "any intelligent jury" will find D innocent, A was representing to the public as fact something which may not be so. By using his position in society and the words "any intelligent jury," it is likely that if a potential juror hears this statement he will be more likely to find in favor of D out of fear that he otherwise may be labeled as unintelligent.

Conclusion

None of the normal exceptions apply here. Moreover, since A held this press conference preemptively instead of in response to other extrajudicial violations, A is most likely to be subject to discipline under both the ABA and CA rules of professional conduct.

Dignity of Profession

A lawyer has a general duty to always uphold the dignity of the profession and to do nothing which would bring disdain to it in the public eye. Here, A has likely violated this duty by asserting that P is acting for an improper purpose without any actual knowledge of its truth. When a lawyer represents publicly, without justification, that another lawyer is dishonest or otherwise untrustworthy, it leads the public to believe that all lawyers are dishonest and untrustworthy. This detracts from the dignity of the profession and all lawyers must strive to avoid it wherever possible.

Improper Influence of Jury

A lawyer has a duty to not seek any improper influence over any jurors. Here, as stated above, A's statement basically amounted to a claim that only unintelligent people could convict his client. He thus is seeking to gain influence over potential jurors in any future hearings by these statements. However, he may not be subject to discipline on this basis alone because it is unclear whether a jury has been sworn or not. If a jury has not been sworn, then there are not really any jurors, in the literal sense, which could be improperly influenced. He would only be tainting the potential juror pool, but there is no

guarantee that a future juror would have heard this statement or, depending on how long before the trial, there's no guarantee that they will have remembered it. Moreover, there is likely to be actual cause to strike from the venire any person who has been influenced by the statement. Therefore, A is probably not subject to discipline merely because of this aspect of the statement unless a jury has already been sworn.

2. P's Ethical Violations

Fairness to Opposing Counsel

Though all lawyers must be zealous advocates of their positions, there remains a duty of fairness to opposing counsel which may trump zealousness in certain situations.

Allow Access to Evidence

A lawyer has a duty to not alter, destroy, or obstruct access to evidence or to counsel, aid, or encourage any other person to do so. Here, upon receiving a copy of the police report describing D's conduct, P asked the police officer to destroy the record and replace it with one that included more details of D's alleged criminal behavior. Although it may have been proper for P to ask the officer to include more details in a supplemental report, by instructing him to destroy the original report, P has obstructed A's access to such evidence. It is highly unfair to opposing counsel to destroy a substantial piece of evidence just because it does not clearly favor your position. Here, A had a right to see that report in its unaltered state and then to point out any discrepancies contained therein at trial.

Instructing Witnesses to Remain Silent

Related to the duty to allow access to evidence, a lawyer has a duty to not instruct or encourage a witness to remain silent about relevant knowledge unless that witness is the employee/agent of the lawyer's client and the lawyer reasonably believes that the witness' refusal to testify will not cause the witness any harm. Here, P interviewed D's housekeeper who witnessed the alleged criminal battery. The housekeeper, H, [said] D

did not knock down V as V had alleged. Thereafter, P told H to avoid contact with the opposing counsel, A. H clearly has relevant knowledge about the incident. He was a percipient witness of it and could accurately testify about what he saw. However, because H's perceptions were harmful to P's case, P instructed him to remain silent and not offer up his story to opposing counsel. This is most likely a violation of the rules of professional conduct because the exception does not apply. Though P may reasonably believe that H's interests will not be harmed by refusing to relate his story, P's client is the State and thus H is not an employee/agent thereof.

No Falsification of Evidence

Along with the duty of access to evidence comes the duty to not falsify evidence or put on false testimony and not counsel, aid or encourage anybody to falsify evidence or testimony. It is unclear exactly what occurred when P instructed the officer to destroy the report and draft a new one with more details. P could have legitimately felt the original report was vague and wanted the officer to include additional accurate details to avoid the vagueness. However, there is a legitimate possibility that P was impliedly asking the officer to exaggerate the details to make P's case more compelling. If this is the case, P is certainly subject to discipline as it was a direct encouragement to falsify evidence.

Special Duties of Prosecutors

Under both the ABA Model Rules and the CA Rules of Professional Conduct, because of the prosecutor's role as defender of the public, he is held to special heightened duties in a few areas. After all, his duty is to protect the public, but a criminal defendant is a member of the public as well and is owed at least some duty of fairness by the prosecutor.

Exculpatory Evidence

A prosecutor has an absolute duty to divulge any and all possible exculpatory evidence to the defense in sufficient time to allow proper preparation for the trial. Here, P

instructed the officer to destroy the original report. Exculpatory evidence is any evidence which weighs in favor of acquitting a criminal defendant. The facts indicate that the report was vague as to the details surrounding the alleged battery. Thus, it is not certain that the report was exculpatory in the sense that it stated that D was not responsible for the crime. However, that is not the standard by which exculpation is judged. The evidence must only have a tendency of favoring the criminal defendant. And if this report was so vague that P felt it necessary to destroy it, surely there was substantial probative value for D's case. A could have used this report to, at the very least, point out an inadequate investigation and discredit the police officer who arrested D.

Moreover, P interviewed H, who basically said D is innocent. This is direct exculpatory evidence. And even though it is not in P's possession because H is a live witness, he has a duty to disclose its existence to A.

Thus, by failing to inform A of H's existence and by instructing the officer to destroy evidence, P is likely to have violated his special duty to inform opposing counsel of any exculpatory evidence.

Absence of Probable Cause

The other special duty of prosecutors is to not proceed with a case in the absence of probable cause. Probable cause is facts sufficient to lead a man of ordinary caution to believe that a crime was committed and the defendant was the one who committed it. Here, P has filed a criminal complaint alleging battery by D against V. However, P has been unable to obtain V's version of the events because he has been overseas and he will not be back by the preliminary hearing. Moreover, the only witness P has spoken to, H, said that D is innocent. Thus, it appears that the only evidence of criminal conduct that P had was the vague police report which he requested the officer to destroy and embellish. This seems to be an absence of probable cause. If the only incriminating facts regarding the incident were those contained in the vague police report, it would not lead a reasonable person to believe that an offense was committed

by the defendant. P should not have filed suit and proceeded to the preliminary hearing without at least hearing V's testimony regarding the matter. P should have waited until V returned before filing suit. By failing to wait, P has violated his duty to not proceed with criminal cases in the absence of probable cause.

Answer B to Question 2

1. Alex's Ethical Violations

Duty of Fairness to Opposing Parties – Press Conference

A lawyer owes the opposing party a duty of fairness, which includes not making public, extrajudicial statements that have a substantial likelihood of materially prejudicing the case.

Alex held a press conference and told the press that "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." Because Alex's statement was made to the press at a press conference, he knew that this extrajudicial statement would be widely publicized. This statement also has a substantial likelihood of materially prejudicing the case because his statement was inflammatory and may influence potential jurors to cause them to make up their mind or at least to have some pre-existing beliefs or bias regarding the case.

The one exception to this rule against extrajudicial statements is that a lawyer may make a public extrajudicial statement if necessary to protect his client from the undue influence of recent adverse publicity that was not self-initiated.

Alex might argue that he only made this statement to the press because he was trying to defend his client from what he believed was Paul's desire to publicize the arrest of a high-profile defendant as part of an election bid for District Attorney. However, Paul has not yet made any public statements regarding the case against Dusty, and, therefore, there is no recent publicity to defend Dusty against. Hence, this exception does not apply, and Alex has violated his duty of fairness to the opposing party.

2. Paul's Ethical Violations

As a prosecutor, Paul has many additional ethical duties that are particular to prosecutors, in addition to all of the professional responsibilities that all lawyers are subject to.

Duty of Fairness to Opposing Parties – Destroying Original Police Report

A lawyer owes the opposing party a duty of fairness, which includes the duty not to tamper with, alter, or destroy evidence.

Paul asked a police officer to destroy the existing police report describing Dusty's alleged criminal behavior. The original police report was a piece of relevant, material evidence for the case against Dusty. By asking the police officer to destroy the original police report, Paul violated his duty of fairness to Dusty.

Duty of Candor to the Court – Creating New Police Report

A lawyer also has a duty of candor to the court, which requires not making a false statement of material fact and not presenting false evidence.

Paul asked the police officer to draft a new report that included more details of Dusty's alleged criminal behavior. If Paul's request to include more details of Dusty's alleged criminal behavior required the police officer to make up details that he did not in fact remember, this would entail the creation of false evidence, in violation of Paul's ethical duties. Furthermore, even if the new police report only contained truthful information that the police officer remembered from the incident, if the police report is offered by Paul as the original, rather than disclosing that it was a second version created at his request, then Paul would be making a false statement of material fact and knowingly presenting false evidence, in violation of his duty of candor to the court and his duty of fairness to the opposing party.

Exculpatory Evidence

A prosecutor has a duty to disclose exculpatory or mitigating evidence to the defendant.

Paul did not disclose the original police report to Alex and Dusty. The original police report described Dusty's behavior in a vague manner, such that Paul was concerned about the police report in making his case. Therefore, this police report could be viewed as potentially exculpatory or mitigating evidence, and Paul, as prosecutor, had a duty to disclose it to the defense. His failure to do so violated his ethical duties as prosecutor.

Paul also did not disclose his interview with Henry, Dusty's housekeeper. Henry had witnessed the incident, and he told Paul that Dusty did not knock Vic down. Because this is exculpatory evidence, Paul had a duty to disclose the interview to Alex and Dusty. Paul might argue that since Henry was Dusty's housekeeper, Dusty is probably already aware of his version of events. Nonetheless, Paul has the duty to disclose all exculpatory or mitigating evidence to the defense, even if he suspects that the defenses might be aware of it. His failure to do so violated his ethical duties as prosecutor.

Duty of Fairness to Opposing Parties and Third Parties – Telling Henry to Avoid Alex

A lawyer has the duty not to tell a third party not to voluntarily speak with the opposing party, unless: (1) the third party is a relative/employee/agent of the lawyer's client, and (2) not voluntarily speaking will not be adverse to the third party's interests.

Paul told Henry to avoid contact with Alex, Dusty's lawyer. Because Henry is a third party, Paul may not ask him to refrain from voluntarily speaking to Alex. (The exceptions do not apply because Henry is not a relative/employee/agent of the state, whom Paul represents, and failing to speak to Alex may actually be adverse to Henry's interests because he is Dusty's housekeeper and may lose his job as a result.) Paul might argue that since Henry is Dusty's housekeeper, he probably has already spoken to Dusty himself. Nonetheless, Paul may not ask a third party to refrain from speaking with the opposing party's counsel, and by asking Henry to avoid Dusty's lawyer, Paul violated his duty of fairness, both to Dusty and to Henry.

Probable Cause

A prosecutor has the duty to only prosecute when there is probable cause.

During Paul's investigation of the case against Dusty, he found a police report where Dusty's behavior was only vaguely described, and he spoke to Dusty's housekeeper, who witnessed the incident and said that Dusty did not knock Vic down. Dusty claims that Vic simply tripped, and Paul has not been able to obtain Vic's version of events because Vic has been on an extended trip abroad. Based on these facts, Paul does not have probable cause to prosecute the case against Dusty. Paul might argue that the police report does not entirely clear Dusty's name because it is only vague, not exculpatory, and that Dusty's housekeeper was likely an interested, biased party who had reason to lie. However, Paul does not have sufficient evidence affirmatively establishing probable cause for finding Dusty guilty. Even though Paul subjectively felt confident that Dusty was nevertheless guilty, probable cause is an objective standard, and this standard has not been met on the facts. Therefore, Paul's decision to proceed with the preliminary hearing anyway, without having spoken to Vic or obtained other evidence of Dusty's guilt, violated his ethical duty to prosecute only when there is probable cause.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

Answer A to Question 5

I. <u>Was the State court's denial of Diane's neighbors' application for a permanent injuction correct?</u>

A permanent injunction is an equitable remedy which is appropriate where there is an inadequate remedy at law, the plaintiff has a protectable property interest, enforcement of the injunction is feasible, balancing of the hardships, and there are no applicable equitable defenses to enforcement of the injunction.

Inadequate remedy at law – A remedy at law is inadequate where monetary damages are insufficient to compensate the plaintiff, or where they are unlikely to be recovered because the plaintiff is insolvent. Furthermore, a legal remedy may be inadequate. In this case, the neighbors are going to argue that an award of monetary damages will be inadequate because they rely on the stream that Diane is diverting to irrigate their crops and fill their wells. While an award of damages would give them money, it would in no way help them in dealing with this problem. Furthermore, they will also argue that because the use and enjoyment of their real property is involved, this is a situation where their land is unique and legal damages will be inadequate because of the irreparable harm that will occur to the neighbors if they lose access to the water.

Protectable Property interest – A plaintiff may only seek a permanent injunction where they have a property interest that a court in equity will protect. While the traditional rule was very strict, the modern rule provides that an interest in property will suffice. The plaintiffs will argue that as landowners living downstream, they have a protectable property interest in the water. The court is likely going to accept this argument because they had been using the water before Diane came into the area and likely have at least some rights to continue using some of the water.

Feasibility of enforcement – Enforcement problems arise in the context of mandatory injunctions which requires the defendant to do something. Negative injunctions which

prohibit the defendant from performing certain actions create no enforcement problems. In the enforcement area, courts are concerned about the feasibility of ensuring compliance with a mandatory injunction and also with the problem of continuing supervision.

Under these facts, Diane's neighbors initially asked for a partial mandatory injunction and partial negative injunction, ordering Diane to stop construction and remove the dam. With regard to the mandatory part (removing the dam), Diane has to affirmatively take this action, rather than being required simply to stop building the dam. Because this is a mandatory injunction, this creates an enforcement problem for the court. It will have the problem of continually supervising Diane to make sure that she in fact takes the dam down. The part of the injunction regarding stopping construction is a negative injunction because all that is required is that Diane stop construction. As such it creates no enforcement problems. While the part of the injunction that requires Diane to take down the dam creates some enforcement problems, the court could solve this problem by couching it as a negative injunction.

Balancing of the hardships – In balancing the hardships, the courts will always balance the hardships if the permanent injunction is granted on the defendant with the hardship to the plaintiff if the injunction does not issue. The only time that courts will not balance the hardships is where the defendant's conduct is willful. Finally, in balancing the hardships, the court can take the public interest into account.

Was the plaintiff's conduct willful so as to prohibit balancing of the hardships – In this case, while Diane willfully continued the construction and used the dam to divert the water, there is no indication that when she was doing this that she knew that her conduct was wrong or was intentionally violating the rights of the plaintiffs. While the neighbors demanded that she stop, there is no indication that she believed that she was not entitled to continue. Consequently, the hardships should be balanced because the defendant's conduct was not willfully in violation of the plaintiffs' rights.

Balancing the hardships – The plaintiffs are going to argue that they will suffer great harm if an injunction does not issue. Under these facts, the plaintiffs need the water from the stream for their crops' irrigation and to fill their wells. Thus if a permanent injunction does not issue their crops are likely to die and they will not have a water supply in their wells. This is a great showing of hardship. The defendant is going to counter that she is trying to construct a free summer day camp for poor kids and that she cannot do so if she is forced to halt construction and if she cannot use the water diverted by the dam for her pond. However, in this case, these hardships do not seem so great compared to the hardships faced by the plaintiffs. There is no indication that she cannot get the water from her pond from somewhere else; furthermore, it seems likely that she could continue constructing her property in a way that does not interfere with the rights of the plaintiffs. The direct balancing of the hardships thus favors the plaintiffs.

Consideration of the public interest in balancing the hardships – Courts may also consider the public interest in balancing the hardships. Diane is going to argue that the public interest favors her because she is doing this project to create a free summer day camp for children who do not have a lot of money. This certainly indicates that her action is in the public interest. However, the neighbors can also make a public interest argument. Assuming that they sell their crops for consumption by the general public, they also have public interest factors on their side. Thus this factor does not seem to favor either side very strongly.

On balance, thus, it seems that the balancing of the hardships favors the plaintiffs when taking the direct hardships and the public interest into account.

Equitable Defenses – Courts in equity will not issue an injunction in favor of plaintiffs where they have unclean hands, where laches applies, or where the claim is barred by estoppel.

Unclean hands – is a defense in equity where the plaintiffs have committed acts of bad faith with regard to the subject matter before the court. In this case, there is no indication that the plaintiffs have unclean hands, so this argument by Diane will be unsuccessful as a defense.

Laches – Laches applies where a plaintiff or group of plaintiffs unreasonably delay in instituting a cause of action or claim against a defendant and this delay prejudices the defendant. In this case, Diane is going to argue that the plaintiffs' delay in this case was unreasonable. When Diane refused the neighbors' initial request to stop construction, they waited six months before filing an application with the state court for an injunction. Furthermore, she is going to argue that she was harmed by this delay because she continued construction and expended substantial funds during this delay. While Diane can make a pretty compelling argument, it does not seem that a delay of six months is enough time that the plaintiffs' claim should be barred by laches.

Estoppel – applies as a defense in equity where plaintiffs take a course of action that is communicated to the defendant and inconsistent with a claim later asserted, and the defendant relies on this to their detriment. In this case, estoppel will not bar the claim by the plaintiffs because once they became aware of the construction, they immediately indicated that they did not approve. They commanded Diane to stop so the plaintiffs' claim is not barred by estoppel.

Conclusion – The state court was incorrect in denying the permanent injunction because it appears that the permanent injunction should have issued because of the factors discussed above.

II. Was the federal court's denial of the permanent injunction correct?

Claim Preclusion (Res Judicata) – The equitable doctrine of res judicata stands for the proposition that a plaintiff should only have one chance to pursue a claim against the same defendant. This doctrine applies and bars relitigating of a claim where (1) the

claim is asserted by the same claimant against the same defendant in case #2 as in case #1, (2) where the first case ended in a valid final judgment on the merits, and (3) where the same claims are being asserted in case #2 as in case #1. In federal court these claims arise from the same conduct, transaction or occurrence.

Same Claimant Against Same Defendant in Case #2 as in Case #1 – In this case, second case, Paul is suing Diane in federal court. The facts indicate that he was one of the neighbors and a plaintiff in the first case in state court. Consequently this element is met, because Paul was also a claimant against Diane in the first case.

Case #1 ended in a valid final judgment on the merits – The facts indicate that in the first case, the court denied the application for a permanent injunction on the merits. The facts also indicate that the neighbors did not appeal. A judgment on the merits is clearly a valid judgment and because no appeal was made, this judgment is also final. Consequently, this element of res judicata is also met. The one issue that Paul may raise on this point is that if the time for appeal has not run in state court, he may argue that he could file a notice of appeal in state court. However, taking up this suit in federal court is improper because absent an appeal in state court, there has been a valid final judgment on the merits that the federal court should adhere to.

Are the same claims asserted in case #2 as were asserted in case #1? Under federal law there is a theory of merger whereby a plaintiff is deemed to have asserted all claims pertaining to a prior claim that arise from the same conduct, transaction, or occurrence. In this case, the facts indicate that Paul asserted the same causes of action and requested the same relief in the second case as in the first case. Consequently, this element is met. California follows the primary rights theory which gives the plaintiff a cause of action for each right that this invaded. However, in this case, because there is no indication that any of the causes of action are different than the ones in the first case, the result in California would not be different.

Conclusion – The court was correct to dismiss Paul's application for permanent injunction because the doctrine of claim preclusion (res judicata) precluded relitigating claims that had already been asserted in a prior case.

III. Ethical Violations of Lawyer in reporting Paul's communications to the 911 Dispatcher

Duty of Confidentiality – Under the ABA Model Rules, a lawyer has a duty of confidentiality to a client which precludes disclosing any information obtained during the representation. Under the California rules, while there is no express duty of confidentiality, a lawyer is required to keep his client's confidences and this is a strict duty.

In this case, Paul is going to argue that lawyer violated this duty when he revealed the information that he was told after the ruling to the 911 dispatcher. While he is correct that this raises an issue with regard to the duty of confidentiality, he may be incorrect that Paul has violated this duty because both the ABA Rules and the CA Code recognize that there are certain situations whereby the duty of confidentiality is overridden by other concerns.

Exceptions to the Duty of Confidentiality – Under the ABA Model Rules, a lawyer may reveal client confidences where he believes necessary to prevent reasonably certain death or serious bodily injury. The California Code has the same requirements but also requires that where reasonable a lawyer should first try to talk the client out of committing the act and then tell them that they will reveal confidences if they are not assured that the client will not commit the act. Under both the ABA and California rules, this type of disclosure of client confidences is permissive; it is not mandatory. Under the federal rules, there is also an exception to the duty of confidentiality where the client has used or is using the client's services to commit a crime or fraud which will result in substantial financial loss. California has no such exception, but this exception will not be applicable anyway because there is no indication that Paul will be using Lawyer's services if he acts against Diane or the dam.

Federal Rules – Under the federal rules, the main issue is whether Lawyer reasonably believed that his disclosure was necessary to prevent reasonably certain death or substantial bodily injury to Diane. If this is the case then he was entitled to reveal client confidences and will not have breached his duty of loyalty. The facts indicate that Paul

was infuriated with the ruling that the federal court had made in dismissing his claim and that he said “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam too.” The question is whether the belief that he was going to get Diane made it reasonable to believe that she was threatened with death or serious bodily injury. Based on the facts of this case, this may not be met here because Paul had just lost his case and was upset. People often say things when they are upset, but don’t necessarily act on them. Lawyer will argue that he tried to talk Paul out of hurting Diane and that he only reported the comments then. However, under these circumstances, it seems like this disclosure may have been unreasonable and violated Lawyer’s duty of confidentiality, particularly because such a disclosure is permissive.

California Code – In addition to the federal requirements discussed above, before revealing any client confidences based on a reasonable belief of a reasonable threat of death or substantial bodily injury, Lawyer was required to first try to talk Paul out of committing the violent act against Diane and inform client of his intention to reveal the confidential communications. In this case, the facts indicate that Lawyer did this by trying to dissuade Paul and telling him that she would report his threatening comments to criminal authorities. However, as discussed above, given all of the circumstances this disclosure may not have been reasonable.

Attorney/Client Privilege – Under the attorney-client privilege, a lawyer may not reveal information intended by the client to be confidential which is given in order to get legal advice. However, in both California and under the ABA Model Rules, there is an exception where disclosure of confidential information obtained during the course of the attorney-client privilege is permitted to prevent death or serious bodily injury. This analysis while similar to the analysis above and the question is whether the statements made by Paul were for the purpose of legal advice; it seems like he was just telling Lawyer what he was planning to do so. The statements may not even be covered by the Attorney/Client privilege. Furthermore, these statements may fall within the exception for threats of death or serious bodily injury if the threat that Paul made against Diane was credible.

Duty to uphold justice – Under their duty to uphold justice under both the ABA Model Rules and the California Code, a lawyer is permitted to disclose client confidences where necessary to prevent reasonably certain death or substantial bodily harm. Lawyer will argue that this is why the disclosure was made. However, if this disclosure was unreasonable, this duty will not protect Lawyer from breaching her duty of confidentiality and potentially the Attorney-Client privilege.

Conclusion – Lawyer may have violated her duty of confidentiality and the attorney-client privilege under both ABA Model Rules and the CA Code if it is found that the threat made by Paul against Diane was not a credible one and just made in the heat of the moment without any reasonable chance of actually carrying it through. However, in her defense, Lawyer may argue that she did not disclose the identity of who was on their way to hurt Diane because she just told the dispatcher that "someone was on the way." However, this will not be dispositive on this issue of whether she breached ethical duties.

Answer B to Question 5

1. Denial of Diane's neighbors' application for permanent injunction

Permanent injunction

A permanent injunction is a court order mandating a person to either perform or refrain from performing a specific act. A permanent injunction is granted after a full trial on the merits. In order to obtain a permanent injunction, a claimant must establish the following elements.

a. Inadequate legal remedy alternative

A claimant must first establish that any legal remedy alternative is inadequate. In this case, the neighbors will argue that a money damages remedy would be inadequate because it would necessitate the filing of multiple suits. The harm that Diane is inflicting by constructing the dam -- i.e., stopping the flow of the water to neighbors downstream who rely on the stream to irrigate their crops and fill their wells -- affects multiple parties and is ongoing, therefore giving rise to multiple suits. Moreover, the neighbors will argue that a money damages remedy would be inadequate because it would be difficult to assess damages. It may be difficult, for instance, to establish how much damages they will sustain as a result of not being able to irrigate their crops. It may also be difficult to determine how much it would cost to obtain such water from other sources. Finally, the dam may be the neighbors' only source of water, and, therefore, the award of any amount of money damages may be inadequate (i.e., the stream is unique). Therefore, the neighbors will likely satisfy this element.

b. Property right/protectable interest

Traditionally, permanent injunctions only protected property rights. However, the modern view holds that any protectable interest is sufficient. In this case, the neighbors likely have a property right in the stream to the extent that the stream flows through their respective properties. Even if they do not have a property right, however, they still have

a protectable interest stemming from their right to use water from a stream that runs through their property. Thus, this element is likely satisfied.

c. Feasibility of enforcement

There is usually no enforcement problem in the case of negative injunctions (i.e., court orders mandating that a person refrain from performing a specific act). Mandatory injunctions (i.e., court orders mandating that a person perform a specific act) present greater enforcement problems. For instance, a court may be unwilling to grant a mandatory injunction if: (a) the mandated act requires the application of taste, skill or judgment; (b) the injunction requires the defendant to perform a series of acts over a period of time; or (c) the injunction requires the performance of an out-of-state act.

In this case, the neighbors seek both a negative injunction (i.e., order requiring Diane to immediately stop construction of the dam) and mandatory injunction (i.e., order requiring Diane to remove the dam). There will be little enforcement problem in ordering Diane to immediately stop construction of the dam. There will likewise be little enforcement problem in ordering Diane to remove the dam since both Diane and the dam are within the court's territorial jurisdiction, and the injunction does not require Diane to perform an out-of-state act. Therefore, the neighbors will satisfy this element.

d. Balancing of hardships

The court will balance the hardship to the neighbors if a permanent injunction is not granted against the hardship to Diane if a permanent injunction is granted. Unless the hardship to Diane greatly outweighs the hardship to the neighbors, a court will likely not grant a permanent injunction. In this case, Diane will suffer little hardship if the permanent injunction is granted because the pond was intended to be used for a free summer day camp. Therefore, the only economic harm she will suffer as a result of this injunction is the money she has already expended in constructing the dam and any additional amount she will incur in removing the dam if the injunction is granted.

However, the neighbors will suffer substantial harm if the injunction is not granted and the dam is completed. They rely on the stream to irrigate their crops and to fill their wells and will likely suffer substantial damage if they either cannot obtain substitute water from another source or must pay significant amounts to obtain any substitute. Thus, the hardship to the neighbors if a permanent injunction is not granted greatly outweighs the hardship to Diane if a permanent injunction is granted, and a court is more likely to grant the injunction.

e. Defenses

Diane may raise the defense of laches and argue that the neighbors delayed in bringing the permanent injunction action, thereby prejudicing her. The laches period begins the moment the neighbors know that one of their rights is being infringed upon. In this case, the neighbors knew six months before they filed an application in state court for a permanent injunction that Diane was constructing a dam and that such construction infringed on their right to obtain water from the stream. By waiting these six months to bring suit, Diane incurred substantial construction expenses in building the dam that could have been avoided if the neighbors had brought the suit sooner.

Thus, Diane will likely be able to successfully assert this laches defense.

In the end, a court may still grant the neighbors the injunction and order Diane to remove the dam. However, the court may require the neighbors to compensate Diane for any construction expenses that could have been averted if the neighbors brought the suit sooner.

2. Denial of Paul's application for permanent injunction

Claim preclusion

Once a court renders a final judgment on the merits with respect to a particular cause of action, the plaintiff is barred by res judicata (i.e., claim preclusion) from trying that same cause of action in a later suit. I will examine each element of claim preclusion, in turn, below:

a. Final judgment on the merits

The court must have rendered a final judgment on the merits in the prior action. For federal court purposes, a judgment is final when rendered. For CA state court purposes, a judgment is not final until the conclusion of all possible appeals. In this case, Paul is filing his case in federal court. Since judgment was rendered by the state court in the prior action, the judgment is considered final.

A judgment is "on the merits" unless the basis for the decision rested on: (a) jurisdiction; (b) venue; or (c) indispensable parties. In this case, the state court's decision did not rest on any of these grounds. Therefore, the judgment was on the merits.

b. Same parties

The cause of action in the later suit must be brought by the same plaintiff against the same defendant. In this case, Paul was one of the plaintiffs in the prior state court case, and the suit is brought against Diane, who was the same defendant in that prior case. Therefore, this requirement is also met.

c. Same cause of action

The cause of action in the later suit must be the same cause of action asserted in the prior suit. In general, if causes of action arise from the same transaction or occurrence, a claimant must assert all such causes of action in the same suit. However, under CA's "primary rights doctrine," a claimant may separate the causes of action into separate suits so long as each suit involves a different primary right (e.g., personal injury vs. property damage).

In this case, Paul is asserting the same permanent injunction claim based on nuisance and taking grounds that he asserted in the prior state court action. He is also requesting the same relief as in the state court case. He is not asserting a different primary right, and, thus, the "primary rights doctrine" is inapplicable. Therefore, this requirement is likewise met.

d. Actually litigated or could have been litigated

The same cause of action must have either actually been litigated or could have been litigated in the prior action. This requirement is met because the permanent injunction cause of action based on nuisance and taking grounds was actually litigated in the prior action.

In the end, Paul will [be] barred by res judicata (i.e., claim preclusion) from trying the permanent injunction cause of action against Diane in federal court, and the court was correct in granting Diane's motion to dismiss.

3. **Lawyer's ethical violations**

Confidentiality

Under both ABA and California rules, a lawyer has a duty not to reveal any information related to the representation of a client. However, several exceptions may nonetheless permit a lawyer to reveal such confidential information. First, a lawyer can reveal confidential client communications if the client gives the lawyer informed consent to do so. In this case, Paul has not given Lawyer such informed consent, and, therefore, this exception does not apply. Second, a lawyer can reveal confidential client communications if he is impliedly authorized to do so in order to carry out the representation. Again, this exception does not apply here.

Third, under the ABA rules, a lawyer can disclose confidential client communications if he reasonably believes it is necessary to prevent a person's reasonably certain death or serious bodily injury. Under the CA rules, however, a lawyer can disclose such information only to prevent a criminal act that is likely to lead to death or serious bodily injury. The lawyer must first make a good faith effort to convince the client not to commit the criminal act and, if the client refuses, then the lawyer must inform the client of his intention to reveal the client's confidences.

In this case, Paul told Lawyer that he "will take care of Diane in my own way" after becoming infuriated with the court's ruling on his permanent injunction application. On the one hand, Paul's statement is too unclear and ambiguous to provide any indication of what specific harm he intended to inflict on Diane. On the other hand, Lawyer will argue that he reasonably believed that Paul intended to inflict serious bodily harm on Diane, as evidenced by his infuriation after the ruling. Lawyer was so convinced that Paul intended serious harm to Diane that he told the 911 dispatcher that Paul was "on his way to hurt Diane." In the end, a disciplining body would likely hold that Lawyer was reasonable in his belief that Paul intended to cause death or serious bodily injury to Diane and, therefore, his disclosure of Paul's confidential communications was permissible. The killing or injuring of a person also constitutes a criminal act, and since

Lawyer first made a good faith effort to dissuade Paul from committing any harm against Diane, Lawyer's revelation of this confidential information would also not subject Lawyer to discipline in CA.

Fourth, under the ABA rules only (i.e., CA has no equivalent rule), a lawyer may disclose confidential client communications to prevent a crime of fraud that is likely to produce substantial financial loss to a person, so long as the client was using the lawyer's services to perpetrate the crime or fraud. In this case, Paul threatened to "take care… of that dam." While this threat may result in substantial financial loss to Diane, the threatened act did not involve the use of Lawyer's services. Therefore, this exception does not apply. Nonetheless, as discussed above, Lawyer should escape discipline for his revelation of client's confidential communications under the "death or serious bodily injury" exception.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name "ABC Legal Services LLP" ("ABC LLP"). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of $1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at $500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.

3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Answer A to Question 2

Limited Liability Partnerships:

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State. Here, the ABC paperwork was not filed and the LLP was never registered. Without the proper paperwork, this venture is likely to be treated as a general partnership.

General Partnerships:

General Partnerships ("GP") are formed by two or more persons carrying on a business for profit. There are no filing requirements for forming a GP. GPs can be made up of general partners and limited partners. General partners have a duty to manage the business and can be held personally liable for partnership debts and/or obligations. Limited partners, however, are not liable for partnership debts and may lose their limited status if they engage in management. Absent any agreement each partner has an equal vote, profits are shared equally, and losses are shared as profits are.

A, B, and C are likely to be seen as general partners in a GP; thus they are entitled to an equal say in the management of the business and may be held personally liable for partnership debts.

Ethical Duties of Attorneys:

Attorneys owe a wide array of duties – to clients, the court, opposing counsel, and the public generally. The duties are established by ABA rules as well as state-specific rules. California's rules on ethical conduct of attorneys largely follows the ABA rules, but there are variances which will be noted if applicable below.

Duties to clients:

Attorneys owe clients the duties of confidentiality, loyalty, financial responsibility, and competence. Duties owed to the court and opposing counsel include the duties of

candor, fairness, and decorum. Attorneys must also ensure that all members of their firm, including staff, act in accordance with the ethical standards imposed. To the extent that one attorney has a conflict, such conflicts are imputed to the firm and are shared by all other attorneys unless the conflict arises from prior governmental work or a personal relationship with the opposing party's counsel, for example.

1. The disclosure of client information:

One of the most important duties owed to clients is the duty of confidentiality. This duty requires the attorney to act so as to not reveal any confidential information of the client – without consent, either express or implied. The facts do not indicate that any consent was given to the disclosure of this information in this case.

Here, the client information was revealed due to the use of an un secured wireless network which the firm used. Although the facts indicate that the attorneys were not aware of the use of the adjacent building's wireless network, we do know that they were surprised by the cost savings. If the attorneys were aware of unexpected savings, they should have spoken with Jack to determine why internet access was so much cheaper than expected. Because they did not so inquire, and consequently were unaware of the issue, Jack acted unethically by using another network for free. A, B, and C all had a duty to ensure that Jack's actions were proper and ethical.

Because ABC is likely to be deemed a GP, all general partners may be held liable for the debts of the firm. These debts can include the economic losses incurred from the disclosure of information and/or debts incurred if the client sues the firm for malpractice.

2. David's liability for malpractice:

Here the issue will be whether David is a partner of the firm or merely a lessee of an office. A, B, and C will argue that D was merely renting space from the firm, making him not a partner, and therefore not subjecting the firm to any liability for his actions. We do not have facts to indicate whether David ran his business under a separate name, kept his files in a separate room, used the same office staff, or contributed any money to the partnership. The first three factors would indicate a separate firm, while the final factor – buying into the partnership – would indicate that D had become a partner of ABC.

What we know is that David paid monthly rent. Absent other facts, paying rent indicates the D was likely a separate practitioner. If D was acting as a separate practitioner, the ABC firm partners would not be liable for this malpractice.

However, if there were facts to indicate the D was a partner of the firm, or that the malpractice occurred with regard to a firm client, the firm general partners may be liable for D's malpractice. In a LLP, as intended, partners are all liable only for their own malpractice, but in a GP, the general partners can be held liable for all partnership obligations. In a GP incoming partners are not liable for existing partnership debts, through the money they contribute can be used to pay off such debts. Outgoing partners of a partnership are liable for debts of the partnership until creditors have been given notice of their departure or 90 days have passed since their departure.

D's malpractice occurred shortly after he took up office space with ABC. If he were deemed to be a partner, and the malpractice occurred after joining the partnership, ABC general partners would be liable for partnership debts arising out of his malpractice.

3. Professional conduct:

The attorneys of ABC have violated a number of rules of professional conduct.

a. Management of Staff:

The attorneys have a duty to properly manage staff and ensure that all members of the firm are in compliance with the rules of conduct. Here, A gave partnership documents to an assistant for filing. While staff members of a firm frequently are in charge of filing court documents or making deliveries, it was likely imprudent to allow such an important document to be handled by an assistant. Because of the assistant's negligence the firm likely lost its privileges as an LLP. Attorneys cannot allow the unauthorized practice of law by non-attorneys. Here the documents likely did not need to be filed by an attorney, but the task was nonetheless important enough that it should have been done by a partner so as to ensure accuracy.

The attorneys were prudent in hiring Jack as a computer services manager as he was properly qualified with a degree in computer science. The use of non-attorneys does

not violate any ethical rules so long as fee sharing does not occur (payment of non-attorney salaries is not considered fee sharing.) The attorneys likely violated their ethical duties in their management of Jack, however. By not managing Jack properly and being unaware of Jack's use of an unsecured wireless network, A, B, and C breached not only their duties as managers, but also their duty of confidentiality to their client.

b. Duties to clients:

Attorneys owe their clients the duty of confidentiality – the duty to not reveal any confidential information without consent. Information may be revealed where necessary to defend oneself against a claim of malpractice or potentially if the attorney knows of conduct which will result in death or serious bodily harm which can be prevented through disclosure. The CA rules indicate that the conduct must be criminal; however the ABA makes no such distinction. Here, the requisite facts for proper revelation of client information do not appear. ABC breached its duty of confidentiality to its client by allowing the transmission of client information to a third party.

Attorneys also owe clients the duty of loyalty, which prevents attorneys from taking on representation or taking actions which are in conflict with current clients. Attorneys must always act in the best interests of their clients and with their interests at heart. It is unclear to whom the confidential information was revealed, but the ABC firm may have breached their duties of loyalty as well if the use of the network resulted in revelation of information to an adverse party.

Financial responsibility imposes on an attorney the duty to properly manage client funds and avoid commingling personal money. There are no facts indicting a breach of this duty by ABC.

The duty of competence requires that attorneys provide clients with professional, skilled, competent services. Here, by use of an unknown wireless server which allowed for the disclosure of confidential information, the attorneys of ABC have acted competently. A competent attorney would have ensured that information was not revealed, and would have properly managed all staff members.

Answer B to Question 2

Liability for Loss Due to disclosure of confidential information:

A partnership is an association of persons to carry on a business as coowners for profit. The partners are jointly and severally liable for the debts of the partnership, both in contract and in tort. A limited liability partnership is a partnership that registers as an LLP with the Secretary of State. As an LLP, the partners are liable for their own torts incurred in furtherance of the partnership but not for the torts of the other partners or the partnership.

Filing the documents to register the partnership as an LLP is a prerequisite to attaining limited liability status. By not doing so the partnership retains the status of a general partnership and, therefore the partners would be personally liable for all liabilities of the partnership to the extent the debt was not satisfied by the partnership.

They could argue they intended to be an LLP and treated themselves as such, so they should be deemed to be a "de facto LLP." However, this argument is likely to fail because filing is such a simple act and the "de facto" argument has been applied in the corporation, not the partnership contract. Also, an LLP by estoppel argument would fail because there are no facts to indicate Abel's client thought he was dealing with an LLP, and, even if he did believe that, this defense would not apply to a loss caused by a tort – i.e., negligence.

As partners A, B, and C are liable for failing to properly supervise Jack. Jack was their employee. His tapping into a wireless network directly caused the disclosure of client information. As his employee A, B, and C Legal Services is vicariously liable for the torts of their employee. Here Jack committed the intentional tort of conversion, the intentional taking of the personal property of another. He did this while working for the ABC LLP and with the intent of furthering their business. Therefore, even though the tort was intentional, ABC LLP is liable. Further they could be found liable for negligently hiring an inexperienced computer person and then failing to adequately supervise him. See the discussion of their failure to supervise and prevent breach of confidentiality

rules infra. Violating the rules does not show a personal liability but is evidence they breached their standard of care. Since ABC LLP is liable, the partners are jointly and severally liable for reasons discussed above.

David's Malpractice

A partnership is defined above. In order to prove the existence of a partnership, the primary element is whether the parties intend to share profits. Other indications are whether they share in losses and share in the management of the enterprise.

In this case David leased an office for a monthly rent that included 10% of his billings. While that relates to David's profits, it does not represent a sharing of profits because the amount is received as rent under a landlord-tenant relationship. Moreover, there is no indication of any sharing of losses or management responsibilities. There is no partnership between David and A, B, or C. Likewise, there is no indication that David otherwise held himself out as a partner of A, B, and C. One can be deemed to be a partner if he is deemed to have apparent authority by being held out as a partner. Since that is not the case here, ABC LLP is not liable for David's malpractice, and therefore ABC or its partners are not liable.

Breach of Rules of Professional Conduct

Lawyers have a duty to preserve the confidentiality of confidential client information. It may only be disclosed if expressly or impliedly authorized by client or permitted by the rules of professional conduct. None of the exceptions are relevant here, such as to present a crime involving death or serious bodily harm, serious economic loss (ABA rules only) or in response to a court order or order of the ethics committee.

Partners in a law firm have an obligation to put in place procedures to assure compliance with the rules of professional conduct.

They also have a responsibility to take any action to prevent or mitigate violation of the rules if they are able to do so.

Here ABC did not adequately supervise Jack or have any procedures in place to prevent violations of the confidentiality rule, resulting in a breach of the confidentiality rules. They breached the rules and may be disciplined accordingly.

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ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
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Question 2

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

What ethical violations, if any, has Anne committed? Discuss.

Answer A to Question 2

Anne's Ethical Violations

Duty of Loyalty

An attorney must not represent a client when there is a concurrent conflict of interest. A concurrent conflict occurs when the interests of one client are directly adverse to those of another or the representation of one client will be materially limited because of the interests of the attorney, a third party, another client or a former client. An attorney can nevertheless take on representation if she reasonably believes that she can competently and diligently represent the interests of all effected clients, discloses the conflict and gets informed written consent from the clients. The CA rules do not apply the "reasonably believes standard" and require written disclosure in situations where the conflict involves a former client.

Potential Conflict

Here, Anne is the longtime tax attorney of Owner (O). She agrees to represent O, Fred (F) and Hap (H) is a case where they are each being required by the County to clean up a hazardous substance spill. Anne has agreed to represent them as her joint clients against County. The County has made it clear that if each party does not pay his share, County will impose joint and several liability one each of them. This means that County can recover the full amount of the costs from either of them. Here, O is wealthier than F and H. We are not aware how wealthy F and H are. Due to County's decision to pursue joint and several liability in case each person does not pay, there is a potential conflict of interest. If either of the parties turns out to be insolvent or does not pay his share, the others are exposed to liability for the full amount, which likely will be a lot. Also, each party has been notified of his culpability. It might be that the parties each have an argument for why they are not at fault and for why another party is more at fault. For example, F is the former owner of the site and may want to argue that he does not have any responsibility for the spill. H produces the hazardous material that is dumped on the site. Thus, H might argue that he is not responsible for the release because O as the owner of the site has responsibility to prevent a release.

Thus, Anne must have realized that there was a potential conflict of interest between the parties and [it] must [be] determined whether she reasonably believed she could effectively represent O, F and H as her joint clients. Here, Anne might reasonably believe that she can do so because their interests are all aligned against County. However, because of each party's different involvement and responsibility for the spill, as well as the County's decision to pursue its claims under the theory of joint and several liability in case one party does not pay, Anne should have realized that she could not make arguments on behalf of each client without taking a position adverse to the others. However, if she reasonably believed that the conflict was consentable, she should have disclosed the conflict [to] the parties, preferably in writing, and received their informed written consent to proceed. Anne must have been careful not to disclose any confidential information about O and his finances since Anne had such information as O's tax attorney. If she could fully disclose the conflict without revealing O's confidential information, and the clients each gave their informed, written consent, then Anne could have proceeded to represent all three of them. However, the conflict would be unconsentable if Anne did not believe she could effectively represent them all. For the reasons discussed above, Anne might have believed that this conflict was not consentable and thus could not have advised the clients to consent.

Also, there is a potential conflict stemming from the fact that O is Anne's former client. [Anne] must not take on representation of a client in a matter that is the same as or substantially related to a matter in which she represented a former client if the former client's confidential information might be relevant. Furthermore, Anne cannot use any confidential information against O in this matter without O's consent. Since O has arranged for Anne to represent O, H and F, O has consented to the representation. However, Anne must be careful not to reveal any confidential information about O without O's consent during the course of her representation.

The fact that O is Anne's current client creates a conflict. Anne may feel a greater sense of loyalty to O to protect his interests because O is already her client and she likely wants to keep O as her client in her tax practice. Thus, Anne might not be able to effectively and fairly represent the interests of F and H. She must also disclose this conflict to F and H and only proceed if it is reasonable to do so and F and H provide

their informed consent. Given that this lawsuit is not related to Anne's tax practice, Anne might reasonably believe that she can fairly represent the clients' interests as joint clients, especially because they are all defending against County. However, given her loyalty to O, perhaps this conflict is also not consentable. It would be useful to know just how long O has been Anne's client. In any case, if the additional facts make it such that a reasonable attorney would not advise F and H to consent to Anne representing all three clients, the consent of F and H will not be effective.

Actual Conflict

An actual conflict can develop in the course of representation. If it does, Anne must revisit the process discussed above, disclose the conflict and only proceed if she has written, informed consent from the parties to proceed. If Anne proceeded with the representation despite the conflicts discussed above, she must be aware of any actual conflicts that might arise. For example, if any of the three parties decides to argue in his own defense that culpability lies with another one of the parties, Anne must realize that continuing with representation is no longer reasonable. At that point, she must disclose the conflict (subject to any limitations due to her duty of confidentiality) and advise the clients to seek independent counsel. Depending on how much confidential information she has at that point, she may be able to continue representing one of them. In this case, that party would likely be O because she already has confidential information about O due [to] previously representing O for tax purposes. However, if she learns confidential information from the parties and an actual conflict arises, she may have to withdraw completely and advise each of them to seek independent counsel in this matter.

Duty of Competence

A lawyer has a duty to competently represent her clients. She must use the skill, knowledge, thoroughness and preparation reasonably necessary for effective representation. Here, we are told that Anne is a longtime tax attorney. The case she is hired to work on involves a major release of hazardous substances from a waste disposal site and cleanup required by County. As a longtime tax attorney, she likely does not have much experience in this particular area of the law. The case relates to matters outside of the scope of a tax attorney's area of practice. However, Anne may

take on representation if she can become competent in the areas of the case by researching and preparing herself in the pertinent field. If she can do so without causing any harm to the clients or causing an undue delay, she may represent them in the matter. Also, she can associate with another attorney who has more experience in the specific area. If Anne takes these measures to prepare herself or associate with another competent attorney, she will not have violated this duty. However, if she proceeds to represent the clients in this matter without becoming competent in this particular area, she will have breached her duty of competence.

Duty of Confidentiality

Under the ABA, an attorney has a duty not to disclose confidential information related to the representation of that client. It does not matter from whom or how the information was acquired. In CA, this duty of confidentiality is recognized in the attorney's oath. There are exceptions for disclosing confidential information: 1) express consent, 2) implied consent, 3) disclosure ordered by court, 4) disclosure to prevent a crime or fraud likely to result in substantial financial loss when the attorney's services have been used to commit the crime or fraud, and 5) disclosure if the attorney reasonably believes it's necessary to prevent certain death or substantial bodily injury. CA does not recognize the exception for crimes and fraud and limits the disclosure to prevent death or bodily injury to situations where the act to be prevented is a crime.

During the course of representation, Anne must take care not to disclose the confidential information from one client to another without their consent, unless one of the other exceptions discussed above applies. Also, if Anne discovers an actual conflict of interest during the course of representation, she must take care to protect such confidences when making any disclosures related to resolving the conflict of interests. If Anne does not properly protect the confidential information from her clients, she will have breached this duty.

Attorney-client privilege

This privilege is an exclusionary rule of evidence. The plaintiff can refuse to testify and prevent his attorney from testifying as to confidential communications between them and their agents during the course of representation. The communications must have

been intended by the client to have been confidential and must have been made for the purpose of legal services. Under the ABA, this privilege lasts even after the client dies. Under the CA rules, the privilege ends when the client's estate is finalized after his death. There are exceptions to this privilege; the attorney may testify 1) to prevent a future crime or fraud when the client has used the attorney's services to commit the crime or fraud, 2) when there is litigation related to a breach of duties between the client and attorney and 3) when joint clients are later involved in civil litigation. CA also allows disclosure to prevent a crime that is likely to result in death or substantial bodily injury. The client holds this privilege and may waive it.

Under this privilege, Anne may not testify as to confidential communications between herself and the three clients unless the clients waive it. If the crime/fraud exception applies or the CA exception for death or bodily injury applies, then Anne can testify as to the confidential communications. Also, if the joint clients are later involved in civil litigation against one another, the clients will not be able to assert this privilege. Anne should make it clear to O, H and F that she may have to testify against them if they are later involved as adversaries in a civil case.

Fiduciary Duties of Attorney

Under the ABA, fees must be reasonable under the CA rules, fees must not be unconscionable. Thus, Anne must make sure that her fees meet these standards based on the amount of time and skill she will use and the level of difficulty in the case. Also, under CA rules, a fee arrangement must be in writing if it is for over $1000 unless the client waives the right to get a writing, there is an emergency, the attorney is performing routine services for an existing client, or the client is a corporation. Thus, the fee arrangement must be in writing to meet the CA requirements if it is for more than $1000 and the clients do not waive their right to a writing.

Receiving Payment from One Person for Representing Another

An attorney may receive payment from one person to represent another so long as 1) the client being represented is aware of this arrangement and provides written, informed consent, 2) the attorney's judgment and the effectiveness of representation will not be affected because of the interests of the person paying for the services, and 3) the

client's confidential information is protected. Here, O is the wealthiest of O, H and F. O offers to pay the attorney's fees for all three of them. Thus, F and H must be made aware of the arrangement. Also, Anne must ensure that her representation of H and F is not affected by the fact that O is paying for her fees. Because O is also a client in the case, the fact that he is paying the fees might interfere with Anne's judgment. Anne might feel a greater sense of loyalty and duty to O not only because O is her current client but also because O is paying for her fees. Thus, she might choose to pursue O's interests at the expense of the others. Thus, Anne may violate her duties of loyalty to F and H if she lets the fact that O is paying her fees influence her judgment. Also, as discussed above, Anne must protect the confidential information of all three clients. If she fails to, she will have violated this ethical duty.

Anne should have disclosed this conflict when she disclosed potential conflicts to all three clients and obtained their informed, written consent. F and H must have been made aware of this situation before agreeing to be represented by Anne and accepting O's offer for O to pay the attorney's fees. If Anne failed to inform the clients when they agreed to the joint representation, Anne has violated her duty to loyalty.

Duty to Communicate – Settlement

Anne also has a duty to communicate to her clients all material developments in the case and to keep them informed. Thus, Anne must communicate material information to all three clients and not rely on one of them to communicate it to the others. If she does [not] she will be found to have violated this duty.

The client has the power to decide whether to settle. Here, if there is a settlement offer by the County or any resolution that affects all three clients, Anne must communicate it to each of them individually, make sure that they understand it and only proceed with their consent. Anne cannot rely on the consent of only one client to proceed. Furthermore, she must clearly explain the terms of any settlement to each client and how it affects each of them.

Answer B to Question 2

Duty of Competence

A lawyer has a duty to the clients to provide competent representation. Competence is defined as the still, thoroughness, and preparation reasonably needed to provide adequate representation in a case. Whether an attorney is competent is dependent on the complexity of the case, the availability of other lawyers in the region to take the case, the circumstances the case was brought to the attorney, the ability of the attorney to research and become acquainted with the case without undue expense to the clients, and the ability of the attorney to consult with local counsel. Here, Anne may have violated this duty. The nature of this case is a complex environmental case arising under state and federal law, CERCLA liability. However, the facts state that Anne's area of expertise is tax. Environmental law requires significant technical training and experience and knowledge of the federal statutes and state statutes. There is no evidence Anne has practiced in this area in the past. Further, there is no evidence that other attorneys in the region are not competent to practice in this area of law. Further, there is no evidence to establish that Anne has attempted to consult with a local expert on environmental law in order to provide competent representation to the clients. Finally, no evidence establishes that Anne has done any research to become familiar with this area of the law. Therefore, under the circumstances she has probably violated her duty of competence by taking a case in an area of the law in which she is extremely unfamiliar.

Conflicts of Interest

Both the ABA and California Model Rules limit an attorney's representation of clients with conflicting interests. Under the ABA rules, an attorney may not represent a client if representation would be directly adverse to a client or there is a significant risk his representation of one client would be materially impaired by his duty to himself or another client, unless the attorney reasonably believes he can provide competent and diligent representation, does not involve a claim by one client against another in the same case, and is not prohibited by law. Under the ABA rules, an attorney only needs to get informed consent in a situation where an actual conflict exists. Anne may argue

that under the ABA rules no informed consent was necessary here because all the parties had the interest in avoiding liability from the county and therefore all of the interests were aligned at the time. Further, she will argue that this offense is a strict liability offense so none of the parties can absolve liability by placing the blame on another party.

However, it may be argued that the parties did have conflicting positions. As parties who were to be jointly and severally liable and had the right of contribution under the act, all parties wanted to shift the blame to the other party and recover from the prior landowners. Generally, environmental statutes allow the nonactive party to seek contribution from the active party; here Hap is the active party. Therefore because each side is trying to place the blame on the other party, it is likely that there is a current conflict of interest. If there is a current conflict of interest, the attorney must reasonably believe she can provide diligent and competent representation to all clients and must give full informed consent, confirmed in writing. The ABA suggests that an attorney notify the clients on the risks of the duty of loyalty, confidentiality, and the lack of privilege if a suit were to arise between the clients. There are two problems here. First it would be tough to argue that Anne reasonably believed she can provide competent and diligent representation to all clients. Given that all the clients are attempting to push liability on each other and will want to recover contribution from each other in the case, it is likely that a reasonable attorney would not believe that they would be able to provide competent and diligent representation. This is not simply a case where the parties are trying to avoid liability, but it also involves relative contribution if the county is to recover from one client. Further, given her continuing business with Owen, it would be tough for her to argue she could provide equal representation to F and H.

Under the ABA, it will also be unconscionable to receive this consent if Anne's duty of confidentiality to Owen prevents her from making a full disclosure of the potential conflicts of interest to the parties. There is no evidence that her duty to Owen will prevent her from fully disclosing the risks and circumstances of joint rep to the other clients because she represented Owen on a totally unrelated matter and the details of that matter are not necessary for full informed consent of the clients.

Further, Anne failed to get the informed consent of any of the clients confirmed in writing. She only distributed retainer agreements but did get the informed consent of any of the clients in a case of actual conflict between the clients. Therefore she has violated her duty for concurrent conflicts of interest under the ABA rules.

She also violated this duty under the California rules. California has similar requirements but extends the conflicts to potential conflicts as well as actual conflicts, requires disclosure of the risks of the conflicts, and the attorney only needs to believe in good faith that she can provide competent representation, not the reasonable attorney standard adopted under the ABA rules. Anne may be able to argue that she honestly believed that she could provide competent and diligent representation to all the clients and may be able to prevail here, which she would not under the ABA rules, which require an attorney's reasonable belief. However, under the CA rules, Anne failed to give full disclosure to the clients of the risks provided by joint representation and failed to get their written consent to these conflicts. Therefore Anne violated the ethical rules relating to joint representation under CA law also.

Therefore, Anne should withdraw from representing all three because she has received confidential information from H and F.

Fee Payor Interests

Anne violated her duties under both the California and ABA authorities by having Owen pay the fees for all three defendants. Under the ABA rules, an attorney may not have a party pay all of the fees for a group of clients unless the attorney reasonably believes it will not interfere with her professional judgment, confidential communications will not be shared with the party, and the nonpaying clients give informed consent. California has similar requirements but also requires that the informed consent be in writing. Here, Anne may run into a few problems. First, it may be argued that by having one of the joint clients paying the interest of all three clients in a joint liability context may interfere with her professional judgment. However, in offering to pay the fees Owen did not require that Anne exercise her judgment in a certain way or proceed in a certain way under the case. Therefore, the payment probably did not interfere with her professional judgment. Next, the payment probably did not interfere with the duty of confidentiality

to the other clients because the fee payor, Owen, did not request that confidential information be given to the other clients. Under the ABA rules, H and F need to give informed consent. There is no evidence of this. Although they both knew that Owen was paying, Anne never disclosed to them the risks of the fee payor interest. For that reason, informed consent was never given. In addition, under California law, informed consent must be given by F and H in writing. Since informed consent, even orally, was never given, Anne violated her duties under the ABA and California authorities.

Duty of Confidentiality

As a past attorney for Owen, Anne has a duty to Owen not to reveal information learned in the course of her past representations of Owen without the consent of Owen, where consent is implicitly given, or where another exception exists. Here, there is no evidence that Anne has revealed any information learned in the course of her past representations of Owen on tax matters. Further, it is unlikely she even came across this information. Therefore a violation of her duty of confidentiality has [not] been violated in this instance, unless she revealed this information. There is no evidence here that she had revealed any of this information but she needs to be sure she does not reveal any of this without the informed consent of Owen.

Further, Anne has a duty of confidentiality to all current clients, Owen, F, and H. In representation she may not reveal information learned in the representation of the other clients unless the clients give informed consent confirmed in writing or an exception exists. Before revealing any information and before jointly representing the clients, Anne should have the clients waive their right for the information to be kept confidential. If this is not done either before rep or during rep, she will probably be forced to withdraw because her duty of loyalty to the other clients requires her to do so.

Duty to Keep Reasonably Informed

Anne [as an] attorney has a duty to keep all clients reasonably informed as to the status of their litigation. Here, this may conflict with Anne's duty of confidentiality to the other clients. If Anne learns of a matter central to her representation of the group, her duty of loyalty to a certain client may conflict with the duty to keep the other clients reasonably informed. As stated above, Anne should inform the clients ahead of time of this duty

and require them to waive their duty of confidentiality so she can fulfill her duty to keep all clients reasonably informed. If a client refuses to waive the duty of confidentiality, she should withdraw from representing all clients.

Duty Not to Use Information of past Clients to Disadvantage

Similar to the duty of confidentiality, an attorney may not use any information to the disadvantage of past clients unless the information is public or the client has given informed consent confirmed in writing. Here, Anne should be sure not to use any information learned in the representation of Owen to the disadvantage of Owen, even if the information is not itself revealed. This is particularly tough situation for Anne if she does come across a situation where some information used in the past representations may be used to the disadvantage of Owen; she will need to be sure not to reveal this information or get Owen's informed consent.

Fee Agreement

The ABA rules do not require a noncontingent fee arrangement to be in writing, although they highly suggest doing so. Further, the ABA rules require the attorney to notify the client within a reasonable time of representation of the fee arrangement.

The California rules that all fee arrangements, including noncontingent fee arrangements, be in writing, unless the services are for less than $1,000, it is a corporate client, the client has received the services in the past, or it is otherwise impracticable to do so. Here, none of the exceptions are met, unless Anne plans on charging less than 1k. Further, the payor, Owen, is an individual, not a corporation. She should give a written disclosure of this arrangement.

Duty of Loyalty

Anne has a duty of loyalty to all clients, which includes the duty to put the interests of your client before all others. In a joint rep situation this is tough to do, but it is required that all clients get treated fairly. Here, Owen is a past client of Anne and Anne hopes for future representation of Owen on his tax matters. Therefore, it will be tough for her to treat all clients equally. She should withdraw from rep for this reason.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Bob owns 51 percent of the shares of Corp., a California corporation. Cate owns 30 percent. Others own the remaining shares.

Bob and Cate have entered into a shareholder agreement stating they would vote their shares together on all matters, and that, if they fail to agree, Dave will arbitrate their dispute and Dave's decision will be binding. Bob and Cate also executed perpetual irrevocable proxies granting Dave the power to vote their shares in accordance with the terms of the shareholder agreement. Attorney Al handled Corp.'s incorporation and drafted the shareholder agreement and the proxies.

Bob and Cate have been able to elect the entire board of directors every year. The board currently consists of Bob, Cate, and Bob's wife, Wanda. Bob and Wanda decided, as directors, to sell substantially all of Corp.'s assets to Bob's sister, Sally. Cate thinks the price is too low. Bob claims he no longer regards their shareholder agreement as binding. He has gone to Al for advice in the matter, and Al has agreed to provide it.

At the shareholders' meeting at which the matter is to be put to a vote, Bob announces he is voting his shares in favor of the sale. Dave says that since Bob and Cate disagree, he is voting the shares against the sale.

1. Is the shareholder agreement between Bob and Cate enforceable? Discuss.

2. Are the perpetual proxies executed by Bob and Cate enforceable? Discuss.

3. Would any sale of Corp.'s assets to Sally be voidable? Discuss.

4. What ethical violations, if any, has Al committed? Discuss. Answer according to California and ABA authorities.

Answer A to Question 5

1. Shareholder agreement between Bob (B) and Cate (C)

A shareholder's agreement is an agreement whereby shareholders agree to combine their votes for voting matters related to their rights as shareholders. The agreement is less formal than a voting trust and requires simply that the shareholders agree to the course of action. Where a voting trust is required to notify the Secretary of the Corp. the shareholder agreement need not be recorded by the Secretary. In addition, where a voting trust is only good for 10 years, a shareholder agreement has no durational requirement.

In this case, B and C have entered into a shareholder agreement stating they would vote their shares in agreement or else submit to Dave to arbitrate any disputes. Dave's decision would be binding. While B and C have entered into a valid shareholder agreement, as they can agree to arbitration to settle disputes, it is necessary to look at Dave in this instance.

It is not clear what, if any, relation Dave has to the corporation. If Dave is familiar with the corporation, then there would be no issues with him arbitrating disputes. If he is a true "outsider" he may not have the knowledge and ability to make the informed decisions in the corp's best interest. In this case, B and C would violate their fiduciary duties to the corp. and the agreement would be ineffective.

2. Perpetual Proxies

A proxy is an agreement between shareholders to have one vote on their behalf. The corp. must be notified and a proxy is valid for 11 months, unless otherwise agreed. An irrevocable proxy requires that the proxy be labeled irrevocable and must be coupled with an interest.

In this case, the proxies are perpetual and irrevocable. As stated above, an irrevocable proxy must be labeled such and be coupled with an interest. It is not clear here what, if any, interest Dave received as part of the proxy agreement, or if the proxies were

labeled irrevocable. If neither requirement was met, the irrevocable proxies would be unenforceable.

If both conditions were satisfied, it would be necessary to determine if the corp. was notified. In addition, proxies typically last for only 11 months. Because the facts state this is perpetual, it is likely that the courts would find this unenforceable.

3. Sale of Corp. Assets

Directors have a duty to manage a corporation. Directors also have fiduciary duties of Care and Loyalty in managing the corporation. Directors may be insulated from violating the duty of care by the Business Judgment Rule.

Duty of Care

Directors have a duty to manage a corporation as a reasonably prudent person would in handling his/her own affairs. Directors must act in the best interest of the corporation.

Here, it is not clear from the facts if Bob and Wanda, as directors, are acting in good faith as reasonably prudent persons would in their own affairs.

Business Judgment Rule

Directors are protected from liability under the Business Judgment Rule when they act in the corp.'s best interest and make a reasonable, innocent mistake.

Here, because it is not clear if Bob and Wanda acted in good faith, it is not possible to determine if this is a simple mistake.

Duty of Loyalty

A director has a duty of loyalty to his corporation, which means that without full disclosure and independent ratification, a director cannot engage in a self-dealing transaction or usurp a corporate opportunity.

In this case, Bob and Wanda, as directors, have voted to sell substantially all assets to Sally, who is Bob's sister. A self-dealing transaction is one that benefits the director or his family members. In order for the transaction to be valid, there must be independent ratification, as defined above. It would be impossible to obtain independent ratification as 2 out of the 3 Directors will not be independent. Both Bob and Wanda, Bob's wife, stand to benefit from the self-dealing transaction, and it does not appear that there was full disclosure, so independent ratification is impossible.

Controlling Shareholders

Controlling shareholders have fiduciary duties to other shareholders in a corporation. As defined above, the controlling shareholder has a duty of loyalty and care as fiduciary duties.

As described above, Bob will have violated his fiduciary duty of loyalty to the corp. by engaging in a self-dealing transaction. In addition, courts have held controlling shareholders liable for looting a corporation in the event the corp. is substantially sold to a 3rd party and that party loots the company. It is not clear here what Sally will do.

Fundamental Change

A corporation must hold a special meeting when a fundamental change is proposed for that corporation. A fundamental change would include selling substantially all assets to another corporation. Therefore, the corporation would be required to have a special meeting.

A special meeting requires that a special notice be mailed to shareholders. This notice must include the reason for the special meeting, date and time, and place. It is important because no other business can be discussed at a special meeting that was not included in the notice. In addition, holding the meeting is important because it gives rise to appraisal and dissenter rights whereby the corporation would be required to repurchase a dissenter's shares.

Because Bob violated his fiduciary duties as a director and controlling shareholder, and because the corp. was undergoing a fundamental change without a properly scheduled special meeting, any sale to Sally would be voidable.

4. Ethical Violations

A. Duty of Loyalty

Al owes a duty of loyalty to the corporation. Al has drafted the incorporation of the corp. and has drafted agreements on behalf of the corporation. Therefore, Al's client is the corporation.

Al has a potential conflict in that he represented the corporation and then drafted the shareholder agreement and proxy on behalf of 2 shareholders. This is permissible under ABA rules and CA rules whereby an attorney can represent multiple parties if he reasonably believes that he can provide necessary legal services without impact. The attorney must also get this consent in writing.

Al has another potential conflict by representing Bob at a later time. As stated above, an attorney can represent multiple parties if he reasonably believes that representation of both will not impact either party. He must get consent in writing. Al would have violated his duty of loyalty if he did not get consent in writing.

This potential conflict would become an actual conflict when Bob has gone to Al for advice and Al agreed to provide it. Al previously represented Bob and Cate in drafting a shareholder agreement and proxies. CA Rules of Ethics strictly prohibits an attorney from representing a client when that client is being represented by the same attorney. Only when the matter ends can the attorney represent another client whose interest is adverse to a current client.

Al will have violated his duty of loyalty.

Duty of Confidentiality

An attorney has a duty to keep all communications with a client confidential. When an attorney represents 2 parties, and one party then approaches the attorney for representation on a similar matter, the attorney will not be able to represent the client because he has confidential information from both clients.

Here, Al arguably represents both parties, as he has drafted a shareholder agreement and proxy for both Bob and Cate. Al should advise both parties to obtain separate Legal Counsel instead of continuing to represent them, as by doing so, he may disclose confidential information received by Cate in representing Bob.

Duty of Competence

An attorney should have the skill and training to be able to competently represent a client. If not the attorney should be able to receive such training in a reasonable time.

In this case, as described above, it is not clear if the proxies were drafted correctly; therefore Al may have breached his duty of competence.

Answer B to Question 5

SHAREHOLDER AGREEMENT

Shareholder agreements in which shareholders agree to vote their shares together are valid, although historically they were not permitted and voting trusts were required. They must be in writing and signed by both parties. Shareholder agreements are governed by regular contract principles, and are not revocable unless as a contract they would be revocable. A valid contract requires mutual assent and consideration. Bilateral contracts are contracts in which the parties exchange promises, and the promises can constitute consideration for the contract.

In this case, the shareholder agreement appears to be in writing, and signed by the parties. It was prepared by an attorney, Al, and so presumably has been validly drafted. In this case, the shareholder agreement is a mutual agreement for Bob and Cate to vote stocks together. It appears that there has been valid mutual assent to the contract, including offer and acceptance. Because the parties have exchanged promises to vote together, it is a bilateral contract. As a result, the contract is supported by consideration based on the exchange of mutual promises to vote together or have disputes decided by arbitration. Thus, Bob would be unable to revoke the shareholder agreement at will, and Cate could sue for damages or for specific enforcement of the agreement.

PERPETUAL PROXIES

PROXY GENERALLY - A proxy agreement must be in (1) writing, (2) signed by the party whose shares are affected, (3) addressed and delivered to the corporation's secretary, (4) clearly state they are delegating the authority to vote.

In this case, it appears that the requirements for a valid proxy agreement have been met. The agreement appears to be in writing, the problem notes it was executed so presumably is signed, it clearly states the procedures for the proxy, indicating that the

shares will be voted in line with the shareholder agreement. Although the facts do not indicate whether the proxy was filed with the corporation, because Al the attorney assisted, presumably the requirement was met.

IRREVOCABLE PROXY - A proxy is normally for a duration of 11 months, and will be revocable at will. To be irrevocable, a proxy must be (1) supported by an interest and (2) clearly state it is irrevocable.

In this case, it appears that the proxy agreement did state that it was irrevocable, and thus the agreement has met the second requirement. However, there is no indication that the agreement was supported by any interest. Normally, the interest must be some exchange for value or, for example, a situation where the record date holder sells his shares to the owner and executes a proxy, and thus the new owner's purchase creates an interest. In this case, there is no interest to support the agreement. Cate may argue that the exchange of promises provides consideration for the proxy in the form of the mutual promises, as was the case for the shareholder agreement, and therefore that the mutual promise is a sufficient interest to meet the element and make the proxy irrevocable. However, the exchange of promises is not a sufficient interest to support a proxy as being irrevocable because the promisor has no interest in the shares to which she is making a promise, and therefore this element has not been met. As a result, Bob is free to revoke the proxy agreement at will.

While the proxy agreement would be revocable because it is not supported by an interest, the shareholder voting agreement would not be. As a result, Cate could sue Bob to enforce the agreement and then Dave would have the power as the arbitrator to vote the shares under the agreement as he saw fit.

WOULD SALE OF CORP BE VOIDABLE

FUNDAMENTAL CORPORATE CHANGE - A fundamental corporate change includes a (1) merger, (2) consolidation, (3) amendment of the articles of incorporation, or (4) a

sale of all or substantially all of the business assets. A fundamental corporate change must be approved by a majority of all shareholders at a special noticed meeting in which notice of the change was given before the meeting. Additionally, the corporation must give dissenters rights of appraisal if the transaction is approved.

In this case, the sale of substantially all of Corp.'s assets is a fundamental change and thus must be approved by a majority of all shareholders in Corp.

DECISION OF DIRECTORS - All decisions of directors must either (1) be approved at a board meeting or (2) be approved by unanimous written agreement of the board. At a board meeting the majority of all directors must be present to have a quorum. A resolution will be adopted if a majority of the directors present approve. Before a fundamental corporate change is brought before a special meeting of shareholders, it must be approved by the board of directors.

In this case, the facts indicate that Bob and Wendy agreed to the sale, but that Cate disagreed. It is unclear if they met at a board meeting and the majority of directors, Bob and Wendy, approved. This would be a requirement that if not met, could lead to a rescinding of the transaction or allow Cate and other shareholders to sue Bob and Wendy for losses suffered as a result of the transaction.

DUTY OF LOYALTY OF DIRECTORS - A Director has a fiduciary duty of loyalty to a corporation to not engage in self-dealing or usurp business opportunities. Self-dealing includes transactions in which the director has a conflict of interest.

In this case, Bob is a member of the board of Corp, and thus has a duty to not engage in self-dealing.

CONFLICT OF INTEREST TRANSACTION - A conflict of interest transaction is one in which the director or his close relative is (1) a party to the transaction, (2) has a financial interest so closely linked to the transaction that would reasonably be expected to affect

her judgment, or (3) is a director, officer, employee or agent of the other party to the transaction and the transaction is of such importance that it would normally be brought before the board. If a Director enters into a transaction in which he has a conflict of interest without approval, that transaction can be rescinded and the director can be held liable for any losses to the shareholders.

In this case, Bob is engaging in a sale of Corp's assets to Sally, Bob's sister. Thus Bob, a director, is engaged in a transaction in which a close relative, his sister Sally, is a party to the transaction, and therefore Bob would have a conflict of interest in the transaction. Thus, unless Bob has the transaction approved, it could be rescinded. Furthermore, because Wanda is also a director, and Sally is also a close relative of hers, her husband Bob's sister, she would also have a conflict of interest.

CONFLICT APPROVAL - A conflict of interest transaction will be considered approved if (1) after full disclosure a majority of the disinterested directors, if more than one, approve; (2) after full disclosure a majority of disinterested shareholders approve; and (3) if it is fair under the circumstances.

DISINTERESTED SHAREHOLDERS - In this case, it is unclear if Bob fully disclosed. Even if he did, the transaction would not be considered to be approved by shareholders if Bob used his 51% of shares to approve the sale because he is not disinterested due to his conflict of interest created by his sister, Sally, being the purchaser. Thus, a majority of the outstanding, the remaining 49% would need to approve. Because Cate owns 30% of the shares, she could essentially block the transaction because she owns more than 50% of the disinterested shares. Thus approval by disinterested shareholders would not be possible.

DISINTERESTED DIRECTORS - Similarly, both Wanda and Bob are considered to have a conflict of interest. Therefore the only disinterested director is Cate. Cate would not approve the transaction and furthermore, for a transaction to be approved by the majority of disinterested directors there must be more than one disinterested director.

Thus, the directors could not approve the transaction because 2 of the 3, Bob and Wanda, are not disinterested.

FAIR - As a result, the only way the transaction could be upheld is if under the circumstances at the time it was entered into it was fair. In this case, Cate claims that the price is too low, but there is no indication if this is really the case. If Bob could show that the price was fair, and thus the transaction was fair then the conflict of interest transaction would be upheld despite the lack of approval from disinterested shareholders and directors.

ACTING AS SHAREHOLDER NOT DIRECTOR - Bob may argue that in voting to approve the sale he is acting as a shareholder, and not as a director and thus does not owe the same duties to the corporation. However, this argument will fail because (1) a director has a duty of loyalty to the corporation even when selling his own shares, and (2) Bob may also have a duty as controlling shareholder.

DUTY OF CONTROLLING SHAREHOLDER - While a shareholder is normally not liable beyond the value of their shares, a controlling shareholder may be liable towards other shareholders if she uses her power in a way to disadvantage the minority shareholders. This is because a controlling shareholder has a fiduciary duty to minority shareholders to not use their controlling share to the minorities' disadvantage.

In this case, because Bob owns 51% of the shares, he is a controlling shareholder. He has a fiduciary duty to not use his controlling share to gain unfair advantage over the minority shareholders. This would likely include selling substantially all of Corp.'s resources to his own sister, Sally, if the price was not fair. Thus, even if Bob is successful in arguing that he is not under a duty as a director when trading on his shares, as a controlling shareholder he would still be liable for breaching his fiduciary duty.

AL'S VIOLATIONS

DRAFTING ARTICLES AND SHAREHOLDER AGREEMENTS - When an attorney represents a corporation, he represents the organization itself and not the directors or officers. While an attorney may also represent the directors and officers separately, these representations are governed by normal rules of conflict of interest. A lawyer may represent two clients so long as he reasonably believes he can do so and that there is no conflict of interest between them. If there is a conflict of interest he must (1) reasonably believe he can adequately represent each of them, (2) disclose the conflict, under the Cal RPC such disclosure must be in writing, and (3) must get the clients' consent in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, there is no conflict of interest, potential or otherwise, between Corp and its shareholders. Therefore, Al did not violate any rules by drafting the agreement.

ADVISING BOB -

CONFLICT BETWEEN BOB AND CATE-

CURRENT CLIENTS- As noted previously a lawyer may not represent one client who has a conflict of interest with another client unless (1) the lawyer reasonably believes he can adequately represent each of them, (2) the lawyer discloses the conflict, under the Cal RPC such disclosure must be in writing, and (3) the client consents in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, it is unclear who Al represented in the drafting of the shareholder agreement and whether or not he continues to represent Cate. If Al does represent Cate

then agreeing to represent Bob in this matter constitutes a current conflict between clients, and Al would have to provide written disclosure and receive written consent. However, even if he did he would not be able to maintain representation because a reasonable lawyer would not believe he could adequately represent both Cate and Bob because their conflict is not just potential, it is an actual conflict.

FORMER CLIENTS- A lawyer may not represent a current client (1) in a matter that is the same or substantially the same as a matter he represented a former client, and (2) the current client's interests are adverse to the former client unless he gets written consent from the former client.

In this case, if Al represented Cate in drafting the shareholder agreement and proxy agreement then he would likely be in violation of this rule. Cate is a former client, and the matter now in dispute is whether the very agreements Al drafted for Cate are valid, and thus it is the same matter. Furthermore, Bob's position, that the agreements are not binding, is directly in conflict with Cate's interest. As a result Al could not represent Bob without Cate's approval because doing so would be in violation of his duty of loyalty to a former client.

Al could also be disqualified if he had gained confidential information in representing Cate, though that is unlikely here, considering he was drafting a shareholder agreement.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

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 my 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 modication 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 relief" 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 modication 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 believes 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 Truthfullness to the Court

As part of his duty to the court, Austin must disclose adverse legal authority and may not make frivilous 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

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

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Question 5

Attorney mailed a professional announcement to several local physicians, listing his name and address and his area of law practice as personal injury. Doctor received Attorney's announcement and recommended that her patient, Peter, call Attorney. Peter had become very ill; he thought the cause was breathing fumes from a chemical company near his home.

Attorney agreed to represent Peter in a lawsuit against the chemical company. At Attorney's request, Doctor agreed to testify as an expert witness on Peter's behalf at the trial. Attorney advanced Doctor expert witness fees of $200 an hour for her time attending depositions, preparing for trial, and testifying.

Attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Doctor was nevertheless willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Attorney did not know whether Doctor's testimony was true or false. He offered Doctor's testimony at trial, and Peter won a judgment.

After the trial, Attorney sent a $500 gift certificate to Doctor, with a note thanking her for recommending that Peter call him.

What, if any, ethical violations has Attorney committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5
Answer A

What, if any, ethical violations has Attorney committed?

The attorney may be liable for ethical violations for: 1) mailing a professional announcement to physicians in the area, 2) paying an expert witness fee, 3) allowing the doctor to testify, and 4) sending the doctor a gift.

Mailing a Professional Announcement to Physicians in the Area

Both the ABA and California prohibit in person, live solicitation to individuals who the attorney does not have a familial or professional relationship with. However, attorneys are allowed to send professional announcements, letters, cards, etc. to people in the area. Moreover, the document must have certain information contained in it, such as the attorney's name or if it is a firm, a name of one attorney in the firm. It must also have an address listed for the attorney and/or any other relatable contact information. However, the document must be accurate and fair, the attorney is not allowed to guarantee success rates or hold himself out as a specialist unless he is certified by the proper authorities in the state.

Here, the attorney is not soliciting in person and is rather sending professional announcements to physicians in the area. This is not prohibited by the ABA or California rules. Furthermore, the attorney has included his name and address as well as his practice of law. The announcement is not misleading and is the accurate reflection of the attorney's information. Moreover, it is of no consequence that the doctor referred her client to the attorney. The attorney and the doctor have not set up a referral service and are not sharing in any of the fee. The doctor simply referred her injured client to the attorney based on the announcement she received. Therefore, the attorney will not be in violation of any ethical rules for sending out professional announcements.

Paying an Expert Witness Fee

Both the ABA and California rules permit attorneys to compensate expert witnesses for their time exerted on the case. However, the compensation cannot be hinged on favorable testimony from the witness. The compensation must also be reasonable in light of factors such as the expert's familiarity with the subject, his experience in the field and other similar factors.

Here, the attorney is advancing the doctor an expert witness fee of $200 an hour for her time attending depositions, preparing for trial, and testifying. These are all ethical reasons for the attorney to compensate the expert witness for. There are no facts to indicate that the attorney is paying for favorable testimony or that the fee being paid is unreasonable. Therefore, the attorney has not violated any ethical rules by compensating his expert witness.

Allowing the Doctor to Testify

An attorney is allowed to call witnesses to testify on his client’s behalf. However, there are some exceptions to this rule. One major exception to this rule is if the attorney knows that the witness will perjure him or herself. This is also a place where the ABA and California rules differ.

ABA

Under the ABA, an attorney shall not call a witness to testify if the attorney knows the witness will commit perjury. However, if the witness is the defendant in a criminal case he has a constitutional right to testify on behalf of himself. The ABA states that if her client insists on testifying and perjuring herself the attorney must attempt to persuade her not to. If the client still insists on testifying, then the attorney should attempt to withdraw as counsel if the court will allow it depending on how damaging it will be to the client. Finally, if the attorney is unable to withdraw he must carefully weigh

the balance of his duty of confidentiality with his duty of candor to the court. If the client persists on testifying then the attorney may advise the court about the perjury.

California Rules

Under California, the rule regarding witnesses who are not the clients are the same. An attorney is prohibited from calling a witness who he knows will perjure himself. However, the California rules differ from the ABA regarding a client who wishes to testify on behalf of himself and who wishes to perjure himself as well. In California, an attorney must make the same effort to attempt to persuade the client to not perjure himself. Furthermore, the attorney must try to withdraw as counsel if the court permits it. The big distinction is that in California an attorney is allowed to let his client testify in narrative fashion regarding the false information. He also is not required to breach is [sic] duty of confidentiality and warn the court of the perjury.

In this Case

Here, the doctor who is testifying is not the client and therefore the attorney under both the ABA and California rules is not permitted to call the doctor if he knows he will perjure himself. The facts state that the attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Nevertheless, the doctor was willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Although the scientific studies failed to find any risks of the fumes, this does not mean that the doctor is necessarily lying. An attorney has a duty to represent his client zealously and just because there is some evidence that states the fumes may not be dangerous there are no facts to indicate that the doctor is lying. The doctor is testifying based on her clinical experience and is allowed to testify even if it contradicts some of the scientific studies. The only way the attorney will not be allowed to call the doctor as a witness is if he knows that she will be committing perjury when she goes on the stand. In light of all the facts, the attorney has not breached any ethical duties by allowing the doctor to testify.

Sending the Doctor a Gift

Both the ABA and the California rules prohibit sending gifts to witnesses who testify on their behalf. The attorney is only allowed to compensate the expert witness for her services in the case such as depositions, preparing for trial and testifying. Moreover, a gift to an expert witness may compromise the witness's ability to be fair and not to give favorable testimony in anticipation of a gift. If the gift was intended for the doctor as a thank you for testifying it will not be allowed.

Referral Fee

Also, an attorney is not allowed to send a gift to a person whether they are a witness or not for referring someone to him. This would be a kickback or a referral service fee. These are explicitly prohibited unless the attorney satisfies certain criteria such as: 1) getting informed consent from the client, 2) having in the contract how the referral is to be split up, and 3) the referral must not be exclusive between the attorney and the referring party.

Here, the attorney has sent a $500 gift certificate to the doctor with a note thanking her for recommending that Peter call him. This violates both the referral arrangement stated above and also violates the ethical rules for compensating an expert witness. Thus, the attorney will be in violation for sending the doctor the $500 gift certificate.

Conclusion

In light of all the facts, the attorney has not violated any rules by his conduct except sending the $500 gift certificate to the doctor, of which he will be found to be in violation of the ethical rules both under the ABA and California.

QUESTION 5
Answer B

Ethical violations committed by Attorney in the representation of Peter (P).

A. Attorney advertising

i The applicable rules

The issue is what limits there are on an attorney's right to send out advertising for her services. The Supreme Court has held that attorney advertising is protected by the First Amendment as commercial speech. While states may prohibit in-person and over-the-phone solicitation entirely, states may only proscribe attorney advertising sent by mail, as it was here if it is either false or misleading. States may impose other regulations as well. For example, in California, all attorney advertisements by mail must announce on the cover of the envelope and on the ad within that this is attorney advertising. It must name an attorney responsible for the ad, as well as the attorney's address. It must list the attorney's area of law practice, and may include information about past results if the attorney makes clear that such results are not typical and that they are not a prediction of future results. A copy of the advertisement must also be held for two years.

ii. Rules applied to A's conduct

In this case, Attorney (A) mailed an advertisement for his services to local physicians. His mailing has First Amendment protection. There is nothing to suggest that the ad was false or misleading. Also, while it is true that the ad will be presumed false/misleading if it is sent to a hospital or some other place where prospective clients may be under undue pressure or distress, there is no indication that A sent the mailing to clients; rather, he sent it to their physicians, who would in such a vulnerable condition [sic]. Thus, A does not have a false or misleading ad, and he will not be liable on that count.

Further, we are told that the ad listed his name and address. However, we are not told whether the advertisement stated on the envelope and on the letter that this was an advertisement. If not, A may have committed an ethical violation.

Therefore, it appears that the mailing does not violate any rules of professional conduct under either ABA or California authorities.

B. Solicitation of prospective clients

i. The applicable rules

As noted, the ABA and California rules of professional conduct prohibit attorneys from soliciting clients for pecuniary gain in person or over the phone. There is an exception where the client and the attorney have an established relationship, are family members, or the client is a corporation.

ii. Rules applied to A's conduct

While none of these exceptions apply in this case, the attorney has not committed any ethical violation because he did not solicit clients over the phone or in person. Rather, he sent a broad mailing. This type of advertising is acceptable and does not constitute a violation of the rules.

C. Paying an expert witness's fees

i. The applicable rules

Under ABA Professional Rules, an attorney may not make any advance payments to a client in anticipation of litigation. Nor may an attorney give loans to the client, even if the client promises to repay. The only exception under the ABA rules is that an attorney may advance the costs of litigation to a client in order to facilitate the client's commencement of a claim. However, under the California Rules of Professional

Conduct (CRPC), attorneys may make loans to clients in anticipation of litigation, as well as fronting any legal costs associated with bringing the claim.

Additionally, clients/attorneys pay compensate an expert witness for his testimony/work so long as the payment is not given in exchange for specific testimony, such as testimony that is favorable to the client's case.

ii. Rules applied to A's conduct

In this case, A has advanced to Doctor (D) an amount of money intended to compensate him for his work as an expert witness. Under the ABA Rules, this probably [does] not constitute a violation of the ethical rules. The costs of hiring an expert witness are high, and many prospective clients would be unable to hire one. However, without the ability to hire an expert witness, the client might not know if he has a colorable claim against the defendant. Thus, advancing the costs of hiring an expert, as A has done here, probably would not violate the ABA Ethical Rules. These are the costs of litigation, and are probably covered under the exception under these rules.

With respect to the CRPC, it is even more likely that advancing D's fees will not constitute an ethical violation. The CPRC makes clear that attorneys may make loans to a client so long as the client has an obligation to pay the attorney back. Here, when Peter (P) wins on his claim, he will have to either pay A for the costs of hiring D as a witness, or the costs will be taken out of any contingency fee awarded to A from P's judgment against the chemical company.

Thus, under both the ABA and California rules, advancing costs to D is not a violation of the ethical rules.

D. Offering D's testimony at trial

i. The applicable rules

There are two sets of conflicting ethical rules that make resolution of this issue somewhat complex. First, A has an obligation to represent his client zealously, in good faith, and to make all colorable claims that support his client's case. This means that A has an ethical obligation to make every argument on P's behalf that A thinks is supported by the record. He should do so only in good faith, but he must be a zealous advocate at all times.

In contrast, all attorneys also have a duty of candor to the court. This means that attorneys should not offer false evidence into the record. Where there is authority that is controlling and on point, the attorney must bring such authority to the court's attention, even if the authority is detrimental to the attorney's position. Attorneys must conduct themselves honestly in court, and may not make any malicious, unfounded claims that the attorney knows have no support in the record.

As noted, these two duties often conflict, and may put attorneys in a precarious position.

ii. The rules applied to A's conduct

In this case, A learned during discovery that numerous scientific studies had failed to find any medical risk from the defendant's fumes. Nevertheless, D, the expert witness who has treated P and was hired by A to prove A's case, believes otherwise. D is willing to testify, on the basis of her experience and knowledge, that the fumes had harmed P. A has offered D's testimony at trial without knowing whether it is true or false. The question is whether this is a violation of A's duty of candor to the court.

In answering this question, it is important to analyze what A knew and didn't know at the time he offered D's testimony into evidence. First, it should be noted that only the studies A found in discovery were able to find no link between the chemicals and P's injury. We are not told whether there may be other studies out there that support such a connection that A has yet to find. In fact, if the list of studies reviewed by A is not exhaustive, there very well may be a study out there that supports such a

connection. Second, it is not clear who funded these studies, or whether the authors had some sort of bias that might discredit their findings. Further, we are not told whether this is a field of science that has been closed to further research, or whether it is a relatively new field that is still developing. It is possible that the chemical in question is relatively new, and therefore its consequences are only recently being analyzed/discovered. There might be other scientists (like D) that are using new techniques to study the connection between the chemicals and injuries, but the results just haven't been published yet. In sum, we can conclude that A has very little information that should convince him, one way or another, that D's testimony is false. There are many open questions about the chemical and a possible link between the chemical and P's injuries.

As noted, attorneys have a duty to represent their clients zealously and to make all colorable claims. The facts tell us that A did not know whether D's testimony was false or true, and this makes sense because D was the expert in the field. While it is unethical for an attorney to offer testimony that she knows to be false, there is no ethical problem under either the ABA rules or the CRPC if the attorney merely has doubts. This is especially true in light of the attorney's obligation to her client. The attorney has an obligation to represent her client vigorously. Thus, it would likely be an ethical violation of A's duty to her client were she to not offer D's testimony into evidence. Since A did offer the testimony on P's behalf, and A did not knowingly offer any false evidence in the process, A did not violate any ethical rules with respect to offering D's testimony.

E. Sharing fees with non-attorneys

i. Applicable Rule

Under the ABA rules, an attorney may not share legal fees with a non-attorney. In California, the attorney may share a fee if the attorney discloses the fee-sharing arrangement to the client and the client consents.

ii. The rules applied

In this case, we are told that A contacted D, a non-attorney, with a mailing advertisement, seeking potential clients. At first, there was no arrangement to share any resulting fees with D. However, after A won a judgment for P, he sent D a $500 gift certificate (the certificate). This is arguably an offer from A to D to share the fees from P's case. A was compensated for his work representing P, and presumably the money that paid for the certificate came from these funds. Thus, A has arguably violated the ethical rule against sharing attorney's fees with a non-attorney. However, A will argue that he gave D the money not for D's work at trial, but for D's recommending P to A as a client. While this may free him from a violation under the "sharing-of-fees" rule, it will support an argument that he violated another ethical rule, as discussed immediately below.

Note that had A disclosed the arrangement to P ahead of time, and had P consented, this would not have been an ethical violation under California's ethical rules. However, because A failed to do so, his conduct is a violation of both the ABA and the California rules of professional conduct.

F. Paying for Referrals

i. Applicable Rule

Under the ABA ethical rules, attorneys may not offer money or services in exchange for getting referrals for prospective clients for pecuniary gain. However, in California, the attorney may pay for a referral if the attorney discloses the referral to the client at the outset of contacting the client, and the client consents to the representation despite having this knowledge.

ii. Rule Applied

The same facts discussed above in section "E" (compensation for referral) are applicable here. However, as noted above, it is also significant that A included a note with the certificate, thanking D for recommending that Peter call him. This sounds like a tit-for-tat situation, in which A is compensating D for making a referral. Thus, one would argue that A gave the certificate to D as compensation for referring P's case to A. Holding A liable under this rule is just another way of characterizing the gift certificate that was given to D after P won his case. In this scenario, the money was given to D for D's work efore the case began, rather than for D's work during the trial that contributed to P's judgment and A's resulting compensation (as suggested in section "E", supra). As mentioned above, A's note to D supports the argument that the certificate was intended to compensate D for making the referral, which is a direct violation of the ABA and California rules.

Under the California rules, an attorney may compensate [a] third party who referred a client so long as the compensation is disclosed to the client and the client consents to being represented by the attorney. Because A did not get P's consent before sending the certificate, A's conduct violated the ABA and California ethical rules.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

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Question 2

Wendy and Hal are married and live in California.

A year ago, Wendy told Hal that she would not tolerate his drinking any longer. She insisted that he move out of the family home and not return until he completed an alcohol treatment program. He moved out but did not obtain treatment.

Last month, Hal went on a drinking spree, started driving, and struck a pedestrian. When Wendy learned of the accident, she told Hal that she wanted a divorce.

Hal has consulted Lawyer about defending him in a civil action filed by the pedestrian. He is currently unemployed. His only asset is his interest in the family home, which he and Wendy purchased during their marriage. Lawyer offered to represent Hal if Hal were to give him a promissory note, secured by a lien on the family home, for his fees. Hal immediately accepted.

1. Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian? Discuss. Answer according to California law.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees? Discuss. Answer according to California Law.

3. What, if any, ethical violations has Lawyer committed? Discuss. Answer according to California and ABA authorities.

ANSWER A TO QUESTION 2

1. **Is Wendy's Interest in the Family Home Subject to Damages Recovered for Injuries to the Pedestrian?**

California is a Community Property State

California is a community property (CP) jurisdiction. Thus, any property acquired by either spouse during the course of the marriage by either spouse's labor is presumptively community property. Property acquired before or after the marriage by either spouse, or during the marriage by gift, inheritance, or devise, is presumptively separate property (SP). In determining the character of a particular asset, it is helpful to look at (1) the source of the asset or the source of the funds used to purchase the asset, (2) any actions by the spouses changing the character of the property, and (3) any relevant presumptions.

The House

Source

The facts tell us that Wendy (W) and Hal (H) purchased the family house during their marriage. However, we don't know what funds were used to purchase the house. If W's or H's earnings were used (or a combination thereof), and those earnings were earned during the course of the marriage, then the house would be CP because spousal earnings are CP to the extent they're earned during the marriage.

However, if one spouse partially used inheritance money or other SP acquired before the marriage, then that spouse would likely have a SP interest in the home to the extent SP was used to purchase it.

However, without more, the best assumption is that spousal earnings were used to purchase the house. The facts say H is currently unemployed, but he may have been employed in the past (and thus had earnings). Further, we can assume W earned money somehow, likely from a job.

Actions

There is no evidence that the house was put in only one spouse's name, suggesting that the house was the separate property of that spouse. Pre-1975, if the house was in W's name, the married woman's special presumption would operate to render the house (or the share of the house in W's name) W's SP.

Modernly, if title was taken in only one spouse's name, a court would not likely hold that to be conclusive evidence that the house was that spouse's SP absent some manifestation by the other spouse that the house was intended as a gift.

If H and W took title to the house as joint tenants with a right of survivorship, each would have a 1/2 SP undivided interest in the whole during life. On death, the form of title would control. On divorce, under CA's anti-Lucas statute, the house would be treated as CP, with a right to reimbursement for any SP used by either spouse to improve the home.

Finally, there's no evidence of a transmutation changing the character of the house, which, after 1985, would have to be in writing.

Thus, absent any of these actions, it appears the house is still CP.

Presumption

All property acquired during the course of marriage is presumptively CP. Here, nothing rebuts that presumption.

Community Responsibility for Debts of One Spouse

All debts incurred by either spouse prior to or during the course of marriage are community debts. Tort obligations are "incurred" when the tort occurs, not when judgment is handed down. Thus, any obligations arising out of H striking the pedestrian were "incurred" when he hit the pedestrian.

W will argue that the marital economic community was not in existence when H hit the pedestrian because she had kicked him out of the house. The marital economic

community begins at marriage and terminates upon permanent physical separation when at least one spouse has no intent of continuing the marriage.

Here, W kicked H out of the house. However, she told him that he could return when he completed an alcohol abuse program. Thus, the marital economic community had not yet ended when H got in the accident because W was still open to the possibility of him returning. W will argue that H manifested an intent to never continue the marriage because he refused to go to treatment. In other words, W will argue that by rejecting the pre-condition to the continuation of the marriage--i.e. getting treatment--H effectively terminated the marital economic community. Indeed, W can point to the fact that 11 months after she kicked H out, he hadn't obtained treatment. Given this length of time, W can argue, it's clear that the community had ended.

However, the stronger argument is that the marital economic community continued until W told H that she wanted a divorce. If W viewed the marital community as over prior to the accident, she would have likely filed for divorce then. Instead, it appears the accident was the "last straw." Thus, the request for a divorce was the clearest signal by either party that the physical separation was permanent and there was no intent to continue the marriage.

Thus, the marital economic community had not ended when H struck the pedestrian, any obligation incurred because of the accident is a community debt.

Order of Payment

When a tort is committed during an activity for the benefit of the community, the debt will be satisfied first by CP, then by the tortfeasor's SP. The non-tortfeasor spouse's SP is not subject to the debt.

When a tort is not committed during an activity for the benefit of the community, the debt will be satisfied first by the tortfeasor's SP, then by CP. Again, the other spouse's SP is safe.

Here, H committed the tort against the pedestrian while driving drunk. This was not an activity for the benefit of the community--to the contrary, H was supposed to be seeking alcohol abuse treatment while he was living away from the family home. Thus, recovery would be taken out of H's SP before the CP.

However, on the facts, it doesn't seem as though H has any SP to satisfy the debt. Thus, any recovery will likely be against the H and W's CP.

Reimbursement to the Community

To the extent any CP--i.e. the house--is used to pay any obligation arising out of H's accident with the pedestrian, the community may be entitled to reimbursement from H. Where CP is used to pay an obligation arising out of spouse's tort that was committed not during an activity for the benefit of the community, the community is entitled to reimbursement for that payment if the tortfeasor's SP was available to pay (or if the order of payment was not followed). However, as mentioned, it doesn't appear H has any SP available to pay the debt and, thus, reimbursement may be unlikely.

Distribution of Debts on Divorce

At divorce, community assets are generally divided under the "equal division rule"--i.e. each spouse gets 1/2 of each community asset in kind.

However, a judge has more discretion as to the allocation of debts at divorce. Typically, a judge will allocate a tort debt to the tortfeasor spouse if the tort was incurred not during an activity for the benefit of the community. However, a judge may take into account ability to pay to effect a more just allocation of debts.

Here, on divorce, the judge would likely allocate any judgment based on H striking the pedestrian to H. H will argue that he's unemployed and can't pay, but it's highly unlikely a judge would saddle W with an obligation to pay H's tort liability post-divorce.

Conclusion

Thus, during the marriage, H and W's CP will be liable for damages recovered for injuries to the pedestrian. Even though H and W have filed for divorce, until community assets and debts are distributed, the community estate continues and the pedestrian can recover against it. However, as mentioned, on divorce, the debt will be allocated to H. Further, W may be entitled to reimbursement for CP used to pay the debt.

*Note: If the court decided that the marital community was terminated when H struck the pedestrian, then CP--i.e. the house--would not be liable for the debt because the debt would be H's SP.

2. **Is Wendy's Interest in the Family Home Subject to Payment of H's Legal Fees**

Equal Management

Each spouse generally has equal rights to manage community property. This includes the right to sell and encumber community property. However, with respect to real property, one spouse may not encumber community owned real property without the other spouse's consent. If one spouse, without consent, sells or encumbers community real estate, the non-consenting spouse has the power to void that transaction within 1 year.

Lien on the House

Here, H has given Lawyer a lien on the family home without W's consent. Thus, W has the power within 1 year to void the encumbrance.

H will argue that because he gave the lien on the house after W told him she wanted a divorce, he was only granting a lien on his 1/2 SP interest in the family home. However, there's no evidence that W actually filed for divorce or that divorce proceedings were held during which a judge divided the community estate. While the marital economic community may no longer exist because there has been permanent physical separation, the community estate lives on until it has been distributed.

Thus, a court would likely allow W to void the encumbrance on the community real property due to her lack of consent in making the encumbrance.

Timing of the Attorney's Fees

Furthermore, H sought legal advice after W told him she wanted a divorce. Because W asking for divorce terminated the marital economic community, CP--i.e. the family home--is not liable for the debts incurred by H after such separation.

Thus, any obligation owed to Lawyer based on legal services rendered to H cannot be satisfied out of CP because such an obligation would not be a community debt.

He would argue that payment of attorney's fees is an obligation arising out of the accident of the pedestrian, when the marital economic community still existed. However, the attorney's fees represent an entirely different event. Furthermore, contractual obligations arise when the contract was made. Here, any contract and/or agreement with Lawyer was made after the economic community ended. Therefore, W's interest in the family home is not subject to payment for the additional reason that CP is not liable for H's separate post-marriage debts.

Necessaries

Post-separation, a spouse can still be liable for obligations relating to necessaries that the other spouse incurred during the marriage. Necessaries generally refer to food, shelter, and medical expenses. Here, H's legal fees don't likely constitute necessaries and, as such, this theory cannot be invoked to hold W's interest in the family home subject to payment.

3. **Lawyer's Ethical Violations**

Obtaining Pecuniary Interest in Outcome of Case

Under the ABA, a lawyer cannot obtain a pecuniary interest in the subject matter of a case other than in the case of a contingency fee arrangement or an attorney's lien. However, in CA, attorneys' liens are impermissible.

Here, Lawyer effectively acquired an attorney's lien on H's family home. Thus, Lawyer will argue that this was permissible because the only purpose here was to secure payment. In CA, this would constitute an ethical violation. Under the ABA, it's less clear.

While under the ABA, an attorney's lien is permissible, if Lawyer knew that H couldn't rightfully encumber the family home, then it's possible that Lawyer committed an ethical violation because accepting the attorney's lien would constitute a violation of a third party's (W's) rights in the course of representing H.

Entering into Business Transactions with Clients

An attorney can only enter a business transaction with a client if (1) the terms are fair and reasonable, (2) the terms are communicated to the client in an easily understandable manner, (3) the client is advised to get independent counsel to represent him in the transaction and is given a chance to do so, and (4) the client consents.

Here, by taking a lien on H's family home, Lawyer entered into a business transaction with H. However, it's not clear that Lawyer ever advised H to seek independent counsel or that he adequately informed him of the material terms of the lien. Although H immediately accepted, he did so without knowing what would trigger enforcement of the lien (1 missed payment? total failure to pay? late payment? H's insolvency?). Thus, by failing to adequately inform H and encouraging him to seek independent advice, Lawyer likely violated the ethics rules.

Fees

Under the ABA, a fee must be reasonable. In CA, fees can't be unconscionable. Further, in CA, a fee agreement must be in writing unless it's (1) less than $1k, (2) with a corporation, or (3) for a routine matter involving an existing client.

Here, the lien agreement was essentially a fee agreement. However, the terms were not adequately disclosed to H. Further, there was no written fee agreement. Because a writing was likely required--there's no evidence H was an existing client or that Lawyer's services were valued at under $1k--this is a violation of CA rules.

Further, the lien was likely unreasonable and unconscionable. Because H was unemployed, it was extremely unlikely that he was going to be able to pay Lawyer's fees. If Lawyer knew that H was unemployed--which he likely did, considering he conditioned representing H on having a lien on the house--then Lawyer must have known that H wouldn't be able to pay. Thus, the fee agreement was unconscionable because it was akin to a mortgagee lending to a mortgagor knowing that the mortgagor was going to default and the foreclosure was inevitable. Lawyer must have known (a) that H wasn't going to be able to pay and (b) that the value of the lien on the home was worth more than the value of the services to be provided.

Thus, the fee arrangement likely constituted an ethical violation.

Violating Rights of Third Parties

Lawyers cannot violate the rights of third parties in the course of representing a client. To the extent the lien violates W's rights and Lawyer knew of this, he likely acted unethically. Furthermore, if Lawyer knew that H could not rightfully encumber the family house, then Lawyer arguably breached his duty of competent and candid representation by not informing H that he couldn't offer a lien on his house without W's consent.

ANSWER B TO QUESTION 2

1. **Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian hit by Hal under California law?**

The parties were married and live in California. Thus, their property rights as a couple, specifically with regard to the property acquired during the marriage, are governed by California community property law. Whether the house was community or separate property can be determined by the source of the asset, whether any presumptions apply, and the actions of the parties during the marriage.

Community Presumption

There is a community presumption regarding property acquired during the marriage that it is community property. This would apply to the family home given, as the facts state, it was acquired during the marriage. The presumption can be rebutted by a showing that the house was not actually acquired during the marriage, it was acquired during the marriage but with separate property funds, the house was a gift/devise/inheritance, or the house was the rent/issue/profit derived from separate property.

Their house was purchased during the marriage so it was not a gift or devise. Although it is possible that the house was purchased with separate property funds, there are no facts to indicate this was the case. Because it was purchased during the marriage, and there are no facts to rebut the presumption, the house is considered community property.

Judgments Against Spouses

A tort judgment against a spouse will subject both the community property and the separate property of the tortfeasor to the judgment. But once the community property is divided, debt cannot be recovered from the spouse who received her half of the community property from what she received under the divorce decree unless she was the spouse that incurred the debt or the debt was assigned to her. Thus, for a judgment

against Hal for drinking and driving, the community will be liable for this debt, and it can be satisfied from the community property.

For the Benefit of the Community

Although the community property is liable for the judgment by the pedestrian, the judgment must be satisfied first from the separate property of the tortfeasor spouse if the tort was not committed by conduct that was being performed for the benefit of the community. For example, if Hal was on his way to drop the kids off at school or to pay the mortgage on the house, this would be for the benefit of the community. In that case, the judgment would be satisfied first from community property, and if there was any deficiency, then from the separate property of the tortfeasor.

Here, Hal had been kicked out [of] the house for his drinking problem at the time of the accident. Wendy had clearly communicated her disapproval for Hal's drinking. The drinking, including drinking and driving, would actually harm, not benefit, the community. Although we do not know where Hal was headed, he had already been kicked out of the house and was, generally, involved in a drinking binge at the time. Therefore, his actions were not to the benefit of the community and can be satisfied first from his separate property assets.

But the facts state that his only asset, at the present time, is his interest in the family home. Because it appears he has no separate property from which to satisfy the judgment, the judgment will be satisfied from the community property home.

End of the Economic Community

The accident in which the pedestrian was hit occurred after Hal had been kicked out of the house but before Wendy told Hal she wanted a divorce. As stated above, the source of property or debt, whether it was incurred before, during or after the marriage, can indicate whether it is community or separate debt. The pedestrian's claim is a form of debt because, once rendered, the plaintiff can reduce it to a judgment and attach liens to the tortfeasor's property. Thus, the question arises whether the economic

community ended when Wendy kicked Hal out of the house, because if so, the injury and judgment would have occurred after the economic community ended and would be the separate debt of Hal. In this case, the judgment could not be satisfied from community property, including the house.

In California, end of the economic community occurs when there is physical separation and an intent not to carry on the marital relationship anymore. If the parties maintain the facade or marriage, although physically separated, the economic community will not be considered to be at an end. The economic community will certainly result, if the above elements are not satisfied, when the divorce decree is entered.

Here, Wendy kicked Hal out of the house one year ago. She did not say anything about ending the marriage or never wanting to see him again. She did tell him he could not return until he completed alcohol treatment. Thus, Hal being kicked out was not indicative of an intent to permanently end the marriage relationship, it was indicative of a temporary physical separation by Wendy for the limited purpose of motivating Hal to get treatment and save the marriage. Thus the economic community would not have ended simply when he left the house.

But, after having moved out and hitting the pedestrian while drinking, Wendy learned of the accident and told Hal she wanted a divorce. At this point, both elements would be met. Hal and Wendy would have been physically separated, and one spouse has indicated an intention not to resume the marital relation by telling the other she wants a divorce.

Because the economic community did not end until that time, when Wendy told Hal she wanted a divorce, and the accident and/or the cause of action that is the basis for any judgment accrued before that time, the judgment resulting would be a community debt because it was essentially incurred before the end of the economic community.

Debt

Debt incurred before or during the marriage can be satisfied from the community or from the tortfeasor's separate property. Debt incurred by a spouse for necessaries, including medical care, can be satisfied from community property or the separate property of either spouse, although indemnity may be available. Here, the debt is for tort judgment and, as stated above, can be satisfied from either community property or separate property of Hal, first from his separate property and then from the community property.
In California, for the purpose of debt for necessaries or medical services, end of the economic community can only occur on divorce. Judgment may not be able to be satisfied from Wendy's earnings if she kept them in a separate (versus joint) account from which Hal had no right of withdrawal.

CONCLUSION--Because the debt was incurred before end of the economic community, it is a community debt. Therefore, it can be satisfied from community property or separate property of Hal. Because the tort that is the basis of the judgment was not conducted for the benefit of the community, the judgment must be satisfied first from Hal's separate property. But because Hal has no separate property, his only asset is the house, it will be reduced to judgment and recovery sought from the asset that is the community home, which as above is classified as community property. Wendy may be able to seek indemnity.

2. **Is Wendy's interest in the family home subject to payment of Hal's legal fees under California law?**

As stated above, the economic community ended when Wendy kicked Hal out of the house and told him she wanted a divorce. Hal appears from the facts to have consulted the lawyer after that time. Debt incurred after the end of the economic community will belong to the debtor spouse.

Attorney Fees for Divorce Lawyer

Generally, a spouse may not unilaterally encumber community real property without a joint action on behalf of both spouses. Additionally, the spouse may not separately

encumber her half interest in the property. The one exception to this rule is for the spouse to satisfy attorney fees in the divorce proceeding between the spouses.

Here, because the lawyer is not representing Hal as a family attorney in his anticipated divorce proceeding with Wendy, this rule would not apply. The lawyer fees incurred by Hal after the economic community ended for the purpose of defending against the tort suit could only be satisfied from Hal's separate property.

Division of Assets on Divorce

Generally, assets are divided pro rata at divorce, 50-50, no cashing out one spouse to give the other an entire asset. The only general exceptions to this rule are: for a closely held corporation whose shares are community assets where one spouse is the CEO and division would destroy the business; a pension plan from which one spouse can take a cashout instead of receiving payments from the pension so the spouse, who no longer wish to have any connection can go their separate ways; or, for the family home when selling it and dividing the proceeds will uproot the children and cause them harm.

While this is the family home, there appear to be no children and no reason not to apply the binding pro rata division, 50-50, by sale of the house and splitting the assets.

This means that on divorce, the assets of the house will be split evenly between the parties. Once the divorce decree is entered, the proceeds from the house that Hal receives are going to be his separate property. Upon divorce, the legal fees of Hal's lawyer can be paid by his share of the proceeds.

But the question asks whether the payment of Hal's legal fees will be satisfied from Wendy’s interest in the home. Wendy has no interest in Hal's proceeds after divorce from sale of the community property house, and thus the proceeds subject Hal's interest, not hers, to liability.

CONCLUSION--because the attorney fee debt will have been incurred after end of the economic community, it will be separate debt of Hal, and does not subject any of Wendy's interest in the family home to liability for those fees. The exception for divorce attorney fees does not apply.

3. **What ethical violations has the lawyer committed according to both the ABA and California law?**

A lawyer is a fiduciary of the client. She has a duty of confidentiality (not to communicate information relating to representation), a duty of loyalty not to act on behalf of her own, a client's, or a third party's best interests that are adverse to her client's, financial duties, and duties of competence which are all owed to the client.

Duty of Loyalty

Under the duty of loyalty, the lawyer must not develop an interest or maintain an interest that is adverse to the client, whether it is the interest of the lawyer herself, an interest of one of the lawyer's other clients, or an interest of a third party with whom the lawyer is closely related.

Loyalty--Financial Assistance to Clients

Under the ABA rules, a lawyer is not permitted to lend the client money for the representation, with the exception of forwarding costs of litigation to indigent clients and forwarding costs associated with a contingent fee arrangement. Under the California rules, the lawyer can lend the client any amount for any reason, as long as she does not promise to satisfy the existing debts of the client in order to buy the client's business.

Therefore, from this perspective, the loan would be considered acceptable under the California rules but unacceptable under the ABA rules. Under the ABA rules, once the client becomes indebted to the attorney, the attorney's personal interest against the client in collecting the money and receiving payment for the debt may conflict with his duty to act for the sole benefit of the client. Under the California rules, because this is not a promise to satisfy pre-existing debt for the prospective client, this is acceptable.

Loyalty--Transacting Business or Developing Adverse Interest to Client

Whenever the lawyer enters into business with the client, the terms must be fair, the lawyer must disclose the terms (effect of the transaction) to the client in writing, allow for an opportunity for the client to consult with independent counsel and probably should suggest she do so if the lawyer's interest will be adverse to the client's in the litigation, and obtain consent from the client in writing.

This loan would essentially be such a transaction. The facts do not indicate the above elements are met. Additionally, there is a question whether it would be fair to encumber a client's sole asset in order to receive payment. But the above rules that specifically address lending a client money are going to govern whether the transaction is permissible. Regardless, even though the loan is permissible under California law, the attorney should ethically consider whether the terms of the loan are fair and suggest receiving independent legal advice if the client wishes to fund the representation in this manner.

Financial Duties

The reason the nature of the fee arrangement is important is to judge whether it is permissible for the lawyer to charge the client in this way. Under the ABA, the fee must be reasonable considering the experience of the lawyer, novelty of the case, difficulty of legal issues, time and effort required, etc. In California, it simply must not be unconscionable. The question is whether the lawyer has complied with the requirements for charging a fee, and whether the amount is justified.

Contingent Fee

A lawyer can enter into either an hourly fee arrangement or a contingent fee arrangement with a client, or potentially a flat fee arrangement. Under the ABA rules, contingent fee arrangements (lawyer forwards fees and sometimes costs in order for a stake in the recovery, if there happens to be one) are not available in criminal or domestic cases. They must include the percentage of recovery taken, the costs deducted from recovery, and whether they are deducted before or after. In California,

the agreement must also indicate that it is subject to negotiation with the lawyer and what costs will not be covered by the contingent fee arrangement.

Under ABA rules, this may be a criminal case, but considering the question implies a money judgment that could subject the house to liability, brought by a private party pedestrian; using contingent fee arrangement in this case would be permissible. But here, if the mortgage is being used as payment, and thus this is more likely to be considered an hourly fee arrangement.

Hourly Fee

The agreement, under ABA rules, must disclose the rate at which the fee is charged, the services it covers, and the respective duties of lawyer and client. In California, it must also be in writing unless it is for less than $1,000, with a corporate client, routine matter for regular client, or emergency renders this impossible.

CONCLUSION--There is nothing in the facts to indicate the lawyer has complied with any of the above requirements regarding the fee arrangement. He made the offer to encumber the property without explaining the calculation of the rate, providing a writing, explaining what services it would cover, etc. Additionally, the case appears to be a simple one, involving culpability for drunk driving. Depending on how much the house was worth, a lien on the home could be unreasonable or unconscionable under either California or ABA approach.

Duty of Competence

A lawyer has a duty of competence, to represent the client with the skill, knowledge, thoroughness and preparation necessary to carry out the representation effectively.

As stated above, the home is community property. It cannot be encumbered unless both spouses jointly enter into the transaction. The non-consenting spouse can recover the house even from a BFP, and set aside the transaction, if she has not agreed to it.

There is a one year statute of limitations, but if the buyer knew the seller was married and failed to seek consent from the other spouse, there is no statute of limitations.

Here, an attempt to encumber the community property house to satisfy the separate debt of Hal would be a failure of competence on the part of the lawyer. A lawyer of reasonable skill, knowledge, thoroughness and preparation would be aware of this and would not attempt to encumber property to pay his debts knowing it was community property not subject to this type of transaction without consent of Wendy. This would ineffectively carry out the representation.

CONCLUSION--Under ABA rules only, the lawyer has breached his duty of loyalty to the client by lending him money in regard to the transaction. Although, he may argue he is permitted to do so because he is permitted to forward costs of litigation to indigent clients and Hal is indigent because he is unemployed and has no assets but the house. But because the house cannot be encumbered this way without the consent of Wendy, and a lawyer of reasonable skill and knowledge would know this, the attempt to encumber the house without Wendy's permission may also be a breach of duty of competence, subjecting the lawyer to discipline, sanctions, and malpractice liability. There is also a question of whether the amount of the fee is reasonable or unconscionable in light of the nature of the litigation and employment of the lawyer.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 2

Carol, a woman with young children, applied to rent an apartment owned and managed by Landlords, Inc. Landlords, Inc. rejected her application.

Believing that Landlords, Inc. had rejected her application because she had young children, Carol retained Abel to represent her to sue Landlords, Inc. for violation of state anti-discrimination laws, which prohibit refusal to rent to individuals with children.

Landlords, Inc. retained Barbara to represent it in the lawsuit. Barbara notified Abel that she represented Landlords, Inc.

Abel invited Ford, the former manager of rental properties for Landlords, Inc., to lunch. Ford had participated in the decision on Carol's application, but left his employment shortly afterwards. Abel questioned Ford about Landlords, Inc.'s rental practices and about certain conversations Ford had had with Barbara regarding the rental practices and Carol's application.

During a deposition by Barbara, Carol testified falsely about her sources of income. Abel, who attended the deposition, suspected that Carol was not being truthful, but did nothing.

After the deposition ended and Carol had left, Barbara told Abel that Landlords, Inc. would settle the dispute for $5,000. Abel accepted the offer, signed the settlement papers that day, and told Carol about the settlement that night. Carol was unhappy with the amount of the settlement.

What, if any, ethical violations has Abel committed? Discuss.

Answer according to California and ABA authorities.

ANSWER A TO QUESTION 2

Any ethical violations Abel may have committed will have arisen out of his representation of Carol. Carol's rental application was denied by Landlords, Inc. (Landlord). Carol retained Abel as her attorney because she believed Landlords rejected her application because she has young children, which would be a violation of the state's anti-discrimination laws.

Abel's Lunch with Ford

Duty of Fairness

An attorney owes a duty of fairness to his opponent. In this case, Abel owes a duty of fairness to Barbara, Landlords' attorney.

An attorney may not communicate with the opposing party or its employees without the opposing party's attorney's consent or presence. While it may be permissible for an attorney to communicate with low level employees, communication with a high level employee requires the opposing party's attorney's consent. In this case, Abel invited Ford, Landlords' former manager of rental properties, to lunch. Abel knew Barbara was Landlords' attorney because she had notified him of her representation. Nonetheless, Abel did not ask Barbara's permission before he invited Ford to lunch. However, Ford had left his employment with Landlords shortly after Carol's application had been denied, so he was no longer an employee of the opposing party. On this other hand, he participated in the decision to deny Carol's application. Abel would argue he did not act unethically because a former employee may speak with whomever he or she wishes. Barbara would counter that Ford had just recently been a high level employee and Abel should have obtained her consent before speaking with Ford one-on-one. However, Abel likely did not commit an ethical violation because Ford was no longer an employee of Landlord.

Attorney-Client Privilege

The attorney-client privilege is an exclusionary rule of evidence. It is held by the client and may be invoked to prevent the attorney from disclosing information that arose out of the client seeking professional advice from the attorney during their relationship. A corporation is also protected by the privilege. Conversations between high level employees and the corporation's attorney are privileged. In this case, it is again important that Ford was no longer an employee of Landlord. By the time Barbara was retained by Landlords, Ford had apparently already left his job at Landlords. Thus, his conversations with Barbara would not be protected by the privilege because he was no longer a high-level employee such as a manager.

Carol's Deposition Testimony

Duty of Confidentiality

An attorney owes a duty of confidentiality to his client. Under the ABA Model Rules (ABA), an attorney may not disclose anything related to the representation without the client's consent. California does not have such a rule, but the Attorney's Oath requires a lawyer to "maintain inviolate" the secrets of his client. Abel owes a duty of confidentiality to Carol. In response to any ethical questions about not revealing his suspicions that Carol testified falsely at the deposition, Abel would likely claim that he could not say anything without violating his duty of confidentiality.

Exceptions

Under the ABA, there are exceptions to the duty of confidentiality to prevent substantial harm or death or great financial loss. California law limits the exception to substantial harm or death. Carol's false testimony related only to her sources of income which does not implicate substantial bodily harm or death. Likewise, even if she was trying to recover more from Landlord by lying about her income this probably does not

rise to the level of the serious financial loss exception recognized by the ABA. Further, these exceptions are permissive so they would not require Abel to disclose anything.

False Testimony

Under ABA, when a lawyer knows his client will give or has given false testimony the lawyer must counsel the client not to do so, attempt to withdraw from the case, and finally tell the judge if the attempt to draw is unsuccessful. In California, an attorney may not tell the judge but must allow his client to testify in a narrative fashion. Further, the attorney must counsel the client not to lie. Even though Carol's testimony was given during a deposition and not a trial, it was still given under oath and thus Abel should have counseled Carol not to lie (and attempted to withdraw and if he could not then have gone to the judge if ABA controls). However, Able will argue that he only suspected Carol was lying, he did not actually know. While Abel probably should have done further investigation to determine if his client was being truthful, he has not acted unethically by doing nothing because he did not know if Carol was lying.

Settlement

After the deposition Abel accepted Barbara's offer to settle with Landlords for $5,000 by signing it that day without telling his client. Abel did not inform Carol of the settlement until that night and Carol was unhappy with the amount.

Duty of Competence

A lawyer has a duty to competently represent his client. A lawyer must use the knowledge, skill, thoroughness, and preparation required to do so. Included in the duty of competence is a duty to communicate with the client.

Duty to Communicate

An attorney must keep his client up to date on the case. The attorney must give the client enough information so that she can make intelligent decisions going forward. In this case, Abel did not inform Carol of Landlord's offer to settle for $5,000. All settlement offers must be related to the client. While the attorney may make strategic decisions during the representation, whether to accept or reject a settlement offer is a substantive decision that must be made by the client. Thus, Abel acted unethically when he first did not tell Carol about the offer and second when he accepted it without her consent.

ANSWER B TO QUESTION 2

Abel's Ethical Violations

Abel's Lunch with Ford

Under both the ABA and CA rules, a lawyer cannot speak to a represented party. Abel was notified that Landlords, Inc. was represented by Barbara. A lawyer cannot speak to the employees of a represented person or corporation in the absence of opposing counsel. Here, Abel invited Ford, Landlord, Inc.'s former manager of rental properties, to lunch with him. Since Ford was a former employee and no longer employed by Landlord, it was not improper for Abel to speak with Ford to investigate the facts of his client, Carol's, case. A lawyer owes his client a duty to diligently advocate his client's case to completion and thoroughly investigate all facts and locate relevant witnesses who will support his client's case. However, in diligently advocating for one's client, the lawyer must conduct himself with integrity, honesty, fairness and good faith in respect to the public, his adversary, the court and to the legal profession.

Here, although Abel's lunch meeting with Ford was not a violation of any ethical duty, Abel crossed the line into unethical territory when he asked Ford about certain conversations Ford had with Barbara regarding the rental practices and Carol's application. Abel was aware that the information he was inquiring about was covered by Barbara's duty of confidentiality to Landlord, Inc. and would also be privileged and inadmissible in court or at a deposition under the evidentiary attorney-client privilege, if that privilege was invoked by Landlord, Inc. Although Ford was currently a former employee, at the time Ford had the conversations with Barbara, he was an employee of the corporation and was speaking within the scope of his employment relationship and those conversations were made in confidence to the corporation's attorney. By asking these questions to Ford without advising him that such information was covered by the attorney-client privilege, Abel violated his duty of fairness and honesty to his adversary and his actions reflected negatively on his integrity and respect for the legal profession.

Carol's Deposition

During Carol's deposition by Barbara, Abel suspected that Carol had testified falsely about her sources of income but Abel did not do anything to correct Carol.

Duty of Honesty and Candor to Tribunal and Adversary

A lawyer owes the court and his adversary a duty of candor, fairness and honesty. A lawyer cannot knowingly offer a false statement of law or fact to the court and upon learning of the falsity, the lawyer owes a duty to the court to correct the false statement. Here, Abel suspected that Carol testified falsely at her deposition. Deposition testimony is taken under oath under penalty of perjury and thus if Abel knew Carol had falsely testified or intended to testify falsely, then he would have allowed her to commit perjury which he has an ethical duty to try to avoid without prejudicing his client. Here, the facts do not indicate that Abel knew for certain that his client had testified falsely, nor do the facts show that Abel had knowledge that Carol had planned to testify falsely. Upon becoming suspicious of Carol's false testimony, Abel owed the court a duty to investigate whether or not the statement was false and to persuade his client to correct the false statement on her own. During the deposition, Abel should have asked to stop the deposition briefly to speak to his client in private, and should have persuaded her that if she was not being truthful, to go back into the deposition and correct herself and restate accurate information. Abel should have advised his client that she was under oath and that the deposition transcript could later be used against her and could ultimately harm her case if not corrected as soon as possible. If at that point Carol refused to correct her false testimony, and Abel was certain that she had committed perjury, he should have sought to withdraw as her counsel, as long as his withdrawal would not severely prejudice her case, because not doing so would continue to confer a falsity upon the court.

Duty of Confidentiality

Under the ABA and under CA, Abel would not be able to disclose the false statement to the court or to Barbara because doing so would breach his duty of confidentiality to Carol. A lawyer owes his client a duty to keep all confidential information related to the representation confidential and not to disclose such information without the client's consent. There are some exceptions where a lawyer is permitted to reveal confidential information, such as where a dispute arises between the lawyer and the client which allows the lawyer to reveal confidential information to the extent necessary to defend himself, or under the ABA and CA where disclosure of confidential information is necessary to prevent certain death or risk of substantial bodily injury or under the ABA where disclosure is necessary to prevent or mitigate fraud or substantial financial loss where the lawyer's services were used in furthering the fraud or financial injury. Here, no exceptions apply to allow Abel to disclose Carol's perjury so Abel's only option if she will not correct the false statement is to withdraw.

Settlement

Abel violated several ethical duties to his client by settling the case without his client's input and consent.

Duty to Communicate

A lawyer owes his client a duty to communicate by informing his client of all developments in the case and by informing his client of all settlement offers. The lawyer is free to make tactical decisions, such as trial strategy, but the client must make all decisions about the case, including whether or not to accept a settlement offer. A lawyer cannot accept a settlement offer without his client's approval and consent. Here, Abel accepted Barbara's settlement offer of $5,000 without informing Carol of the offer and obtaining her approval and consent to settle at that amount. By accepting the offer,

signing the agreement and telling Carol after the fact, Abel breached his duty to communicate to Carol.

Duty of Diligence and Duty of Competence

By accepting and signing the settlement offer without Carol's input and approval, Abel also violated his duty to diligently represent Carol to the case's completion as well as breached his duty of competence. A lawyer owes a client a duty to diligently see the case to completion and zealously advocate for the client. Here, Abel breached that duty by terminating the case right after his client's deposition, by accepting a settlement offer without his client's input. The facts do not indicate whether Abel had previously deposed Barbara's client, but if not, accepting the settlement before having the opportunity to do so, prevented Abel from learning more information that could have potentially increased the value of his client's case. Furthermore, since Carol was not happy with the settlement and probably would not have approved it, Abel did not zealously represent his client's interests.

A lawyer also owes his client a duty of competence, which requires the lawyer to represent his client with the knowledge, skill, preparation, experience and thoroughness that a competent lawyer would exercise under the same circumstances. A competent lawyer would not have accepted the settlement offer without consulting his client and without negotiating a larger amount and without being confident that his client was receiving a fair amount under the circumstances. Since Abel did not consult with his client nor try to get her a better offer, Abel breached his duty of competence as well as his duty of care.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 1

Patty was hit by a car, whose driver did not notice her because he was texting. Joe, a journalist, wrote a story about Patty's "texting" accident. Patty contacted Tom, a real estate attorney, and asked him to represent her in a claim against the driver. Tom agreed, and entered into a valid and proper contingency fee agreement. Tom later told Patty that he had referred her case to Alan, an experienced personal injury attorney, and she did not object. Unknown to Patty, Alan agreed to give one-third of his contingency fee to Tom.

Thereafter, Alan sent a $200 gift certificate to Joe with a note stating: "In your future coverage of the 'texting' case, you might mention that I represent Patty."

Patty met with Alan and told him that Walter, a homeless man, had seen the driver texting just before the accident. Alan then met with Walter, who was living in a homeless shelter, and said to him: "Look, if you will testify truthfully about what you saw, I'll put you up in a hotel until you can get back on your feet."

1. What ethical violation(s), if any, has Tom committed? Discuss.

2. What ethical violation(s), if any, has Alan committed? Discuss.

Answer according to both California and ABA authorities.

SELECTED ANSWER A

(1) <u>What ethical violations, if any, has Tom (T) committed?</u>

<u>Lawyer/Client relationship</u>

A lawyer owes duties to his client as soon as the relationship is formed. The relationship is formed even if the client never retains the lawyer but approaches him regarding legal representation.

Here, the relationship between P and T began as soon as she contacted him and asked him to represent her in a claim against the driver who hit her. Even though P never retained or ultimately 'hired' T, he owes her duties as his client from this point forward.

<u>Duty of Competence</u>

Under ABA and CA, a lawyer (L) owes his client the duty of competence, which requires using the requisite skill, preparation, thoroughness, and knowledge to adequately represent his client's interests. If an L is not competent in an area of law, he must become competent without undue expense or delay upon the client; otherwise, he should associate with an L who is competent in that area.

Here, T is a real estate attorney who was contacted by P regarding an injury she suffered after a car hit her. P's cause of action is a tort, likely negligence or battery, which is entirely unrelated to real estate. T should not have taken the case if he had no knowledge in this area of law. In fact, T 'later' told P that he referred the case to Alan. This is not 'associating' with an attorney to help with an area of law, nor is it becoming up to speed on the requisite area of law.

T has breached his duty of competence to P because he was not able to represent her interests in a tort claim and did not adequately respond by not taking the case or by the steps noted above.

<u>Referring P's Case to Alan</u>

<u>Duty of Confidentiality</u>

ABA: A lawyer has the duty to maintain all confidential communications acquired in the course of representation. In CA, there is no delineated duty of communication; however, the Attorney's Oath requires lawyers to maintain the client's secrets and confidences.

Here, T has contacted another attorney regarding information he has obtained from P in the course of representation – specifically that she was hit by a car and needs a lawyer, as well as her personal information. T has breached his duty of confidentiality by revealing this information to Alan.

Exceptions to duty of confidentiality – consent

If a client consents, a lawyer may reveal her confidences.

Here, T told P only afterwards that he was referring her case to Alan, an experienced personal injury attorney. While she 'did not object' she certainly did not consent to the disclosure in the first place because she was entirely unaware of it. Second, a non-response will not be considered affirmative consent to disclose. T will not be able to use P's failure to object as evidence of consent.

Duty of Communication

A lawyer has the duty to communicate with his client regarding all stages of representation, to return phone calls and inquiries promptly, and to communicate the ultimate strategy decisions to the client for her decision.

Here, T failed to communicate to P that he did not have the requisite experience to represent her and that he had referred her case to Alan. This is an important juncture for communication that T owed to P; he should have let her know he was unable to take the case but would be able to refer her to someone else.

Referrals & Referral Fees

Under the ABA and CA, a lawyer may refer a client to another lawyer with the informed consent of the client and as long as the referral agreement is 'non-exclusive.' Under the ABA, referral fees are prohibited; under CA, they are permitted as long as the client gives informed consent and the total fees are not increased due to the referral agreement.

Here, T has referred P to A but failed to tell P about the referral, beaching his duty to obtain her consent. Further, it appears T has obtained a referral fee for this referral paid by 1/3 of the contingency fees in this case (see below) which is absolutely prohibited under the ABA. In CA, fees are permitted if the total fees to P did not increase; however, without P's consent this was an improper referral. Further, if A and T have an 'exclusive agreement' to refer to each other, the referral agreement also breaches their duties.

Fee splitting among lawyers

Fee splitting is prohibited by both the ABA and CA with non-lawyers. However, under the ABA, a lawyer may split fees with another lawyer if (i) it is in proportion to the services rendered or both L's are jointly and severally liable, (ii) the total fee is reasonable, (iii) the client gives informed consent, and (iv) the total fee is not increased. In CA, an L may split fees with a non-lawyer if (i) the total fee is not unconscionable, and (ii) the client gives written consent.

Here, T has entered into a fee sharing agreement with A to give 1/3 of a contingency fee to T. Under the ABA, this is not going to be 'in proportion' to the services rendered by T because it is likely he will not be engaging in the litigation that is outside of his practice area. However, if T remains jointly and severally liable, he may rebut this requirement. However, there was no consent given by P per this fee splitting arrangement so the agreement violates the rules under the ABA regarding splitting. The total 'fee' will be determined reasonable because it is not 'increased' as a contingency fee.

This arrangement under the ABA is a violation of fee splitting because it was not consented to in writing by P and it is not in proportion to the efforts to be made by T.

In CA, lawyers may split fees in the fashion A and T did as long as the total fee is not unconscionable and there is written disclosure to P. While the total fee will be determined as a percentage of the contingency, it is clear that P did not consent to this arrangement because "unknown to P" A agreed to give 1/3 of the fee to T. T has breached the fee splitting rules under CA as well.

Contingency Fees

Contingency fees are fees to be paid as a percentage of a successful judgment. Under the ABA and in CA, contingency fee agreements must be (i) in writing, (ii) signed by the client, (iii) describing the duties of the lawyer and client, (iv) the percentage of fees to be taken for the lawyer, and (v) whether these fees are before or after legal fees have been paid. CA additionally requires the L to note that the fees are negotiable and to indicate how legal fees not covered by the contingency will be paid.

Here, T has entered into a contingency fee agreement with A, the subsequent attorney, not P, the client. P has not signed any agreements, no agreement in writing has been made, there is no description of duties and a percentage has not been indicated. This is a violation of a lawyer's duties regarding fees.

(2) <u>What ethical violations, if any, has Alan (A) committed?</u>

<u>Attorney-Client Relationship</u>

See above.

Here, A has obtained P's information from T regarding representing her in his capacity as a personal injury attorney. Therefore, because this is related to legal representation, A owes P duties as his client.

<u>A and T's fee arrangement</u>

Unknown to P, A agreed to give T 1/3 of the contingency fee to T, violating many of the same rules as T under this agreement.

<u>Referral fees</u>

See above.

A breached his duty related to referral fees under the ABA in relation to giving part of the contingency to T which is likely a 'fee' and under CA because this was without the consent of P.

<u>Fee splitting</u>

See above.

For the same reasons noted above, the fee splitting arrangement between A and T is prohibited by both CA and ABA.

Fees Generally

Under the ABA, fees must be reasonable and agreed upon by the client (consented to) in writing. In CA, the fees must be 'not unconscionable' and agreed upon (consented to) by the client in writing.

Here, it is unclear whether the contingency fee that A will be taking for this case is either reasonable or 'not unconscionable' under the ABA and CA respectively; however, because the fee was likely determined in advance of A ever meeting with P, A breached his duty to P regarding fees because they were not consented to by P.

Contingency Fees

See above.

For the reasons noted above, A also breached his duty regarding contingency fees to P for failure to get them in writing, with the required terms under both ABA and CA.

$200 gift from A to Joe

Duty of Fairness

A lawyer owes the duty to the legal profession to maintain the public confidence, dignity, and efficiency of the legal system and the profession. Additionally, even those actions by an attorney that are not specifically prohibited by the ABA or CA professional conduct rules, or the law, may still be prohibited if they reflect poorly on the profession.

Here, A sent money to a journalist asking him to write in his newspaper coverage of the 'texting case' that A represents P. While it is generally public information as soon as a case is filed who is being represented by whom, this is an improper action by A to have a news organization write something in his favor so he gets public notoriety or even advertisement for his services. This reflects poorly on the profession because not only did A ask to be mentioned, he seems to have 'bribed' the journalist by sending a $200 gift certificate. This is an unethical move that will be looked down upon as not maintaining the public confidence in the profession.

Advertisements

Solicitation

Out-of-court statements regarding a case

A lawyer may not make public statements that are substantially likely to materially prejudice the case. He may comment on those topics that are generally public knowledge (who the parties are, what the cause of action is) and he may conduct 'damage control' if his client has been prejudiced.

Here, A is looking to have information publically noted about his case in Joe's news organization. He has requested only the fact that he represents P to be printed; therefore, this will not be considered an improper public statement if published because it is public knowledge and does not risk prejudicing the case.

A's meeting with Walter (W)

Meeting with unrepresented persons

A lawyer, if meeting with a person who is not represented by an attorney, must not make any indications that he represents that person's interests or is impartial.

Here, A met with W after finding out he is a potential witness in the P's personal injury case. Upon meeting him, he must indicate that he does not represent W and is not impartial in the case, but rather represents the best interests of his client. It is not clear whether A clearly indicated his position, but by offering W a hotel until he gets back on his feet, W may feel his interests are being represented by A, in which case A has breached his duty to express partiality.

Duty of Fairness

See above.

A lawyer has the duty to refrain from altering or obstructing access to legally discoverable evidence.

Here, A has contacted a witness with personal knowledge of the accident and indicated he would put him up in a hotel. This may make W harder to find for the opposing party and unfairly influence his testimony, in effect, altering the evidence. A's actions also reflect poorly on the legal profession because it is not an honest or ethical action to pay homeless individuals to testify by baiting them with a hotel room until they are back on their feet – something that A may not ultimately do for W and creating a significant risk of biased testimony.

Improperly influencing a witness

A lawyer may not pay a witness for their testimony. If it is an expert witness, the expert witness's expenses for travel and time away from work may be paid for.

Here, A has effectively 'paid' a witness in this case by offering to pay W's hotel until he 'gets on his feet.' W is living in a homeless shelter, so moving to a hotel is a very serious and significant 'bribe' for W to do as A wants and W will be regarded as being paid to testify for P because he is receiving a direct benefit for his testimony. This is a violation of A's duty of fairness to opposing counsel and the legal profession by improperly influencing a witness and paying a non-expert witness to testify.

Perjury

ABA and CA: In a civil case, a lawyer must not call a witness whom he knows will perjure himself. An L may not encourage perjury as this violates both his ethical duty and the law.

Here, it is not clear that W will 'perjure' himself, as A has indicated that he wants him to "testify truthfully." However, A has made it seem that if W gives him the testimony that A desires, he will have a hotel until he gets back on his feet – a very big incentive for the witness to do as A desires. By A calling W as a witness whom he has in effect bribed, even with the caveat he told him to testify truthfully, A may be regarded as having suborned perjury should W state anything that is untruthful but bodes well for P and A.

SELECTED ANSWER B

TOM'S ETHICAL VIOLATIONS (Real Estate Attorney)

Agreement to Represent Patty

An attorney owes a duty of competence to his clients. An attorney should not agree to represent a client where the subject matter of the case is outside his area of knowledge, unless he can learn the relevant law without undue delay or expense to his client, or he can affiliate himself with an attorney who is experienced in that area of law. Here, Tom is a real estate attorney and he agrees to represent Patty in a personal injury suit. The suit is based on a personal injury claim because Patty was hit by a car whose driver was texting and thus did not notice her. Tom's experience in the area of real estate law does not relate at all to the area of personal injury. Thus, Tom must decline to take the case, learn about the relevant law, or affiliate himself with a knowledgeable personal injury attorney.

Here, Tom will argue that he referred the case to Alan, who is an experienced personal injury attorney, and thus did not violate the duty of competence. However, Tom did not merely affiliate himself with Alan and work with Alan on the case; rather, he referred the entire case to Alan, after entering into a valid representation agreement with Patty. Tom will argue that this may be deemed appropriate because Tom has no experience in the area of personal injury and thus is not competent to represent Patty in a personal injury suit. However, it would have been more appropriate for Tom to decline to take the case in the first place because, as a real estate attorney, he has no experience in personal injury law.

Tom acted appropriately in referring the case to a personal injury attorney, and thus did not violate the duty of competence; however, it would have been more appropriate for him to decline to take a case in the first place where the case necessarily requires knowledge of an area of law in which Tom has no experience.

Referral of Case to Alan for a fee

Under the ABA, an attorney may not refer a case to another attorney for a fee. Under California law, an attorney may refer a client to another attorney for a fee as long as the client is informed. Here, Tom referred Patty to Alan and accepted one-third of the contingency fee as a possible referral fee. Here, Tom did refer Patty's case to Alan, in breach of ABA rules. He also breached California rules because he failed to tell Patty that he made a referral to Alan until after the fact, and did not tell her at the time of the referral. Thus, he violated rules regarding referral of a client for a fee under both ABA and California.

Failure to Communicate to Patty that the case was referred to Alan

An attorney has a duty to communicate with is clients regarding the representation. Here, Tom referred the case to Alan without consulting with Patty first. Because Tom had agreed to represent Patty and had entered into a contingency fee agreement with her, and thus Patty was expecting Tom to be her attorney, Tom should have consulted with Patty and obtained her permission before referring the case to Alan. Because Tom failed to communicate with Patty when he failed to acquire her permission to transfer the case to Alan, Tom violated his duty to communicate with his client.

Contingency Fee Arrangement

A valid contingency fee agreement must be in writing, signed by the client, include the lawyer's percentage, the expenses to be deducted, and whether the lawyer's percentage will be paid prior to or after the expenses are deducted from the award. In California, the agreement must also include a statement as to how services not provided for under the contingency fee agreement will be provided, and that the lawyer's percentage is negotiable. As it appears that a valid and proper contingency agreement was entered into, no ethical violations arise from this agreement.

ALAN'S ETHICAL VIOLATIONS (Personal Injury Attorney)

Fee Splitting with Tom

An attorney may split fees with other attorneys outside of his firm, subject to certain restrictions. Under the ABA, the total fee must be reasonable; under California law, the fee may not be unconscionably high. Further, the client must be informed about the fee splitting and must consent to it. Finally, the fee must be split proportionately in accordance with the relative amount of work that each attorney performs.

Total Fee

Here, we do not know what the total amount of the fee was, but it appears that the total amount was the same amount agreed to under the original contingency fee agreement. We know this because Alan agreed to give one-third of his contingency fee to Tom, and thus Tom's share comes out of the original amount agreed on. Thus, if the original contingency agreement included a valid fee, then there should be no violation regarding the total fee due to the attorneys.

Informing the client

Here, Patty was not informed of the agreement between Tom and Alan. Because Patty should have been informed about the fee-splitting arrangement between Tom and Alan, the failure to notify her of the agreement constitutes a violation of fee-splitting rules under both the ABA and California law.

Proportionately splitting the fee

Here, Tom appears to be doing none of the work and Alan is doing all of the work in the representation of Patty's case. Under the rules on fee splitting, Tom should thus receive none of the fee and Alan should receive the entire fee. Because Alan has actually promised to give Tom one-third of his contingency fee, where Tom is not performing any of the work, Alan has violated the rules on fee splitting.

Alan has violated the rules on splitting fees with attorneys outside his firm, because he did not inform Patty that he was giving Tom one-third of the contingency fee, and

because the fee is not split in proportion to the amount of work that each attorney is actually performing in the representation.

Gift to Joe and Request that Joe Report Alan's Representation of Patty

An attorney has a duty of candor to the public. An attorney may not attempt to influence the press by granting gifts to journalists. Because a journalist has a duty to report fairly and in a manner that is not unduly affected by outside influences, an attorney's attempt to interfere with a journalist's duty of fair reporting constitutes a violation of the duty of candor. Here, Alan gave Joe a $200 gift certificate with a note stating that Joe might include the fact that Alan is representing Patty when Joe is covering the case. The gift certificate would appear to be a means of attempting to influence the journalist's coverage, in that Joe might feel compelled to actually include information favorable to Alan when reporting the case. The gift certificate might be seen as a gift, but it might also be seen as payment. Alan will argue that he is simply requesting that Joe include truthful information in his coverage, such as the fact of Alan's representation, and that the information does not influence the case in any way. However, because Alan made a gift and is attempting to influence the journalist's coverage of the case, he has violated a duty of candor to the public.

Advertising

Attorney advertising must abide by certain rules. An attorney cannot engage in real-time phone or live contact with prospective clients with whom he has no prior personal or business relationship. Any advertising must be labeled attorney advertising, it cannot make any misrepresentations or be misleading, and it must state the name of at least one attorney responsible for the material. In California, making any guarantees or warranties as to results is considered presumptively improper and constitutes a misrepresentation.

Here, Alan is essentially attempting to purchase advertising from Joe, by "paying" Joe with a gift certificate and asking Joe to essentially include Alan's name in coverage of the texting accident. This appears to constitute advertising, but in a way that makes it

appear that it is not advertising. The news article will be read by the public as impartial news, and will not be labeled advertising, even though Alan "purchased" the coverage regarding his relationship to the case. Alan will argue that the coverage merely states his representation of Patty, and the article does include his name as a responsible party.

However, if the coverage later states that Alan won the case for Patty, that may constitute a misrepresentation under California law, as the outcome may imply to the public that a certain result is guaranteed, even if it is the case that Patty's success is an anomaly and not indicative of typical results. Thus, depending on how Joe writes the coverage, including the information about Alan could pose an improper misrepresentation or otherwise be misleading to the public in violation of California rules.

Thus, because the coverage of Alan's representation of Patty in the case could be misleading in the message that it sends to the public, and because there would be no express indication in a news article that Alan is essentially advertising his services, Alan is violating the rules regarding proper attorney advertising by asking Joe to include Alan's name in Joe's coverage of the case.

Solicitation

An attorney has a duty not to solicit prospective clients. Solicitation is live or phone contact with potential clients with whom the attorney has no preexisting personal or business relationship. Alan has not violated any solicitation rules because newspaper articles and advertising do not constitute solicitation.

Offering to Put Walter Up in a Hotel

An attorney may pay reasonable expenses for a witness in connection with testimony at trial; however, any payment cannot be made in connection with the witness' testimony at trial. Here, Alan violated both of these rules.

Reasonable expenses

Reasonable expenses in connection with a witness' testimony could include travel expenses, a place to stay and meals during the time that the witness is required to be present at trial. However, here, Walter lives in a homeless shelter and Alan offered Walter a place to stay "until you can get back on your feet." This implies an indefinite period of time, and not just the time necessary for Walter to testify at trial. Because Alan is offering Walter a place to stay for a period of time that potentially exceeds the time of the trial, Alan has violated the rule that he may not pay expenses other than those that are reasonable in connection with a witness' attendance at trial.

Payment in connection with testimony

An attorney may not make the payment of reasonable expenses contingent on a witness' testimony at trial. Here, Alan stated that if Walter will testify truthfully at trial about what he saw, then Alan would put Walter up in a hotel until he can get back on his feet. It appears that Alan is making his offer to pay for a hotel contingent on Walter's truthful testimony at trial. Alan will argue that he simply wants to assure that Walter will testify truthfully, and that he is fulfilling his duty of candor to the court by ensuring truthful witnesses. However, because Alan conditioned his "payment" of a hotel stay to Walter on the nature of Walter's testimony, he violated an ethical rule, nonetheless.

Alan violated the rules regarding the payment of a witness' expenses in connection with testimony at trial because he offered to pay expenses that exceeded a reasonable limit, because he offered to pay for a hotel for an indefinite period of time, and because he conditioned the payment of expenses on the nature of Walter's testimony.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 1

Three months ago, Dave was arrested for the burglary of a shoe store after a forensic investigation by the police department identified him as the burglar. Patty, a prosecutor, brought burglary charges against him.

A week ago, Patty saw a press release that the police chief was planning to issue to the media. It stated that Dave was a "transient" and had been "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals."

Four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable.

Three days ago, Patty announced "ready for trial" at a pretrial conference.

Yesterday, Patty learned that two eyewitnesses had identified Dave as the burglar. Because she did not intend to use evidence from the forensic investigation, she did not disclose the federal agency report to Dave's attorney. Dave's attorney has never asked her to provide discovery.

This morning, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave.

What ethical violations, if any, has Patty committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

Prosecutors have numerous unique ethical duties as a consequence of their role as public representatives and their power to interfere in the liberty of private persons. In general, a prosecutor has a duty to seek justice, not to secure a conviction at any cost.

Press Release Suggesting That the Accused Is Guilty

A lawyer has a duty not to make any statements that she should reasonably expect to be publicly disseminated and that are substantially likely to prejudice a judicial proceeding. A prosecutor in particular must not broadcast or allow to be broadcast a statement that expresses an opinion regarding the guilt or innocence of a criminal defendant. If a prosecutor knows that an attorney or law enforcement agent under her oversight plans to make such a statement, the prosecutor must make reasonable efforts to prevent the statement from being issued.

Here, the chief of police planned to issue a statement declaring that Dave had been apprehended by a detective "who is known for his ability to apprehend guilty criminals." Patty saw this press release before it was issued and knew that the chief planned to issue it. She therefore should reasonably have expected that it would be publicly disseminated. Patty will likely argue that the statement does not pose any problems, because in it the police chief does not directly express an opinion that Dave is guilty (or innocent). This argument will likely fail. The police chief's statement announces that Detective Ing has a reputation for apprehending guilty parties, which suggests strongly that the chief believes that Dave in particular is guilty. Patty may also argue that she has no duty to prevent the statement because it is attributable to the chief, not to her. This argument will likely also fail. As a prosecutor, Patty has a duty to make reasonable efforts to prevent law enforcement from making public statements that will prejudice a proceeding in which she is counsel. The chief's planned statement suggests strongly that the chief believes that Dave is guilty. This statement would likely prejudice the public against Dave, perhaps making it more difficult to select an unbiased jury. Patty

therefore had a duty to make reasonable efforts to prevent the statement from being made.

Patty may argue that the other portions of the press release are not objectionable. For instance, a prosecutor generally may announce the name of a criminal defendant, the fact of an arrest, and the nature of the charges. That the police chief planned to announce that a person named Dave was arrested for burglary is therefore consistent with Patty's duties with regard to trial publicity, as is the chief's statement that Dave is a "transient." However, the statement that Dave was arrested by a detective who is known for apprehending "guilty criminals" suggests an opinion as to Dave's guilt, and amounts to a violation.

Patty's failure to prevent the chief's statement that Dave was arrested by a detective known for apprehending "guilty criminals" after learning that he planned to make it was a violation of her duty to avoid public statements that may prejudice a proceeding.

Prosecution Despite Lack of Probable Cause

A prosecutor's duty to seek justice requires that she never pursue a charge that she knows is unsupported by probable cause. Probable cause exists when the facts known to the prosecutor are sufficient to allow a person of reasonable prudence and caution in the prosecutor's position to seriously entertain the possibility that the defendant is guilty of the crime charged.

Here, Patty will argue that she has probable cause to pursue Dave's burglary charge to trial. She will note that two eyewitnesses have identified Dave as the burglar, and eyewitness testimony is usually sufficient to make out a prima facie case against an accused. The State Bar would likely point out that Patty did not learn of the eyewitness testimony until yesterday. Before that time, the sole evidence on which the charge was based was the police department's investigation. Four days ago, however, before Patty learned of the eyewitnesses, a federal report revealed that the forensic investigation

was unreliable. The State Bar will argue that, as of this time, Patty lacked probable cause because the sole evidence on which the charge was based had been revealed to be suspect. The State Bar would be correct. In the two days between receiving the federal report and learning of the eyewitnesses, Patty lacked sufficient facts as would justify a reasonable person in believing that Dave was guilty. Instead of continuing to pursue the charge, she should have conducted further investigation to learn whether Dave was likely to be responsible for the burglary charged. Patty may argue that the mere existence of a report calling into question the police department's investigation does not alone establish that the investigation was faulty. This is true, but it does not excuse her conduct. At minimum, the report called the investigation into question. Patty should have pursued that question rather than continuing to rely blindly on the forensic evidence.

Patty's continued pursuit of the burglary charge after receiving the federal report was likely a breach of her duty not to pursue a charge in the absence of probable cause.

Lack of Candor Before the Tribunal

A lawyer's duties to uphold the integrity of the profession and to avoid prejudicing the administration of justice require that she make no false statements to a court in the course of a proceeding. This duty applies to prosecutors as well as to all other lawyers.

Here, Patty announced ready for trial three days ago at a pretrial conference. The day before the conference, she had learned that the sole evidence on which the burglary charge was then based, the police department's forensic report, was unreliable. Rather than announce this fact to the court, however, she told the court that she was ready for trial. Patty may argue that this statement was not a misrepresentation. She may assert that she intended to proceed to trial on the forensic evidence despite the federal report, perhaps in the belief that the report was mistaken. Other facts in this case belie that assertion. After the pretrial conference, as soon as Patty learned that there were eyewitnesses to the charged crime, she abandoned the forensic evidence. This

indicates that she understood that the forensic evidence had limited value, and suggests that Patty did not truly believe that she was "ready for trial" when this evidence was all that was available. On the other hand, if Patty did believe that the forensic evidence was sufficient to proceed to trial, this fact reinforces the conclusion above that Patty breached her duty not to pursue a charge in the absence of probable cause.

Patty likely did not believe that she was ready for trial when she announced as much to the court, a breach of her duty of candor. If she did believe that she was ready when the only evidence available was the unreliable forensic evidence, her announcement of readiness for trial is a breach of her duty not to pursue a charge in the absence of probable cause.

Failure To Disclose Exculpatory Evidence to the Defense

The Due Process Clause of the United States Constitution imposes a duty on every prosecutor to disclose to the defense material evidence favorable on the issues of guilt or punishment. Evidence is "material" if the prosecutor's timely disclosure raises a reasonable possibility that the outcome of the trial would be different than if the evidence had been withheld. The duty to disclose exists even if the defense makes no discovery requests. A prosecutor is responsible for violating this duty even if she did not act in bad faith.

Here, Patty received a report from a federal agency suggesting that the police department's forensic investigation was unreliable. This evidence is favorable to Dave because he can use it to show that the forensic evidence deserves little weight. Patty will argue that the report is not material because she intends to rely on eyewitnesses, and does not plan to introduce the forensic evidence at all. She will assert accordingly that the defense will not be able to use the report to affect the outcome because it does not address the reliability of the eyewitnesses' testimony. This argument will fail. The report allows the defense to attack the reliability of the police department's entire investigation. By demonstrating that the forensic investigation was inept, the defense

will be able to suggest that the police handled the eyewitnesses ineptly as well. Because the defense can use the report to undermine the police department's investigation, a reasonable possibility exists that it could influence at least one juror to vote not guilty, calling for a mistrial. This is sufficient to give rise to a reasonable possibility that disclosure of the report could lead to a different outcome. Patty may also argue that she has no duty to disclose the report because the defense never asked for it. This argument will also fail. A prosecutor has a duty to disclose exculpatory evidence in her possession whether the defense asks for it or not.

Patty's failure to disclose the federal report is a breach of her duty to disclose exculpatory evidence to the defense.

Improper Ex Parte Contact with the Presiding Judge

A lawyer's duty of fair play to her opposing counsel requires that she not engage in any ex parte contact with a judge in order to influence the outcome of a proceeding.

Here, Patty called the presiding judge in Dave's trial to assure him that she has sufficient non-forensic evidence to prove the burglary charge. There is no indication that she announced to Dave's counsel that she intended to make this contact or that she invited Dave to speak with the judge at the same time. This was an improper ex parte contact. Moreover, it was likely intended to influence the judge in the proceedings. That Patty felt the need to reassure the judge that she need not rely on the forensic evidence suggests that she knew or suspected that the judge had misgivings about the forensic evidence. Her reassurance was likely intended to assuage those misgivings. Making this communication in the absence of opposing counsel was a violation of Patty's duty of fair play.

By contacting the presiding judge ex parte in an attempt to influence him regarding the strength of her case, Patty violated her duty of fair play to opposing counsel.

QUESTION 1: SELECTED ANSWER B

Patty's Ethical Violations

Attorneys have a duty to represent their clients with diligence, competence and zealous representation. The attorney must conform their conduct with their client, courts, opposing counsel and other parties within the rules under the Business and Professions code and Ethical codes of conduct. Generally, the ABA and California are the same but I will note when they are different.

Here, Patty as prosecuting attorney has a duty to zealously represent the state and conform her conduct with the professional rules and uphold the integrity of our legal system. Patty has potentially violated some of these rules which will each be discussed in turn below.

Statements to the Public/Media

Patty likely committed an ethical violation when she knew the police chief was planning to issue a press release to the media containing prejudicial statements about Dave that would adversely affect his right to a fair trial and impartial jury.

An attorney may not make extrajudicial statements that would inhibit a defendant's right to a fair trial. An attorney cannot make statements about a trial that would prevent the selection of an impartial jury or prejudice the defendant. It is important public policy that the community not be tainted by these statements to the media; otherwise a defendant will be unable to obtain a fair trial with an impartial jury. However, there are a few matters where an attorney may make a statement to the public such as any defenses to the crime charged and an attorney may respond to accusations by another attorney. In other words, the attorney can make statements in rebuttal of any prejudicial statements made by opposing counsel. Without allowing statements of rebuttal the jury selection would be tainted and prevent a fair trial for the defendant. Statements may also be

made when the police are still conducting an investigation and are seeking help from the public. For instance, looking for witnesses or information regarding persons of interest or whereabouts.

Here, Patty is a prosecutor bringing burglary charges against Dave. Patty is arguably responsible for statements by the police chief as he is the head of the department leading the investigation of the crime for which she is prosecuting. Patty knew of extrajudicial statements before they were made by the police chief because she saw the press release a week ago. As such, Patty has a duty to prevent any extrajudicial statements to the press by the police chief that would adversely affect Dave's right to a fair trial. Furthermore, Patty had knowledge of these statements and she knew of their potential prejudicial effect on Dave the defendant. Dave's attorney may argue Patty knew the police chief's statement contained prejudicial statements about his client because she knew the police chief was going to call Dave a "transient". Dave's Attorney will argue by telling the public Dave is a transient will have a prejudicial effect on the public. The public may infer guilt upon Dave because traditionally in our society being a transient indicates a lack of money and provides motive to rob a shoe store. Patty will counter argue statements as to the potential motive of the criminal act is a permissible statement. Patty cannot argue as a defense these statements were not made in an ongoing effort to solve a crime or gain information from the public and are thus permissible. It is possible the disciplinary boards or the court may not find the "transient" statement to have been so prejudicial as to be an ethical violation by Patty.

The second statement made by the police chief was that Dave was "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals." While the first part of the statement announcing Dave was arrested for burglary by Inspector Ing does not appear prejudicial, the police chief crossed the line with the statement "known for his ability to apprehend guilty criminals." This statement would have an extremely prejudicial effect on the public at large because he is stating Detective Ing only arrests those who are guilty criminals. Dave's right to a fair trial and impartial jury are tainted by such statements because it is telling the public by inference

of his arrest he is guilty. Again, as prosecuting attorney Patty had a duty to prevent the police chief from making prejudicial statements about Dave to the public because she had knowledge of his press release he was planning to issue.

In conclusion, it is likely Patty will be found in violation of the ethical code of conduct because she knew of the police chief's press release stating Dave was arrested by Detective known for apprehending guilty criminals.

Malicious Prosecution: Bringing Charges Without Probable Cause

Patty committed an ethical violation by bringing charges against a defendant without sufficient probable cause.

A prosecuting attorney has a duty to not bring malicious actions and may only bring charges supported by probable cause. If a prosecutor initially has probable cause to bring charges but later finds out there is no probable cause (lack of evidence, etc.) then the charges against the Defendant must be dropped. In order to have probable cause there must be facts sufficient to indicate the defendant committed a criminal act. The policy behind this rule is to uphold the integrity of our justice system by only prosecuting individuals when there are sufficient facts to constitute a cause of action. This rule also prevents undue costs and waste of the court’s time.

Here, Patty has made an ethical violation because she proceeded with the charges against Dave even after she learned the forensic investigation identifying Dave as the burglar was unreliable. Patty only initially brought the charges against Dave because of the forensic investigation identifying him as the burglar. This was sufficient probable cause because there was evidence indicating Dave committed a criminal act of burglary upon the shoe store. Thus far Patty has not committed a violation for filing charges against Dave for the burglary. However, four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This negates probable cause to arrest Dave

because there does not appear to be any other evidence linking him to the shoe store burglary. Furthermore, it was a federal agency reporting to Patty that the investigation was unreliable. This should have been a clear indication to Patty that she did not have probable cause and thus charges against Dave should have been dropped. Patty committed a violation when three days later she announced "ready for trial" at a pretrial conference. There are no other facts to indicate Patty had any probable cause to link Dave to the burglary and thus she committed an ethical violation by bringing charges without probable cause.

In conclusion, Patty will be in violation of bringing charges against a defendant with lack of probable cause because she did not have any evidence linking Dave to the burglary and otherwise announced she was ready for trial.

Duty of Diligence and Competent Representation

Patty potentially committed a violation of diligent and competent representation when she knowingly carried out charges against Dave for burglary after learning she no longer had sufficient probable cause.

An attorney has a duty to competently and diligently represent a client with the required skill, knowledge and experience required for the matter.

Patty potentially violated her duty to represent the state diligently and competently because she did not drop the charges against Dave after a lack of probable cause. It can be argued it would have been diligent for Patty to drop the charges against Dave because once the jury is sworn in Dave cannot be charged again due to double jeopardy. If there was a lack of evidence it would have been prudent of Patty to drop the charges and await discovery of further evidence sufficient to support probable cause. This indicates a violation of her diligent and competent representation of the state (and essentially the shoe store) because she is prosecuting a defendant who may have committed the crime but will not be convicted due to a lack of evidence.

False Statement to the Court

Patty made a false statement to the court when she stated she was ready for trial at a pretrial conference but had insufficient probable cause to carry out the charges against Dave for burglary.

However, Patty will argue she did not commit a violation because she had probable cause when she learned that two eyewitnesses had identified Dave as the burglar. Patty will still be in violation because this information was obtained after she told the court she was "ready for trial" at a pre-trial conference. This may be considered a false statement to the court which is another violation of ethical conduct. By falsely telling the court she was ready for trial indicates she still had probable cause to charge Dave. However, Patty did not have sufficient probable cause at the pretrial conference because she received a report from a federal agency stating the forensic investigation identifying Dave as the burglar was unreliable. Again, no other evidence was apparent linking Dave to the shoe store burglary. Furthermore, Patty did not attempt to alert the court to this false statement and it was made knowingly because she knew the report made her forensic evidence unreliable. Thus, Patty made a false statement to the court when she told them she was ready for trial although she had lack of probable cause. By continuing trial this would result in a waste of the court's time and expenses of attorney fees upon the defendant not to mention the stress of facing criminal charges.

Although Patty will argue she had sufficient probable cause because she had two eyewitnesses to identify Dave as the burglar this evidence did not arise until after the statement was made to the court. Patty will not be able to retroactively rectify the fact she made a false statement to the court.

In conclusion, Patty made an ethical violation by giving the court a false statement that she announced she was ready for trial at a pretrial conference.

Disclosure of Evidence to Opposing Counsel

Patty will be in violation of providing exculpatory evidence when she did not disclose the federal agency's report to Dave's attorney.

A prosecuting attorney has a duty to turn over any evidence that is helpful to the defense even outside of discovery requests. This goes towards the policy of providing a defendant with a fair trial giving both parties the same evidence to use in arguing their case. A prosecutor has access to evidence and resources a defense attorney may not have, such as federal agency reports. An attorney who does not disclose such evidence will be found in violation of the codes of ethical conduct.

Here, Patty did not disclose the federal agency report to Dave's attorney. Dave's attorney is likely a public defender since Dave is a transient. The public defender's office may not have access to the federal agency report stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This evidence is beneficial and essential to Dave's case because it shows the prosecution has no probable cause to bring charges. Essentially the federal agency report making the evidence unreliable is a strong piece of evidence to argue Dave's innocence. Thus, as prosecutor Patty should have disclosed the evidence to Dave's attorney within a reasonable time of its discovery.

Patty will argue that she was not intending to use evidence from the forensic investigation so she did not disclose it to Dave's attorney. She will further argue that Dave's attorney has never asked her to provide discovery so she was not required to disclose the report and could not have committed an ethical violation where there was no duty to disclose. This defense will not stand because Patty as prosecutor had a duty to disclose the beneficial evidence to Dave's attorney of her own accord. Furthermore, Dave's attorney had no indication of knowledge of the report’s existence so he would not have known to ask for it. Thus, Patty remains in violation although Dave's attorney never specifically asked for the document.

In conclusion, Patty committed an ethical violation when she did not disclose the federal agency report which was of benefit to Dave's attorney.

Attorney Work Product Doctrine

Patty will argue the federal agency report is attorney work product doctrine and thus cannot not be turned over to Dave's attorney because of privilege. However, it is likely Dave's attorney can show undue hardship without the production of the federal agency report and thus Patty must turn over the report or will be in violation.

An attorney's work product of their thoughts, opinions, legal conclusions, labor or investigation by an agent falls under privileged information and is not discoverable by opposing counsel. However, when an attorney can show (i) a substantial need for the information or document and (ii) an undue hardship (such as excessive costs) and inability to reproduce the same document the court may grant an exception this rule. In California, the attorney needs to show a reasonable and compelling reason for the need to disclose the evidence. However, the information must be redacted (blacked out, crossed out) of any conclusions, opinions, thoughts about the case made by the attorney to whom the document belongs. This ensures the attorney's thoughts and any privileged information between themself and a client remains undisclosed to the opposing counsel.

Here, Dave's attorney will argue there was a substantial need for the information because it is proof his client is being wrongly accused for the shoe store burglary. Furthermore, Dave's attorney will have to show an undue hardship in obtaining the federal agency report and show he does not have access or it would be a great expense to duplicate the report. If the court were to grant the request then Patty's opinions, thoughts or legal conclusions about the case must be redacted or crossed out, thus keeping Patty's privilege intact and preventing inadvertent disclosures of client communications or her own legal conclusions.

In conclusion, it is likely Dave will have access to the federal agency document and Patty cannot use it in defense of her ethical violation of non-disclosure.

Extrajudicial Statements to a Judge

Patty committed an ethical violation when she made an out-of-court statement without the presence of counsel regarding the trial to the presiding judge.

An attorney may not make extrajudicial statements to the presiding judge regarding the case matter (outside of logistical issues) without the presence of other counsel or their knowledge. This prevents a prejudicial effect on the judge who will be presiding over the case and protects the defendant's sixth amendment right to a fair trial.

Here, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave. This is a statement out of court because Patty called the judge by telephone. Furthermore, Patty's statement was made to the judge without the presence of Dave's attorney. Patty's statement to the judge was regarding a matter for trial when she was telling the judge about evidence not yet admitted or presented at trial. Patty also "reassured" the judge there was ample non-forensic evidence to "convict" Dave. This statement puts in the mind of the judge Dave is guilty. Dave may waive his right to a jury trial and have a bench trial where the judge decides whether or not he is convicted. Thus Patty has given the judge information about the evidence not yet presented at trial. This was a clear ethical violation by making a prejudicial statement to the judge presiding over the burglary case and outside the presence of Dave's attorney.

In conclusion, Patty committed an ethical violation when she gave prejudicial information outside of trial to the judge that there was ample non-forensic evidence to convict Dave.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 3

Alice's and Bob's law firm, AB Law, is a limited liability partnership. The firm represents Sid, a computer manufacturer. Sid sued Renco, his chip supplier, for illegal price-fixing.

Renco's lawyer asked Alice for a brief extension of time to respond to Sid's interrogatories because he was going on a long-planned vacation. Sid told Alice not to grant the extension because Renco had gouged him on chip prices. She denied the request for an extension. Sid also told Alice that he'd had enough of Renco setting the case's pace, so he wasn't going to appear at his deposition scheduled by Renco for the next week, and that he'd pay his physician to write a note excusing him from appearing. Alice did nothing in response.

In the course of representing Sid, Alice learned that Sid planned a tender offer for the publicly-traded shares of chipmaker, Chipco. Alice bought 10,000 Chipco shares. By buying the 10,000 Chipco shares, she drove up the price that Sid had to pay by $1 million. When Alice sold the 10,000 Chipco shares, she realized a $200,000 profit.

1. What ethical violations, if any, has Alice committed regarding:

    a. The discovery extension? Discuss.

    b. The physician's note? Discuss.

    c. The Chipco tender offer? Discuss.

    Answer according to California and ABA authorities.

2. What claims, if any, does Sid have against Alice, AB Law, and Bob? Discuss.

QUESTION 3: SELECTED ANSWER A

Governing Law: California is governed by the California Rules of Professional Responsibility as well as certain sections of the business code. The ABA has promulgated its Model Code of Professional Responsibility as well.

(1) What ethical violations, if any, has Alice committed regarding (1) the discovery extension, (2) the physicians' note, or (3) the Chipco tender offer?

Discovery Extension:

Duty of Fairness: An attorney has a duty of fairness to the opposing party to act in good faith. While an attorney has no duty to accept all requests made by opposing counsel if not required, and while an attorney has a competing duty to her client to act in the client's best interests and should advocate for her client's interests zealously, denial of a good faith request for a short extension may be considered a breach of A's duty of fairness to opposing counsel.

Here, Alice ("A") represents Sid ("S") in suing Renco ("R"). R's attorney has requested a brief extension to respond to interrogatories. The reason for R's request is to go on a long-planned vacation. Without a showing that R's counsel has continuously attempted to delay the litigation by asking for continuances and extensions, A's duty of fairness likely requires her to accept such brief extension. Her denial is based on her client's order that it not be granted for no other reason than "because R had gouged him on chip prices". Because if R's counsel requested an extension from the court based on good reason it might well be granted, it is improper for A to require such unnecessary resort to the court. A has likely violated her ethical duties of fairness.

Duty of Loyalty: An attorney has a duty of loyalty to always act in her clients' best interests and not to engage in conflicts of interest or compete with the client.

Here, A will likely argue that her duty of loyalty to S requires that A not fail to acquiesce to her client's requests. However, the duty of loyalty does not extend this far. An attorney must not advocate for her client to the point that it causes her to make other ethical violations.

Scope of Decision-Making: While the client has the right to state which claims he or she wishes to pursue and make major decisions regarding settlement or whether to plea, etc., it is within the attorney's scope of authority to determine the proper strategy for effectuating these goals.

A should not allow S to "order" her to deny the extension based on no substantive reason. This is within A's scope of authority to decide, and A should not acquiesce to a bad-faith denial of a good-faith request. If A and her client cannot agree on the scope of representation, withdrawal from the case may be appropriate to avoid A being pulled into improper conduct.

Physician's Note:

Duty of Candor/Honesty: An attorney must not make any false representations to the court or opposing counsel, and must not allow her client to make any false representations to the court.

Here, A has stated that he is going to bribe his doctor to get a note to excuse him from appearing at his deposition. This will constitute a fraud upon the court because it is not true that D is unavailable. Further, there is no valid reason for S to fail to appear at his deposition. An attorney can breach his or her ethical duties by failing to speak when she has a duty to counsel her client against illegal or fraudulent activity and advise him that he or she cannot be a part of such conduct. Here, when A failed to respond to S's statement, she impliedly acquiesced in his proposal. This is an ethical violation because it will cause A to participate in a fraud upon the court and will violate her duty of candor.

Withdrawal: An attorney must withdraw from a case when she learns of conduct that will constitute a crime or fraud that will necessarily involve the lawyer's services. If it will not involve the lawyer's services, the attorney may but does not need to withdraw.

Here, paying one's doctor to write a false note excusing him from appearing may constitute such improper behavior that reflects poorly upon the profession. Such conduct is clearly in bad faith and relates directly to the representation, directly involving A. Thus, A should have withdrawn from the representation had she not been able to dissuade S from failing to appear at his deposition for a fraudulent reason because she will necessarily be involved.

Duty of Confidentiality: An attorney has a duty of confidentiality not to disclose any information related to the representation of the client. However, there is an exception to this rule which allows disclosure if the attorney learns that the client plans to commit a crime or fraud. Further, California imposes a duty on an attorney who has learned that his client plans to commit a crime or fraud to attempt to dissuade the client from his proposed actions and further, if that fails, to tell the attorney that the attorney plans to disclose the information to the appropriate authorities.

Here, it is unclear the length S plans to go to in order to get him a "note". However, this likely does not constitute an actual crime or fraud, so A likely has no right to breach her duty of confidentiality to her client. Since she has not, she has not violated this rule.

Duty to Diligently Pursue Completion of the Case: An attorney has a duty to diligently pursue a case to completion without allowing it to languish in the court system.

Here, by impliedly acquiescing in S's statement that he plans to fail to appear at his deposition, this will require a further scheduling out of a deposition at a time convenient

for the parties and court reporter. This is a bad faith delay of the case that constitutes breach of A's ethical duties.

Chipco Tender Offer:

Duty of Loyalty: As stated above, an attorney has a duty of loyalty to her client to always act in the best interests of the client. This includes not acquiring an interest adverse to the interest of the client. California allows an attorney to obtain an interest adverse to that of her client in certain circumstances.

Here, when A learned of S's plan to make a tender offer for the publicly traded shares of Chipco, she immediately purchased Chipco shares and then sold them for a $200,000 profit. A's acquisition of these funds constitutes a breach of A's duty not to obtain an interest adverse to her client's, because the price S had to pay on the shares was raised by one million dollars. A has caused serious financial injury to S by acquiring an adverse interest and essentially taken a profit that should have gone to S. In doing so, A has breached her ethical duties.

Conflict of Interest: An attorney has a concurrent conflict of interest when there is a substantial likelihood that her ability to represent her client will be materially limited by her own personal interests, her duties to another client, a former client, or a third party. An attorney may take on the representation despite the concurrent conflict of interest if the attorney can believes that she can competently and adequately represent the interests of the parties, and if she obtains written consent from all involved parties. California has no "reasonable lawyer" standard and does not require written consent, only written notice, when the interest is personal to the lawyer.

Here, in gaining a personal interest in Chipco, A may have created a conflict that will materially limit her representation of S. However, A may argue that this is a deal on the side and is unrelated to the subject of the litigation in which she represents S; and further, A may argue that ownership of the shares has no bearing on her representation of S. If the court determines that she has acquired a conflict of interest, A has breached

her duty by failing to get written consent. In California, she has further breached her duty by failing to give written notice to S.

Duty of Confidentiality: See above. In using confidential information S provided to her in telling her about the tender offer for her own benefit, A may have breached her duty.

(2) What claims, if any, does S have against A, AB Law, and B?

Limited Liability Partnership: A limited liability partnership is a special type of partnership that affords limited liability to all its partners, created by filing a Statement of Qualification with the Secretary of State. In a limited liability partnership, the individual partners are not personally liable for any damages sustained by the partnership itself.

A: See above.

A will be personally liable for her own torts.

B: See above.

Because B is a partner in an LLP, he has limited liability. Thus, S will have no claim against Bob ("B") A's partner.

AB Law:

Authority: A partnership is liable for its partner's actions if the partners have authority to act for the partnership. Authority may be actual (express or implied), apparent, or ratified. Actual authority exists where a reasonable person in the agent's position would believe he had the right to act on behalf of the business. This may be express, through an agreement, or implied, through actions or conduct. Apparent authority exists where a reasonable person in the shoes of the third party believed that the person had authority to act. Ratification occurs where no authority exists but the business has

adopted the contract through action such as accepting its benefits. A partner in a partnership has both apparent and implied authority to act on behalf of the partnership.

Here, as a partner of AB law, A has actual authority to act on behalf of the partnership. Her acts taken in the scope of her law practice will thus subject the partnership to liability. Thus, A will both be personally liable for her own torts, and S will further be able to collect against AB Law for her actions.

Unjust Enrichment:

Here, S will sue A personally and AB Law for likely malpractice for losses caused by her breaches of her duties. Her misconduct has led to a loss by S of 1 million dollars, and has resulted in a gain to A of $200,000. In equity, a court may under unjust enrichment theory disgorge profits made by someone and impose a constructive trust. A constructive trust is not truly a trust but is an equitable remedy imposed by the court which forces the wrongdoer to hold unjustly realized profits in trust for the benefit of the rightful owner. Because she has been unjustly enriched by action taken in breach if her duties to S, the court will likely impose a constructive trust on the profit realized by A and will thus force A as trustee of these funds to distribute them to their proper owner, S.

Intentional Interference with a Business Expectancy: Intentional interference with business expectancy occurs where a person knows of a business expectancy of another party and knowingly interferes with that expectancy, resulting in damages. Here, S had planned a tender offer with C. Her actions in purchasing Chipco shares may constitute an interference with this expectancy with S, although A will argue that this expectancy is not yet an enforceable contract and that she has a valid defense of fair competition. This will be balanced by the court.

QUESTION 3: SELECTED ANSWER B

Discovery Extension

Scope of Representation

A client usually determines the ends (goals) of a representation, whereas the lawyer generally determines the means (legal strategies). If a client is insisting upon actions that the lawyer does not wish to take, the lawyer may limit the scope of employment through informed written consent by the client. Here, it appears that Alice let Sid influence her legal decision-making by telling her to deny the request for an extension to respond to Sid's interrogatories. This type of decision should normally be decided by the lawyer because it falls into legal strategy. Although it is permissible for the lawyer to seek the client's input, the final decision should ultimately be left up to the lawyer. Alice let Sid control the litigation means.

Fairness to Opposing Counsel/Adverse Parties

A lawyer should treat opposing counsel and adverse parties fairly during the representation. A lawyer should not engage in certain actions if it is known to be for the purpose of harassing or making a task unduly burdensome for opposing counsel/adverse party. Here, Sid told Alice to reject the request to extend the time for answering the interrogatories. Renco's lawyer asked for a reasonable "brief extension" to respond since he was going on a long-planned vacation. This seems to be a reasonable request and is not an attempt by Renco's attorney to delay for an improper purpose. Sid's reasons for wanting to deny the extension, however, would be considered improper. He denied the request because Renco had "gouged hi on chip prices," so he was acting out of spite. He told this directly to Alice, so she knew his improper motives. She should have counseled him to allow the extension since it was a reasonable request and made clear that Sid's motives were improper. Because she did not do this, Alice violated her duty of fairness to Renco and its lawyer by furthering her client's improper purpose.

That being said, a lawyer does owe a duty to her client to diligently dispose of the case (work productively and not delay unnecessarily). If for some reason the extension requested was unreasonable, or it had been one of many requests for extensions, then perhaps Alice would be justified in denying the request. She has a duty to her client to make sure that his case is handled efficiently and effectively. The facts do not suggest this was the case, but if it was, then again it is possible she may not be in violation of an ethical duty.

Physician's Note

Duty of Candor

A lawyer owes a duty of candor to opposing counsel, adverse parties, and the court. A lawyer must not submit evidence that she knows to be false or make a false statement of fact or law that she knows to be untrue. If she makes such a statement without knowing it is false and later learns of its true nature, the lawyer has a duty to correct the evidence or testimony.

Sid told Alice he was not going to appear at his deposition for Renco the next week because he'd had enough of Renco setting the case's pace. He also told Alice that he was going to pay his physician to write a note excusing him from appearing at the deposition. Alice did nothing in response. Alice knows that Sid is not sick and that he just does not want to attend the deposition. He is going to get a fake doctor's note written to excuse him, so this would be false "evidence" or a false statement of fact being presented to the opposing side. Alice has a duty not to allow such false information to be presented to the other side. That being said, there is a conflict with her duty of confidentiality to Sid not to disclose his statements to her since they were made during and related to the representation.

A lawyer owes a duty of confidentiality to her client for anything related to the representation, even if not made by the client. Under the ABA, a lawyer may reveal confidences if the client persists in engaging in criminal or fraudulent conduct that will

result in death or serious bodily harm, or if the lawyer's services are being used to perpetuate a crime or fraud by client that will result in serious financial harm. California does not have an exception for financial losses. Neither of these exceptions appears to be present. Sid's actions will not cause harm to anyone to the extent of death or serious bodily harm. It may pose a financial burden on Renco because they have to pay the lawyer for time that was spent preparing and now it will be postponed, but the amount spent is not likely to satisfy the requirement of financial harm under the ABA. Therefore, since no exception applies, Alice cannot reveal Sid's confidences.

So Alice cannot reveal the confidences but she must not present false evidence. What she should have done is counseled Sid by trying to get him to show up for the deposition and not pay a doctor to make a false note. If that did not work, then she should have withdrawn from the representation since he was persisting in engaging in fraudulent conduct. If the withdrawal would be harmful to Sid, a court might not let her withdraw and it may request why she is choosing to withdraw. If that is the case, then Alice may reveal Sid's confidences regarding the letter. Because Alice did not take these steps and said nothing when Sid mentioned a fake doctor's note, she breached her duty of candor to Renco and its lawyer.

Duty of Fairness

Again, as mentioned earlier, Sid has improper motives for wanting to submit the doctor's note and not attend the deposition. He wants to regain control of the pace of the litigation and is acting out of spite toward Renco for the price he was charged for the chips. Alice should know based on the comments Sid has made to her that he only wants to delay the case for improper purposes. Because she is aware of this, Alice is violating her duty of fairness to opposing counsel and adverse party.

Chipco Tender Offer

Duty of Loyalty

A lawyer owes a duty of loyalty to her client. If the interests of another client, the lawyer, or a third party materially limit the lawyer's ability to effectively represent the client, then she has a conflict of interest. The lawyer must act in the best interest of the client. Tied with the duty of confidentiality mentioned below, a lawyer also cannot use information learned during the course of the representation to the disadvantage of her client.

Alice used the information she learned from Sid during the representation that Sid was going to make a tender offer to her advantage by purchasing shares of the stock and driving up the price. Alice benefitted by realizing a $200,000 profit while Sid had to pay $1 million more than he would have before she purchased the shares. Alice was looking out for her interests first and negatively impacted her client's interests in the process. Because she subordinated her client's interests to her own, Alice violated the duty of loyalty she owed to Sid.

Duty of Confidentiality

A lawyer owes a duty of confidentiality to her client. She must not reveal any information related to the representation that she learns, and she must not use that information to the disadvantage of her client.

Here, Alice learned while representing Sid that Sid planned to tender offer for the publicly-traded shares of Chipco. She used this information to Sid's disadvantage by purchasing 10,000 Chipco shares, which drove up the price that Sid had to pay. Although this purchase is unrelated to the representation, it involved information learned during the representation. The duty of confidentiality is broad and covers any information related to the representation. Alice may try to argue that this information is unrelated to Sid's illegal price-fixing claim against Renco, but it would likely be found to be covered by the duty of confidentiality. Price-fixing involves the market of that particular industry, and if Sid intends to make a tender offer for a competitor chipmaking company, it would affect the same market involved in the litigation that she is representing Sid for against Renco. Therefore, a court would find that the information is attenuated but still within the realm of the confidences covered by the duty of

confidentiality. Since Alice used the information against Sid to his disadvantage, she violated her duty of confidentiality.

Sid v. Alice, AB Law, and Bob

AB Law is a limited liability partnership (LLP). A limited liability partnership operates almost exactly the same as a general partnership except the partners in an LLP are not personally liable for the debts of the partnership like they are in a general partnership. Therefore, the partnership is liable for the negligent acts (but not intentional torts) of its partners but the other partners are not personally liable for different partner's negligent acts or debts of the partnership. A partner always remains liable for her own actions.

Alice

Alice obviously violated several of her ethical duties. The breach of the duty of loyalty that she committed against Sid by purchasing Chipco stock caused actual pecuniary harm to her client. This was an intentional act on Alice's part. Under her breach of the duty of loyalty, since she financially benefitted from her actions, realizing a $200,000 profit from buying and selling her shares of stock, she would be liable to Sid for profits realized as a result of her breach of the duty of loyalty. Therefore, Alice is personally liable for $200,000. She may also be liable for the harm caused to Sid by the breach. Sid had to pay $1 million more than he otherwise would have if Alice had not purchased the shares. But for Alice's purchase of the stock, Sid would not have had to pay $1 million more for the tender offer. It was also foreseeable to Alice that if she purchased the shares, it would drive the price of the stock up for Sid's tender offer. Therefore, she is also liable as the actual and proximate cause of Sid's loss due to her breach. Alice is personally liable for $1,200,000 to Sid.

As for a specific claim, Sid may be able to claim misappropriate. Alice was in a relationship of trust and confidence with him as a fiduciary. Sid had nonpublic information that most people would find material, meaning it was affect whether someone would purchase a stock or not. Sid did not tell this information to Alice for an

improper purpose and surely did not anticipate she would use the information to purchase stock. Therefore, Sid would not be a tipper and Alice cannot be a tippee. But she can be a misappropriator since she was in this fiduciary relationship with the source of the non-public material information and she purchased stock in reliance on that information. Therefore, she is liable to Sid for the same amount of damages mentioned above because they were profits that would need to be disgorged and harm caused from her misappropriation.

Bob

Because these actions were taken by Alice, even if the partnership is liable, Bob cannot be personally liable for the harm caused by Alice. It is a limited liability partnership, so partners are not personally liable for the debts of the partnership or torts of other partners. Therefore, Sid does not have any claims against Bob.

AB Law

A partner is an agent of the partnership and thus can bind the partnership to certain obligations. The partnership is also liable for the negligence or non-intentional torts committed by partners while in the scope of employment for the partnership.

Here, Alice was working as Sid's lawyer when she learned the information that she misappropriated from him. Her actions, however, would likely be considered beyond the scope of her employment as a partner. She took the information and used it for personal reasons. If she had, for example, not filed an important document on time resulting in a dismissal with prejudice, then Sid could sue for malpractice and the LLP would be liable because the claim arose from her duties as a lawyer. This harm caused to Sid was not because of Alice's actions as an attorney for Sid. Therefore, a court would likely find that the LLP is not liable for Alice's actions and Sid has no claim against AB Law. If the court did find her actions were within the scope of her duties as a partner, then AB Law would also be liable for the losses Sid incurred.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

QUESTION 5

Online, Inc. was duly incorporated as an Internet service provider. Its articles of incorporation authorized issuance of 1,000 shares of stock at $1,000 par value.

Online initially issued only 550 shares to its shareholders as follows: Dick and Sam each received 200 shares and Jane received 150 shares. Online's Board of Directors (composed of Jane, Sam, and Harry) named Jane as the Chief Executive Officer and named Harry as General Counsel.

Online's business grew substantially in the following months. Still, Online was short on cash; as a result, instead of paying Jane $10,000 of her salary in cash, it issued her 50 additional shares with the approval of its Board of Directors.

Looking to expand its operations, Online sought to enter a strategic partnership with LargeCo, Inc. Jane had learned about LargeCo through Harry's wife, who she knew was the majority shareholder of LargeCo. Jane directed Harry to negotiate the terms of the transaction with LargeCo. In the course of Harry's negotiations with LargeCo, LargeCo offered to acquire the assets of Online in exchange for a cash buy-out of $1,000,000. Harry telephoned Jane and Sam; Jane and Sam agreed with Harry that the offer was a good idea; and Harry accepted LargeCo's offer.

Two days after completion of the transaction, LargeCo announced a joint venture with TechCo, which was solely owned by Harry. The joint venture was valued at $10,000,000. In its press release, TechCo described the joint venture as a "remarkable synergy of LargeCo's new technology with TechCo's large consumer base."

The following week, Dick learned of LargeCo's acquisition of Online's assets. An expert in technology matters, he was furious about the price and terms of the acquisition, believing that the value of Online had been seriously underestimated.

1. What are Dick's rights and remedies, if any, against Jane, Sam and/or Harry? Discuss.

2. What ethical violations, if any, has Harry committed? Discuss. Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

1)

Directors of corporations owe fiduciary duties to the corporation. Among these duties are the duties of care and the duties of loyalty. If a director breaches either of these duties, affected shareholders may bring either a direct action or a derivative action against the director, based upon the nature of the injury the shareholder suffered.

Duty of Loyalty.

Directors owe a fiduciary of duty of loyalty to the corporation, which requires the director to act in the best interest of the corporation, to refrain from self-dealing with the corporation, and to refrain from usurping business opportunities from the corporation.

Harry's Breach of the Duty of Loyalty as a Director:

One aspect of the duty of loyalty is that it requires the director to refrain from self-dealing with the corporation. Here, the facts indicate that Harry negotiated the terms of a transaction with LargeCo., of which Harry's wife is the majority shareholder. Self-dealing extends not only to the director or businesses in which the director has a financial interest, but also those of the director's family. Here, because LargeCo is mostly owned by Harry's wife, the acquisition of Online's assets by Online was a self-dealing transaction.

In order not to be liable for a breach of duty regarding a self-dealing transaction, the terms of the deal must be objectively fair to the company, or the decision must be ratified at a meeting by a majority of disinterested directors who are fully informed about the conflicting interest and the terms of the agreement. (Or, by unanimous written consent of disinterested directors, if no meeting). Here, Harry provided no notice for a special meeting of the board of directors. There was no vote by the disinterested investors (Jane and Sam). Harry's telephone call to Jane and Sam, and Jane and Sam's subsequent agreement was insufficient to ratify the transaction.

Furthermore, the facts indicate that the acquisition was not fair to the company. LargeCo. offered $1,000,000 for all of the assets of Online. However, two days after completion of the transaction, LargeCo announced a joint venture with TechCo, valued at $10,000,000. This suggests, but is not conclusive, that the $1,000,000 acquisition offer may have been lower than fair market value for the acquisition.

Harry also arguably breached the duty of loyalty by usurping a corporate opportunity. TechCo, owned solely by Harry, entered into a joint venture with LargeCo two days after the completion of the acquisition of Online by LargeCo. A director may not obtain business opportunities for his own benefit at the expense of the corporation. Whether a business opportunity is one that should first be offered to the corporation is usually determined by the corporation's business, and whether the corporation is in the same general business as the opportunity. It is unclear from the facts whether the joint venture with LargeCo was a business opportunity that TechCo usurped from Online, but, if TechCo and Online conduct similar business, Harry likely violated the duty of loyalty in this aspect as well.

Harry, Jane, and Sam's breaches of the duty of care.

Corporate directors also owe the fiduciary duty of care to the corporation, which requires directors to act as reasonably prudent directors and in good faith when making corporate decisions. Under the business judgment rule, a court will not disturb a director's business decisions, and will find compliance with the duty of care, if a director takes reasonable steps in becoming informed, bases decisions on a reasonably rational basis, acts in good faith, and refrains from self-dealing with a corporation.

Under this standard, Harry, Jane, and Sam have breached the duty of care, and will not be afforded the protection of the business judgment rule. The facts indicate that Jane knew that LargeCo was largely owned by Harry's wife, yet Jane directed Harry, a director she knew to be interested, to negotiate the terms of a transaction with LargeCo. This was likely unreasonable; a reasonable director would have had a disinterested

party negotiate the terms of a possible acquisition. Furthermore, Jane and Sam failed to take reasonable steps in becoming informed about the deal. The facts indicate that Harry, again an interested party, telephoned Jane and Sam, and that Jane and Sam agreed that the offer was a good idea. This is not sufficient; Jane and Sam undertook no independent investigation to determine if the terms of the proposed acquisition were fair to the corporation. Sufficient steps would have included, for example, obtaining an independent audit of Online's value as a business. Here, there are no facts Jane and Sam took **any** steps in becoming informed about the deal. Therefore, they have both breached the duty of care in this respect.

Finally, Harry's negotiations with LargeCo. were not in good faith. Harry's wife was the majority shareholder of LargeCo. Furthermore, mere days after the completion of the transaction, LargeCo entered into a $10,000,000 joint venture with Harry's solely owned company. Both of these facts indicate that Harry was acting not in the best interest of the corporation, but in his own best interests.

Issuance of the Stock For Less Than Par Value.

Dick may also bring a derivative suit on behalf of the corporation to recover for the issuance of the stock to Jane. Par value sets the minimum price for which stock may be issued. Here, Online Inc's stock has a par value of $1,000. This means shares cannot be issued for less than $1,000. The facts indicate that Online, short on cash, issued Jane 50 shares of Online stock, in lieu of $10,000 salary she was owed. This was improper. The board, Jane, Sam, and Harry, are liable to the corporation for the difference between the par value of the 50 shares ($50000) and the price paid ($10000). This is known as the "water." Jane is also personally liable as the party who received the stock, because, as a director with knowledge of the par value, she was aware that the stock was being issued to her below par value.

Failure to provide Notice and Obtain Shareholder Vote for Acquisition of Substantially All of Online's Assets.

Certain major events in a corporation must be put to a shareholder vote. These include a merger or an acquisition of substantially all of the corporation's assets. Before disposing of substantially all of a corporation's assets, there are procedures that must take place. First the board must pass a resolution, either during a meeting or by written consent, agreeing to the acquisition. Appropriate notice must then be given to shareholders, informing them of the terms of the transaction and the date of the shareholder's meeting for purpose of the vote. At the meeting, a quorum must be present, and a majority of shares voted must be in favor of the acquisition.

Here, none of these procedures took place. Dick, as a shareholder, was uninformed of the acquisition, which was agreed to solely by the directors, Harry, Jane and Sam, and accepted solely by Harry.

Derivative Action.

Here, Harry would be able to bring a derivative action on behalf of Online Co against Harry, Jane, and Sam, for the above violations. Normally, a shareholder must make a demand upon the board of directors, before bringing the action on its behalf. Here, however, demand will be excused, because the action would be against all members of the board of directors, who would be defendants in the action. Harry will likely be able to recover, for the corporation, the "water" from the stock issued to Jane, and damages for breaches of the duties of loyalty by Harry, Jane and Sam. Furthermore, Harry, again, on behalf of the corporation, may be able to rescind the acquisition, because the proper procedures for the acquisition of Online's assets were not followed. If he is successful in his derivative action, Harry will be entitled to attorney’s fees and costs of suit.

2) Harry's Ethical Violations

Duty of Loyalty:

Harry has also violated his ethical duty of loyalty. Under both the ABA and CA rules, an attorney must always act in good faith and in the best interest of the client.

An attorney may not represent a client where the attorney's representation creates either a possible or actual conflict of interest. Under the ABA, an attorney may represent a client if the attorney reasonably believes he will be able to represent the client without a conflict, and the client provides informed written consent. In California, there is no reasonableness standard, but the attorney must receive informed written consent in the case of a possible conflict and again if the conflict ripens into an actual conflict.

Here, Harry has a conflict of interest in representing Online Co. with respect to its transaction with LargeCo. LargeCo's majority shareholder is Harry's wife, so Harry has a financial interest that is directly in conflict with Online Co's interest. Harry failed to disclose the conflict to Jane and Sam (it is immaterial that Jane knew this on her own; Harry still has a duty to inform), and Harry failed to obtain written consent from the company. Having violated this duty, Harry is subject to discipline.

Business Deal with the Client:

When entering into a business deal with the client, the deal must meet four specified criteria. First, the deal must be on objectively fair terms to the client. Second, all terms of the deal must be clearly and thoroughly disclosed in writing to the client. Third, the client must be advised that outside counsel is recommended. Fourth, the client must provide written consent.

Here, Harry has failed to meet these requirements. By entering Online into a deal with LargeCo, of which his wife is majority shareholder, Harry is essentially entering into a business deal with Online. The facts suggest the deal is not fair, because 2 days later Harry enters into a joint venture with LargeCo for 10x the price paid to Online. The terms of the deal were not fully disclosed in writing, because the deal was discussed

over telephone. Harry did not advise Online that it should have independent counsel. Finally, Harry did not receive written consent by Online for the deal.

Accordingly, Harry has violated his duties regarding this deal, and is subject to discipline.

Duty of Competence

An attorney has a duty of competence in his representation of a client. An attorney must exercise reasonable skill while representing the client. Reasonable skill is determined by a number of factors, including how long the attorney has practiced, the attorney's expertise, the amount of time the attorney put into becoming informed, and the ability to associate with more knowledgeable counsel. Here, the facts indicate that Harry, as general counsel of Online, breached numerous fiduciary duties. Harry approved the issuance of stock for significantly below par value, resulting in liability to himself, the other directors, and Jane, in her role as purchaser. Furthermore, Harry represented Online in a transaction in which he knew he had a personal financial interest. Finally, Harry accepted LargeCo's offer, without proper board approval and approval by shareholders. These actions suggest that Harry did not exercise reasonable skill in his representation of Online Inc.

While each of these may subject Harry to discipline under the ABA, California requires a repeated, reckless, or intentional failure to exercise reasonable skill, in order to be subject to discipline. Even under the California standard, it is likely that Harry could be disciplined, due to both his intentional conduct in violating the duty of loyalty, and in his repeated failure to exercise reasonable skill in the issuance of stock and acceptance of LargeCo's acquisition offer.

QUESTION 5: SELECTED ANSWER B

1. What are Dick's remedies?

Direct Remedies

Dick will likely be unsuccessful in bringing direct action in his own right as a shareholder, as he likely cannot succeed in suing for oppression. In a closely-held corporation, with a small number of shareholders, when one shareholder owns a majority of the shares, that shareholder may not take actions to oppress the minority shareholders and deprive them of their ability to exercise their rights as shareholders, such as voting, or unreasonably deprive them of dividends.

Here, Online Inc. is probably a close corporation, as it has only three shareholders: Dick, Sam, and Jane. However, Dick will probably be unable to argue for oppression because he owns 200 shares, which is equal to Sam's holdings, and after Jane received an additional 50 shares, she is also a holder of 200 shares. Therefore, because the shareholders own equal portions of Online, there is no majority shareholder oppression here, and Dick will need to take action in a shareholder's derivative suit on behalf of the corporation to obtain relief for the acts of Sam, Jane, and Harry.

Derivative Suit

Dick will be able to sue on behalf of Online Inc, in a shareholder's derivative suit. To bring a derivative suit, the shareholder must first petition the board of directors, and be rejected by the board. However, many states now do not require this step if the petition would be futile (i.e. where a majority of the board would be defendants in the derivative suit). Here, because the entire board would be defendants, it would be futile, and Dick would be able to bring his shareholders' derivative suit.

a. Jane

i. Watered Stock

When a corporation is incorporated, it can include a par value for its shares in the articles of incorporation. A par value is the minimum value that the share can be issued for. A share issued for below par is called "watered." A shareholder who takes knowing of the water may be liable for it, and the board of directors will be liable to the corporation for the "water": the difference between the par and the issued value.

The issue here is whether the board issued watered stock to Jane when it gave her 50 shares in the place of a $10,000 salary payment. A corporation may exchange shares for anything of value, including real property and wages, but that exchange must still meet the par value. Here, Online's par value for its shares was $1,000 per share. Thus, 50 shares would be worth $50,000 par. The board of directors voted to issue Jane $50,000 worth of stock for $10,000 worth of labor, creating $40,000 of water. Therefore Dick could sue on behalf of the corporation to recover the value of the water from either Jane, who took the shares with knowledge of the water, and also voted to issue them as a board member, or the other two directors for the water as well.

ii. Breach of Duty of Loyalty

All directors of a corporation owe fiduciary duties of loyalty and care to the corporation. A director must not deal with the corporation as an outsider, and must not engage in transactions where the director is interested in the transaction. Here, Jane breached the duty of loyalty by issuing herself the watered stock. Thus, she took advantage of her position as a board member, and obtained stock at below par in exchange for her services.

iii. Breach of Duty of Care

All directors owe a corporation a duty of care. A director must conduct business as a reasonably prudent director in the same or similar circumstances. A director may rely upon experts when voting on decisions, and may also rely upon other members of the board, but only if they are reasonably qualified to give that advice. A director will not be held liable for good faith business judgment decisions. Here, in voting on the decision to sell Online, Jane "agreed with Harry" that the offer was a good idea, and Harry accepted the offer. This deal was for the sale of the entire company,

and Jane did absolutely no due diligence whatsoever to ensure that the deal was in fact a good one. Importantly, she relied only upon Harry, an attorney, and not upon Dick, who was an expert in technology matters, and who would have been a better resource on the value of the company. Jane could argue for the business judgment rule, but because she did so little in the way of due diligence, she will not be able to argue good faith successfully. This is especially true because she knew of Harry's marital relationship with the majority shareholder of LargeCo.

Therefore, Jane will be liable for a breach of the duty of care.

b. Sam

i. Watered Stock

Sam will be liable as a board member for the "water" on the stock issued to Jane, for the same reasons Jane was liable as a board member.

ii. Breach of the duty of Care

Sam will be liable for a breach of the same duty of care as Jane, because he too relied solely upon Harry when agreeing to sell Online to LargeCo.

c. Harry

i. Interested Director/Breach of Loyalty

The same duty of loyalty applies to Harry as a director as applied to Jane. A director is part of an "interested director transaction" where the director is personally part of the opposite side of a deal with the corporation, or is in a close relationship with a majority owner or board member of the other corporation. In this situation, any transaction may be voidable and the director may be held liable for the damages.

Here, Harry was an interested director. He was engaged in negotiations with LargeCo, in which his wife was the majority shareholder. He had a duty to disclose that to the board. He did not, and thus breached his duty. Harry could argue that Jane knew of the relationship, and thus the board was aware of the interest he had. That argument will fail because he had a duty to inform the entire board, not just rely on one member.

Thus, Harry will be liable for the deal between LargeCo and Online.

ii. Duty of Care

Harry also breached his duty of care, by not doing any due diligence on the deal, and by accepting an offer that undervalued the company. The same reasonably prudent director standard applies here. Because Harry alone negotiated the deal, did not do any research into the value of the company, and took a low offer, Harry breached his duty of care.

d. Fundamental Corporate Change

Dick will also have a successful action against all three board members together for a failure to put a fundamental corporate change to a vote of the shareholders. A fundamental corporate change includes the sale of all, or substantially all of the corporation's assets. A fundamental corporate change must be approved by a resolution of the board, at a board meeting, and then submitted to the shareholders, who must approve it by a majority vote.

Here, the board agreed to a fundamental corporate change when it allowed the cash buy-out of all Online assets for $1 million. Thus, they were required to hold a board meeting to approve the change and submit it to the shareholders. They did not. A board meeting must be an in person meeting, and a special meeting requires written notice to all board members. Neither occurred here, only a phone call, without an actual vote. More importantly, the change was not submitted to the shareholders for a vote. In fact, the non-board shareholder Dick was not informed at all.

Therefore, the board will be liable to the shareholders for damages on the fundamental change.

2. Harry's Ethical Violations

Potential Conflicts

Under the California rules, an attorney may not represent a client where the representation would be directly adverse to another client in the same matter, or where there is a significant risk that the representation will be materially limited by the lawyer's representation of another client, or the lawyer's own personal interests. A lawyer may still take on a representation under the California rules if the lawyer believes that he can

still competently represent both clients, all affected clients give informed, written consent, and the representation is not prohibited by law or ethical rule. California extends the written notice requirement to potential conflicts, while the ABA does not. The ABA rules also include a "reasonable lawyer standard" where a lawyer must reasonably believe he can competently represent both parties.

Here, a potential conflict existed when Harry sat on the Board and was also General Counsel. He put himself into the position where he may have been interested in taking an action on the board for his own personal financial gain, that may not have been in the corporation's best interest. Thus, in California, he would have had to give Online written disclosure of this potential conflict, and under the ABA and CA rules, would have had to get informed, written consent if the conflict became actual. Harry did not do this, and therefore violated the rules.

Actual Conflicts

Harry also engaged in actual conflicts of interest when he negotiated the deal with LargeCo. Here, under the California rules, Harry's personal interest with his wife, the majority shareholder, was likely enough on its own to trigger a conflict. Because Harry's relationship with his wife would lead him to be more willing to make a deal unfavorable to his client, Online, an actual conflict existed when he began negotiating. Under the ABA, the conflict is a bit more remote, as Harry is not *personally* interested in the transaction, but it would probably still be enough that his wife is the majority shareholder. Therefore, Harry was in a representation where he had an interest that was probably directly adverse to his client, or at the least posed a significant risk that it would materially limit his ability [to] represent Online. Thus, Harry would have had to obtain informed written consent, and did not. Further, it is possible that this conflict could be non-consentable under the CA and ABA rules, as it seems unlikely that *any* lawyer would advise a client to allow an attorney to negotiate a deal with a company majority-owned by that attorney's wife. Therefore he violated both the ABA and CA rules.

Duty of Loyalty

An attorney owes the highest duty of loyalty to a client, and may not take any actions directly adverse to the client's interests. An attorney can enter into regular business transactions with client, so long as those transactions are fair and are in the client's usual course of business. Any other business transactions between a lawyer and client where the lawyer is adverse, the lawyer must give the client an opportunity to obtain independent counsel, and get informed consent to the deal in writing.

Here, Harry did not disclose his own company TechCo, which put his interests in the sale directly adverse to Online, as he could then negotiate a deal with LargeCo for a greater sum. TechCo, which was owned by Harry, eventually negotiated with Harry's wife's company for a deal 10x more valuable than the one he negotiated for his client, Online. Because Harry did not inform Online of the opportunity to seek independent counsel, or obtain informed consent, Harry violated both the CA and ABA rules.

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Question Number	Subject
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 3

Contractor and Lawyer had been in a consensual sexual relationship for months. Contractor could not afford to hire an experienced lawyer to defend him against Plaintiff's complex construction defect case and to bring a cross-complaint. Contractor told Lawyer, who had never handled such matters, that he wouldn't sue her for malpractice if she would defend him for half her regular rate. Lawyer felt pressured because of their relationship.

Lawyer told Contractor she would defend him for half-price, but she would only bring his cross-complaint on contingency at her regular rate of 30 percent of any recovery. Contractor agreed. Although they continued to have sexual relations, their personal relationship deteriorated. Lawyer forgot to make a scheduled court appearance in the case.

At trial Plaintiff lost, and Contractor won $100,000 on his cross-complaint. Lawyer deposited the $100,000 in her Client Trust Account. She told Contractor she would send him $70,000. Contractor said Lawyer must send an additional $15,000 because she agreed to represent him for half-price on everything, including the contingency fee.

1. Did Lawyer commit any ethical violation by agreeing to represent Contractor? Discuss.

2. Did Lawyer commit any ethical violation by failing to make the court appearance? Discuss.

3. What should Lawyer do with the money in the Client Trust Account? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

1. L committed several ethical violations when she agreed to represent C:

The ABA Model Rules of Professional Conduct ("ABA Rules") and the California Rules of Professional Conduct ("CA Rules") both contain provisions relating to sexual relationships with clients. The ABA Rules prohibit sexual relationships with clients, unless there was a preexisting sexual relationship. The CA Rules also allow for a preexisting sexual relationship, but also allow for new sexual relationships so long as sex is not a condition for professional representation, the client is not unduly influenced or coerced into sex, and the lawyer's performance is not negatively affected by the sexual relationship. Here, Contractor ("C") and Lawyer ("L") had already been in a consensual sexual relationship for months prior to L agreeing to represent C. Therefore, this would not be an ethical violation under the ABA Rules by itself because the sexual relationship was already existing at the time L agreed to represent C. The relationship may be considered a violation under the CA Rules, because while it was a preexisting relationship, L's performance and representation of C deteriorated such that she forgot to make a court appearance in the case.

L may have also violated the duty of loyalty. When there is a significant risk that the interests of another client, the lawyer, or a third person could materially limit the representation of the client, there is a conflict of interest. Here, the lawyer's own personal interest in attempting to appease her lover could be seen as materially limiting her competent representation of C, as it would be difficult to separate their personal relationship from the professional one. Further, L felt pressured to take on the case, and it is arguably likely that her professional obligations could be also subject to pressure from C.

L also agreed to represent C despite not having any experience in complex construction defect cases. Under the ABA Rules, a lawyer has a duty of competence, which is to possess the necessary skill, knowledge, preparation and thoroughness reasonably

necessary to represent the client. If the lawyer does not have the requisite competence, the lawyer must either learn the law without undue delay or expense, or associate with a lawyer who is well-versed in the law (subject to client approval in bringing on this new lawyer). Since L was not experienced in complex construction defect cases, and does not appear to have taken any action to educate herself in this field of practice or associate with a lawyer who is experienced in these matters, she breached her duty of competence. Further, she failed to appear at a scheduled court hearing, which is also a violation of her duty of competence that may subject her to disciplinary action. Under the CA Rules, a lawyer has breached her duty of competence if the lawyer intentionally, recklessly or repeatedly fails to provide competent representation would they be subject to discipline. Here, L may be found to have been in violation of the CA Rules as well since she intentionally or at least recklessly took on the matter while knowing she was not qualified to do so (and only took it on because she felt pressured). The failure to appear at court because she forgot may not rise to a violation of the CA Rules; however, since it does not appear to be intentional, reckless or repeated - it is probably negligent at the most.

L also agreed to represent C if he wouldn't sue her for malpractice if she would defend him for half her regular rate. Under the ABA Rules, a lawyer may not limit a client's right to seek disciplinary action or to participate in an investigation. The ABA Rules allow for the client and lawyer to limit malpractice liability, so long as the client is represented by independent counsel. The CA Rules, however, expressly forbid any limitation of malpractice liability. Therefore, L is in breach of the ABA Rules because C was not represented by an independent attorney when L's malpractice liability was limited, and is in breach of the CA Rules because they do not allow for any limitation on malpractice liability.

Further, L agreed to represent C for a contingency fee for the cross-complaint, but it does not appear the fee agreement was in writing. A contingency fee agreement under the ABA Rules must be in writing, state the percentage of fees that the lawyer would receive, what expenses would be deducted from recovery, and whether the lawyer's

percentage would be deducted before or after expenses were deducted. Under the CA Rules, the fee agreement must also state how other costs will be paid, as well as that the fees are negotiable. Here, it does not appear that L and C entered into a fee agreement, but rather orally agreed on the contingency.

Note that the agreement to represent C for half price under the ABA Rules did not have to be in writing, but under the CA Rules likely should have been. The CA Rules require written agreements for non-contingency fees unless the fees will be under $1,000, is for a corporate client, is for routine matters, the client agrees otherwise in a separate writing, or there is an emergency or other good reason. Here, it is likely even with L's fees being half price for defending C, the fees will be over $1,000; the matter is not for a corporate client but is instead for C individually; the case is not a routine matter that L normally handles for C; C has not agreed otherwise in a separate writing; and there is no emergency or other good reason. Therefore, L would be in violation of the CA Rules because her agreement to defend C for half her normal price was not in writing.

2. L committed several ethical violations when she failed to make the court appearance:

As stated above, L owed C a duty of competence. She breached this duty under the ABA Rules by agreeing to take on his matter without experience, and also by failing to appear at court. She likely breached this duty under the CA Rules by intentionally agreeing to take on a matter in which she was not experienced, but would probably not be in breach under the CA Rules for failing to appear, as this did not appear to be intentional, reckless or repeated conduct on her part.

L also breached her duty of care. A lawyer must act in good faith and as a reasonably prudent person with the same care, skills and caution as would be expended on her own matters. L breached this duty by failing to appear at court, as a reasonably prudent person would not have forgotten to make a scheduled court appearance.

L also breached her duty of diligence to C. A lawyer has a duty to pursue cases to completion, and to diligently represent clients in their matters. Part of this duty under the ABA Rules is the duty to act promptly and expedite a client's case if it is in the client's best interest. Under the CA Rules, the lawyer may not unduly delay for improper purposes or for her own convenience. She breached the duty of diligence because she failed to appear. If she caused a delay in the proceedings due to the rescheduling of the court appearance, she again breached this duty.

3. L should send C the undisputed amount from the Client Trust Account, and is entitled to keep the disputed amount in the Client Trust Account until the dispute is settled.

A lawyer has the duty to notify the client and distribute client funds promptly when funds have been received on the client's behalf, and to distribute funds to third parties (if the client knows and has consented to having third parties being paid out of the client trust account). Here, it appears L has properly maintained a separate client trust account for C. When L deposited the $100,000 in the Client Trust Account, she also appeared to have promptly told C that the funds had arrived. However, C disputed the amount L was to send - L said she would send $70,000, which reflects the $100,000 minus her 30% contingency fee, but C said the contingency fee should also have been half price, so only 15%. Therefore, C claims L should send him $85,000. When there is a dispute as to the fees owed, the lawyer must send the undisputed portion to the client, and is entitled to keep the disputed portion in the client trust account until the dispute has been resolved. As a result, L should send C $70,000, which they have both agreed to, and can transfer $15,000 to her own account as part of her fees. The disputed $15,000 must remain in the client trust account until the dispute has been resolved.

As a side note, the ABA Rules encourage arbitration to resolve fee disputes, while the CA Rules mandate arbitration if the client demands it.

QUESTION 3: SELECTED ANSWER B

1.

Consensual Sexual Relationship

Under the ABA Model Rules (ABA), it is permissible for an attorney to represent a client with whom she has a pre-existing relationship, as long as the sexual relationship will not compromise the attorney's competence or duty of loyalty to the client. However, the ABA, lawyers may not enter into sexual relationships with clients that begin after they take on the clients. In California, attorneys may carry on sexual relationships that pre-existed the lawyer-client relationship, as well as being sexual relationships during the pendency of the representation, as long as competence and loyalty are not compromised. In addition, under CA rules, an attorney cannot condition acceptance of a client on agreement to have sex with the attorney. Here, the contractor and the lawyer had a preexisting sexual relationship, so their relationship did not automatically violate ABA or CA rules. However, the sexual relationship may have violated both ABA and CA rules because it conflicted with the duties of competence and loyalty (see below).

Duty of Competence

An attorney has a duty to competently represent her client which means using the knowledge, skill, thoroughness and preparation reasonably necessary for the representation. However, an attorney is permitted to take a case which she might not otherwise be competent to take if she can acquire through study the skills/knowledge necessary to represent the client and/or work with another attorney who specializes in that area.

Here, the attorney had never handled a complex construction defect case before. Thus, it appears she was not competent at the outset to do so. We have nothing in the facts

to indicate that the attorney studied day and night to become reasonably competent to represent her client in this matter. And she did not partner with another attorney with expertise in construction defect cases.

Therefore, she violated her duty of competency when she agreed to represent contractor.

In addition, it appears that lawyer's pre-existing sexual relationship with client encouraged her to take a case for which she was not competent ("Lawyer felt pressured because of their relationship" may refer to taking the case as well as the fee she accepted.) Therefore, the lawyer also violated the duty not to let sexual relationships with clients interfere with your work, in violation of both ABA and CA rules.

Agreement not to sue for malpractice

Under ABA rules, a client can only contract away her right to sue an attorney for malpractice if the she is represented by outside counsel and agrees in writing. CA rules prohibit attorneys from contracting out of malpractice liability under any circumstances.

Here, Lawyer violated both ABA and CA rules. There is nothing on the facts to indicate that client was represented by outside counsel when he agreed not to sue for malpractice, or that the agreement was in writing. Thus, the ABA rules were violated. Because it is an agreement to limit malpractice liability the attorney violated CA law when she agreed to take on the case on this basis.

Duty of Loyalty

The duty of loyalty is always potentially implicated when a client and a lawyer have a sexual relationship. The duty of loyalty requires an attorney to avoid conflicts of interest. A conflict of interest exists when the interests of another client, a third party or the attorney herself are adverse to materially conflict with those of the client. Here,

there is a potential conflict of interest between the lawyer's personal interest (her relationship with the client) and the representation. Under the ABA, when a conflict exists, an attorney can only represent a client if she reasonably believes she can do so competently, she discloses the conflict to the client, and gets the client's consent in writing. In CA, the belief need not be reasonable but only sincerely held, and personal conflicts only require written disclosure, not written, consent. Here, the attorney should have disclosed the nature of the potential conflict and gotten written consent at the outset (ABA). If she reasonably believed she could represent the client she could have done so with written consent, but here her belief would not be reasonable because she already felt pressured at the outset. Therefore, she violated ABA rules by taking on the case. Under CA rules, she would have had to provide only written disclosure (there is no indication of this on the facts) and the fact that her belief she could competently represent him would not matter. However, mere failure to provide written disclosure means that she already violated the CA duty of loyalty when she took the representation.

Fee agreement

Under the ABA, fee agreements must be reasonable. They don't have to be in writing, unless they are contingency agreements, in which case they must state the percentage of the attorney's fee, what expenses will be deducted, whether expenses will be deducted before the attorney's fee, and must be signed by the client. Under CA rules, all agreements over $1000, not with corporate clients, regular clients, or under exigent circumstances must be in writing. In addition to the ABA contingency fee requirements, CA contingency fees must include in writing that attorney fees are negotiable and state how non-covered services will be paid. In addition, the entire fee must not be unconscionable.

Here, attorney agreed to defend client at half her regular price, but his cross-complaint on a 30% contingency basis. Under ABA rules, the first part of the agreement did not need to be in writing but the second part did. There is no indication of a writing;

therefore the contingency agreement violated ABA rules. In addition, the agreement was probably per se unreasonable because it was the result of duress or undue influence exerted by the client.

Under CA rules, the whole agreement would have to be in writing unless they regularly worked together as lawyer-client or the first part was under $1000. Definitely the second contingency part had to be in writing, as it was not here, and lacked everything required in CA. In addition, despite the fact that 30% seems reasonable, it may be considered unconscionable because it was agreed to under duress and undue influence.

2. Failure to make court appearance

When the attorney failed to make the court appearance, she violated her duty of loyalty and competence to the client, and duty to pursue the case diligently. She didn't come to court due to what appears to be the deterioration of the sexual relationship. This means that she violated the duty not to let sexual relationships interfere with the representation, as well as the duty not to let her personal interests conflict with those of her client. In addition, she failed to pursue her case diligently in violation of her duty to her client and to the judicial system.

3. When there is a dispute over fees, the lawyer must retain the disputed portion in the client trust account pending resolution of the dispute. Here, the lawyer can send the 70k to the client, but must retain the additional 15k in the client trust account until the dispute is resolved.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

QUESTION 6

Len, an attorney, is a member of Equal Ownership Inc. (Equal), a nonprofit organization that seeks to help low-income families purchase homes throughout the state. Len does not represent Equal as an attorney. Equal helped to get a statute enacted that requires that all new residential developments contain a certain percentage of low-income housing.

ABC Development Corp. (ABC) is a corporation that wants to challenge the statute. Pat, the President of ABC, asked Len to represent ABC and Len agreed. Len does not personally agree with ABC's objective, but moves forward with the representation nonetheless by filing a complaint challenging the statute. Len personally thinks the statute is a good law and secretly hopes that ABC is not successful in its lawsuit.

During the course of Len's representation of ABC, Pat informs Len that he (Pat) has filed false reports with the State Environmental Protection Agency regarding the disposal of non-hazardous waste, and is planning to file another false report next month. Filing a false report makes a person and his or her employer liable for a substantial civil fine. Len does not take any action with respect to the impending filing of the false report.

What ethical violations, if any, has Len committed? Discuss.

Answer according to ABA and California authorities.

QUESTION 6: SELECTED ANSWER A

Attorney-Client Relationship

An attorney-client relationship is formed when the client reasonably believes it has been formed. The existence of an attorney-client relationship triggers numerous duties, including the duties of competence, confidentiality, loyalty, and fiduciary duties. Breaching one of these duties is a violation of the Model Rules and California Rules.

Here, ABC has hired Len (L) to represent them in an effort to challenge the residential housing statute. Thus, it is likely that they reasonably believe an attorney-client relationship exists. One has therefore been formed. The duties mentioned above now apply to this relationship, and any breach will be considered an ethical violation.

For similar reasons, L does **not** have an attorney-client relationship with Equal. Although he has helped them get the housing statute enacted, he does not represent them as an attorney. Thus, we may assume that Equal would not reasonably believe such a relationship existed. Even in the absence of a formal relationship, however, his association with Equal may raise other problems, as discussed below.

Corporation as a Client

An attorney may represent a corporation as a client. The corporation acts through its duly-appointed representatives, usually officers. However, the corporation, not the officers, is the actual client and the attorney must be careful not to provide legal information to the officers in a personal capacity or to mislead them into believing that the attorney represents them personally.

Here, ABC, a corporation, has retained L to handle the representation. This is permissible under both sets of rules. ABC, acting through Pat (P), will likely give L

instructions on how to proceed and define what the goals of the representation are. However, L must remember that he represents ABC and not P.

Duty of Loyalty

An attorney owes his clients a duty of loyalty. The duty of loyalty includes the duty to refrain from conflicts of interest. Conflicts of interest take several forms: conflicts personal to the lawyer, conflicts between current clients, and conflicts between current and past clients.

Lawyer-Client Conflict

A lawyer may breach his duty of loyalty by representing a client with interests adverse to his own. This often arises when litigation the attorney is handling is adverse to one of his personal interests. When an attorney has a conflict between his or her personal interests and the interests of the client, under the California Rules he or she must provide the attorney with written disclosure of the interest. The model rules, by contrast, require that the attorney get informed consent from the affected client before continuing with a representation that raises a personal conflict. Further, under the Model Rules, the lawyer must reasonably believe that he will be able to provide competent and diligent representation in the face of the conflict.

Here, under either rule, L has breached his duty of loyalty. L is a member of Equal, an organization that helped to pass the statute his new client, ABC, is now challenging. L has admitted that he thinks the law is valid and that he hopes ABC is not successful in its suit. Under the Model rules, this would be a violation because he cannot reasonably believe he will be able to provide diligent and competent representation in the face of this admission. Further, under the California rules, there is no indication that he has provided written disclosure to ABC of his personal interest. He may argue that ABC only knew about him because of his work with Equal, and thus ABC was necessarily informed of his interest. However, California requires written disclosure, which was not

provided. L has breached his duty of loyalty by representing a client in the face of a personal conflict without disclosure and without a reasonable basis for believing he can continue to provide competent and diligent representation.

Client Conflicts

A lawyer may breach his duty of loyalty by representing current clients with interests adverse to one another or by representing a current client whose interests are adverse to a former client.

Current Clients

A lawyer may breach his duty of loyalty by representing current clients whose interests are adverse to other current clients. Under the Model Rules, a lawyer must get informed consent from the adversely affected client and reasonably believe that they can undertake the representation in spite of the conflict. The Model Rules require this consent only for **actual** conflicts of interest. By contrast, California requires informed consent for either **actual** or **potential** conflicts of interest. However, California does not require that the attorney reasonably believe he can prove competent representation in the face of the conflict.

Here, although Equal might argue that there is a client conflict, it is unlikely that L has breached either the model or California rules by agreeing to represent ABC. L was a member of Equal, but there was never an attorney-client relationship between L and Equal. There would therefore be no need to get informed consent from ABC or Equal before pursuing the representation of ABC.

Former Clients

Like a conflict of interest arising from the representation of current conflicting clients, an attorney may likewise breach their duty of loyalty by representing a client with an

interest adverse to a former client. In this case, the test under the California rules is generally whether the attorney learned any confidential information in the previous representation which could harm the client.

Here, like above, there is likely no former client conflict because there was no attorney-client relationship with Equal. However, Equal's argument on this front would be stronger--there is a strong possibility that as a lawyer-member of Equal, he learned information about Equal's litigation and lobbying strategies that could be used by ABC to defeat the statute. If he obtained confidential information from Equal, some courts might treat it as an ethical violation to use this information in subsequent litigation against that organization without getting informed consent. However, because there was no actual attorney-client relationship between Equal and L, it's unlikely that he breached his duty of loyalty by not getting Equal's informed consent.

Duty of Competence

An attorney owes a duty of competence to his client. Under both the Model rules and the California rules, this requires that he or she have the requisite knowledge, skill, thoroughness, and preparation necessary to handle the case. If a lawyer is not competent to handle the representation, he must become competent before proceeding, associate with a competent lawyer, or withdraw.

Here, although there is nothing to suggest that L is technically incompetent to represent ABC (he likely has experience in this area of law through his membership in Equal), it is possible that his affiliations and loyalties make it such that he cannot provide competent representation. He has admitted that he secretly hopes ABC is not successful in its lawsuit. This signals that he is biased against his client and therefore might be tempted not to use the requisite knowledge, skill, thoroughness, and preparation the representation deserves. If this is the case, then L will have breached his duty of competence to ABC.

Duty of Confidentiality/Disclosure

An attorney owes a duty of confidentiality to his clients. This requires, under both sets of rules, that they keep any information related to the representation confidential and inviolate. The duty of confidentiality is not absolute, and the Model rules and California rules both have exceptions for disclosure in case of fraud or financial harm (Model rules) or the threat of serious bodily harm or death (both sets of rules).

Here there are two potential issues related to confidentiality: (i) the possibility that L will breach his duty of confidentiality and provide information related to the representation of ABC to Equal, and (ii) whether L has a duty (or permission) to disclose information related to ABC's filing of false reports.

(i) Threat of Disclosure to Equal

As mentioned above, a lawyer must not disclose <u>any</u> information related to the representation to an outside source.

Here, his close association with Equal, a company whose law he is now attempting to strike down on behalf of ABC, presents a serious risk that he will violate the duty of confidentiality by disclosing information related to ABC's challenge of the law. Although there is no indication that he has yet made such a disclosure, if he does, he will have violated the duty of confidentiality and thus have committed an ethical violation.

(ii) Reporting ABC's False Reports

The Model rules and California rules treat the disclosure of confidential corporate information differently. When an attorney discovers that a corporation has undertaken an unlawful act, such as filing fraudulent documents or committing a criminal act, under both sets of rules an attorney must first **report up**. Reporting up requires that the attorney take the matter to the most senior member of the corporation. Under the

Model Rules, if the executives of the corporation refuse to take action, the lawyer may **report out** if he believes it is in the best interest of the corporation. This is an exception to the duty of confidentiality and allows the lawyer to report misconduct to an outside agency. California does not permit reporting out for financial crimes. California permits reporting out only when he or she has reason to believe that (i) the client or a third party will commit an act that creates a **risk of death or substantial bodily harm**, (ii) he or she has **remonstrated** the client to not take this action, and (iii) the disclosure is **reasonably necessary** to prevent the harm. Under the California rules, a lawyer may not disclose financial harms, although he may choose to withdraw from the representation.

Here, L has discovered that P has filed false reports with the State EPA regarding the disposal of non-hazardous waste and is planning to file another false report soon. Filing this false report opens the corporation up to a substantial civil fine. As a threshold matter, L should report this matter up the chain of command of the company. However, as it appears that P is the president, it is not apparent who else this could be reported to. Under the Model Rules, since L has exhausted his "reporting up" options, L is permitted to disclose the false report to an outside agency, since this involves a threat of substantial financial harm to the corporation. He may also withdraw from representation. He does not violate the Model Rules by <u>not</u> filing the report, although he may not counsel them on committing this type of fraud.

By contrast, L has no ability to report the fraud under the California rules. California permits reporting outside the corporation only where there is a risk of death or substantial bodily harm. The facts indicate that the waste is non-toxic, and thus it is unlikely that there is any risk of bodily harm. Although L may choose to withdraw from the representation and may not counsel the corporation on filing such documents, he is not required (or allowed) to disclose--to do so would be a breach of the duty of confidentiality.

In short, L's responsibilities in the situation depend on the rules applied. Under either

circumstance, he can likely withdraw from the representation since the client is committing fraud. Under the Model Rules, he may, but is not required to disclose the fraud to an outside agency. Under the California rules, he may not disclose the fraud and would be liable for a breach of confidentiality for doing so.

Duty of Candor to the Court

In addition to duties owed to the client, an attorney also owes a duty of candor to the court. As part of an attorney's duty of candor to the court, the lawyer owes a duty not to advance or file frivolous claims under both the California and Model Rules. This requires that they not knowingly put forward a claim that is unsupported by the law, although a good faith argument for modification or reversal is not considered frivolous.

Here, L has filed a claim seeking to invalidate the residential housing statute, a law that he helped pass. He has admitted that he secretly hopes that ABC is not successful in its lawsuit and that the statute is good law. Thus, there is a substantial likelihood that he will violate the duty of candor by filing a suit seeking to invalidate the law. This is because, if the law is valid, then claiming it is not valid without a reasonable basis is considered a frivolous claim. L will argue that he does not <u>know</u> that the law is good law, he just believes it is. Therefore, because he does not <u>know</u> whether the law is good or not, he is not prohibited from putting forth a good faith argument that it should be modified or overturned. Whether this argument succeeds depends on whether or not he believes there is a good faith basis for challenging the law. If he does not, and he proceeds to litigate the claim anyway, he will have violated his duty of candor to the court.

QUESTION 6: SELECTED ANSWER B

DID LEN COMMIT ANY ETHICAL VIOLATIONS IN CHOOSING TO REPRESENT ABC?

Duty of loyalty

A lawyer owes to their client the duty of loyalty. Under the ABA rules, the duty of loyalty requires that a lawyer not take a representation when there is a conflict of interest, unless the lawyer: (1) reasonably believes that his ability to represent the client will not be materially limited by the conflict of interest; and (2) the lawyer discloses the conflict to the client and receives their informed consent to continue with the representation. The California rules are quite similar, except the lawyer only needs to have a good faith subjective belief that his ability to represent the client will not be materially limited by the conflict of interest, and if the conflict is a personal conflict, the lawyer only needs to provide a written disclosure of the conflict in writing to the client. However, if the conflict is not a personal conflict, the client's consent itself, and not just a confirmation of consent, must be in writing.

Conflict of interest #1: Len's membership of Equal Ownership Inc. (Equal)

Did a conflict of interest exist?

Although Len did not represent Equal, a conflict of interest still likely existed because Len was a member of Equal, yet he agreed to represent ABC in its suit to challenge the statute. Equal was the nonprofit organization that helped to get the statute in question enacted. As a member of Equal, Len likely assisted or at the very least approved of and supported Equal in its mission to help get the statute enacted. Now, Len is on the opposite side of the same conflict, seeking to get this same statute struck down.

Accordingly, Len had a conflict of interest due to his membership of Equal and his representation of ABC, as Len was required to essentially fight a statute that was supported by the nonprofit which he was a part of.

Did Len take appropriate steps to represent ABC notwithstanding this conflict?

ABA MODEL RULES

Under the ABA model rules, Len could still represent ABC notwithstanding this conflict if: (1) he reasonably believed his ability to represent ABC would not be materially limited by this conflict; and (2) Len obtained ABC's informed consent in writing. Note that Len was not required to obtain Equal's informed consent, because Len does not represent Equal as an attorney.

Here, Len would argue that Len could reasonably believe he could represent ABC notwithstanding this conflict because even though he was a member of Equal, Len did not necessarily participate in the specific lobbying strategies or otherwise directly work on/contribute to Equal's efforts to enact the statute. Len could argue that though he supported Equal's mission at the time, this past support would not undermine his ability to represent ABC, despite the fact that ABC's objectives sought to tear down this specific statute.

On the other hand, it could be argued that Len's belief was not reasonable. Len was a member of the organization that supported and helped to enact the low-income housing statute. It could be argued that it would not be reasonable for Len to believe he could represent ABC and somehow place his membership of Equal and his support of Equal in an "isolated mental box" in his mind, which would not affect his ability to represent ABC, because the interests directly and squarely conflict with one another.

Overall, Len may very well succeed on his argument that he reasonably believed that this conflict of interest would not have materially limited his ability to represent ABC. Len was only a member of Equal, and the facts do not suggest that Len spearheaded or otherwise was deeply involved with the Equal's work in helping the statute get enacted.

However, despite this fact, Len did not disclose the conflict to ABC at the time he chose

to take on the representation. The facts do not suggest that Len told Pat he was a member of Equal, and that Pat consented to the representation notwithstanding this consent. Moreover, even if Len may have told Patrick about it and Patrick consented, such consent was not obtained or otherwise evinced by a writing.

Therefore, Len breached his duty of loyalty under the ABA model rules by improperly accepting a conflicted representation.

CA RULES

Here, Len would argue that he at the very least had a subjective good-faith belief that he could represent ABC notwithstanding his membership of Equal. A court would likely agree with Len, on grounds that as discussed above, while Len was a member of Equal, Len did not represent Equal, nor do the facts indicate that Len was directly or deeply involved with Equal's efforts to enact the statute. Accordingly, regardless of whether this belief was reasonable or not, Len may have had a good faith belief that he could have represented ABC notwithstanding this conflict.

However, Len did not provide a written disclosure of this conflict to ABC in writing. Indeed, this was a personal conflict, as it related to Len's membership with Equal and not some other conflict due to representation of other past or present client. However, under the ABA rules, Len was required to give ABC notice of this conflict and obtain its informed consent in writing. Len did not provide such a disclosure or obtain informed consent.

Therefore, Len breached his duty of loyalty under the ABA model rules by improperly accepting a conflicted representation.

Conflict of interest #2: Len's personal disagreement with ABC's objective

Did a conflict of interest exist?

In addition to being conflicted due to his being a member of Equal, another potential conflict of interest existed because Len did not personally agree with ABC's objective. Len personally thought that the statute was a good law, and secretly hoped that ABC was not successful in its lawsuit. Len's interests therefore directly diverged and conflicted with those of the objectives of his client. Accordingly, a conflict of interest also existed as regards Len's personal sentiments as to the merits of ABC's lawsuit, which Len was working on.

Did Len take the appropriate steps to accept the representation notwithstanding the conflict of interest?

ABA MODEL RULES

Len would argue that he reasonably believed that he could still represent ABC despite the fact that he did not personally agree with ABC's objectives, and believed that the statute was good law. He would argue that it is common for lawyers to personally disagree with their client's positions, but for them to nonetheless do the work as required and necessary to further their interests in the current matter.

However, it could be argued that Len's belief was not reasonable. Len's beliefs **directly and completely** diverged from that of his client's objectives. Such a strong, powerful belief, which even led Len to secretly hope that ABC was not successful in its lawsuit, would have inevitably affected Len's ability to represent ABC fully and to his utmost ability. Accordingly, it could be argued that due to the divergent disparity between his beliefs, and the objectives of his client, which even led him to essentially root for his client's failure, Len could not have reasonably believed he could represent ABC despite his personal beliefs.

A court would likely find that Len's belief that he could represent ABC effectively notwithstanding his personal beliefs was likely to be unreasonable. While it is common for a lawyer to disagree to an extent with the client's objectives, here Len was completely against them. The severity of his belief, and the likelihood of his personal sentiments materially impairing his ability to represent ABC is strongly evinced by the fact that he was rooting against his own client's victory.

Moreover, as discussed above, Len did not disclose such a conflict in writing to ABC, nor did Len obtain their informed consent.

Therefore, Len breached his duty of loyalty in accepting this representation with a conflict of interest.

CA RULES

Indeed, it is still possible that Len had a good faith subjective belief that he could represent ABC notwithstanding his strong feelings against their objective. However, as discussed above, Len did not disclose the nature of the conflict in writing.

Therefore, Len breached his duty of loyalty under the CA rules in accepting the representation with a conflict of interest.

Duty of competence

The duty of competence requires that a lawyer pursue a representation with the knowledge, skill, prudence, and effort that is reasonably required for the representation. Under the California rules, the lawyer only violates his duty of competence if he intentionally, recklessly, or repeatedly commits ethical violations.

ABA MODEL RULES

Under the ABA Model Rules, it could be argued that Len violated his duty of

competence in choosing to represent ABC notwithstanding such a conflict. A lawyer acting with appropriate knowledge and skill would have been aware that Len faced multiple conflicts of interest, and should not have taken on the representation. A lawyer acting with sufficient prudence would have been aware of the risks that his ability to represent the client would have been limited, and that he would be subject to discipline for taking on such representation. On the other hand, it may be argued that even a lawyer with appropriate knowledge, skill, and effort would have taken on this representation, as they would have had sufficient knowledge and skill to further ABC's interests notwithstanding the conflict of interest.

Under the ABA Rules, it is likely that Len breached his duty of competence. He did not act with the proper prudence in representing ABC, given the conflicts of interests that had existed.

CA RULES

Under the CA Rules, it is possible that Len did not violate his duty of competence. Len may have failed to act without prudence in accepting such a conflicted representation, but the facts do not suggest that Len had intentionally acted or even recklessly acted incompetently. Rather, he may have merely been negligent in taking on this representation, and this would not have been sufficient to support a finding of a breach of the duty of competence in California.

<u>Conclusion</u>

Len may have violated his duty of competence under the ABA model rules, but likely did not violate the CA rules.

DID LEN COMMIT ANY ETHICAL VIOLATIONS IN FILING THE COMPLAINT ON BEHALF OF ABC?

Duty to avoid filing frivolous lawsuits with the court

A lawyer has a duty to the courts and the judicial system to refrain from filing frivolous lawsuits with the court. A lawsuit is frivolous if the suit as filed was not warranted by the current law, or by a good-faith argument for a change in the law.

Here, Len personally thought that the statute is a good law. Yet, he still filed the lawsuit challenging the suit. Thus, it could be argued that Len breached his duty to the courts to avoid frivolous lawsuits, as he filed the suit without a good-faith belief that the suit was warranted by existing law or by a good-faith argument for a change in the law. However, it could also be argued that Len did not breach this duty because while Len may have personally believed the statute is good law, there is a possibility that other precedent and jurisprudence would have provided a good argument to strike it down.

It is likely that a court will find that Len did not breach this duty to the court. The facts indicate that Len **personally** thought that the statute was **a good law.** The statute was not necessarily founded on solid principles and immune from attack on other legal grounds. Thus, though Len personally disagreed with the filing of the complaint, there are insufficient facts to establish that it was frivolous to do so.

DID LEN COMMIT ANY ETHICAL VIOLATIONS FOR HIS FAILURE TO TAKE ACTION WITH RESPECT TO THE IMPENDING FILING OF THE FALSE REPORT?

Duty to protect the interests of the corporate client

When the lawyer represents a corporate client, the lawyer owes a duty to act in the corporate client's best interests. The duty to corporate clients provides that if the lawyer learns that the corporation, or one of its agents or employees, were to commit an act of wrongdoing or other act that would be harmful to the corporation's interests, or be imputed to the corporation to expose it to liability, the lawyer has a duty to report such

information to the highest authority in the corporation, such as the corporation's CEO or Head of Counsel. If such reporting is not possible, or would not be effective at preventing the harm, under the ABA model rules, the lawyer **may** report the information to an outside authority to avoid **harm** to the corporation. In California, however, although internal reporting is still required, reporting to an outside organization is **not permitted** except when necessary to comply with the requirements of the Sarbanes-Oxley Act.

Len **may** have breached his duty to the corporation under the ABA and California model rules. Here, Len found out that Pat had filed false reports with the State Environmental Protection Agency (EPA), and that Pat is planning to file another false report next month. Len was also aware that filing a false report makes a person **or his or her employer** liable for a **substantial civil fine.** Accordingly, Len was aware that one of the employees of his client (ABC), had taken actions, and was going to take actions, that could both be **imputed** to the corporation, AND would expose the corporation to liability. Therefore, Len was required to "run the information up the corporate flagpole."

The facts do not indicate whether Pat was the highest authority in ABC or not. Indeed, Pat was ABC's president. However, it is possible that there were other corporate officers (i.e., a CEO or something) or directors that were higher up on the "corporate flagpole" than Pat. If there were such individuals available, Len was required to inform them of Pat's actions to avoid having civil liability imputed to his client, ABC, and his client being subject to potential civil liability by having to pay a fine. Assuming that there were other individuals who were higher up than Pat on the corporate flagpole, Len may have violated his duty to protect the corporation's interests in failing to take any action with respect to the impending filing of the false report.

Note that under the ABA Model rules that if, however, Pat was the highest authority at ABC, Len was **permitted, but not required** to disclose the information regarding the false report to the State Environmental Agency. Len was not mandated to disclose, but only was permitted to do so. Accordingly, under these circumstances, because Len did

not have an affirmative duty to disclose, but only had the right and the privilege to disclose to an outside authority, Len did **not** breach his duty to protect the corporation's interests by failing to report the false reports to the State EPA.

Conclusion

Therefore, Len **may** have breached his duty to protect the interests of his corporate client under the ABA and California rules, depending on whether there were other individuals on the "corporate flagpole" that Len could have reported this information to in order to protect the corporation from having liability imputed onto it by an action of one of its employees.

Duty of confidentiality - was disclosure required or permitted in these circumstances?

Because Len was not required to disclose the information to the State EPA due to his duties to protect the interests of his corporate client, the only other means by which Len may be disciplined is if he was **required** to make such a disclosure and breach his duty of confidentiality.

A lawyer owes to his clients a duty of confidentiality. The duty of confidentiality requires that a lawyer may not disclose or reveal any information that the lawyer receives as part of the representation. The duty of confidentiality continues even after the representation has ended, and even after the death of the client.

Under the ABA model rules, the lawyer is **permitted** to reveal confidential information from the client in the following circumstances: (1) Where necessary to avoid serious bodily injury or death to others; (2) Where necessary to avoid or ameliorate financial injury to others that was a result of crime or fraud that was accomplished with the lawyer's services; (3) Where reasonably necessary to further the representation; and (4) Where reasonably necessary to comply with other ethics obligations, such as the disclosure of limited client information for conflicts checks. In California, however, the lawyer is only permitted to disclose confidential information to avoid physical injury or

death to others, **and** if reasonable, before disclosure, the lawyer must first: (1) reason with the client and attempt to persuade him not to follow through with his acts AND (2) tell the client of his intent to disclose.

Avoid serious bodily injury or death

Here, Pat had filed false reports with the State EPA regarding the disposal of **non-hazardous waste.** While ABC may have been improperly disposing waste, such waste was non-hazardous. Therefore, it is likely that the disclosure of this confidential information was not reasonably necessary to avoid serious bodily injury or harm, as the waste was not hazardous waste.

Moreover, even if the waste was hazardous, the lawyer's duty to disclose was **permissive, and not mandatory.** Accordingly, Len did not breach his duty of confidentiality under either the ABA or CA rules, as this exception was not applicable, and Len was **permitted, but not required** to provide such disclosure.

Avoid financial injury to others due to crime/fraud procured through use of lawyer's services

Here, Len's representation concerned challenging the low-income housing statute. However, Pat's statements to Len were completely unrelated to the scope of his representation and provision of legal services, as Pat's false reports were related to the disposal of non-hazardous waste, and false reports in connection with such disposal to the EPA.

Though the disposal of non-hazardous waste may have harmed other individuals' financial interests, as the non-hazardous waste may have caused damage to others' property, such harm was not procured using Pat's legal services. Moreover, as with the duty to disclose information to prevent physical injury or death, the duty to disclose to avoid financial injury is also **permissive,** rather than mandatory.

Therefore, even if this rule was applicable, Pat did not violate any duty in failing to report

or disclose this information, as his duty to disclose was **permissive,** not mandatory. Note, moreover, that California does not have this exception.

Conclusion

Len was not required to disclose the information regarding the filing of the false report in the present case. Although he may have been permitted to do so under two exceptions to the duty of confidentiality under the ABA Model Rules, Len was not required to do so.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

What ethical violations, if any, has Len committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his or her clients to zealously advocate on their behalf and be free of conflicts of interest that have a significant chance of materially affecting their ability to do so. That duty begins, at the very least, at the execution of a retainer agreement. Claire and Len executed a retainer agreement, and thus the attorney-client relationship was formed and Len owed Claire all of the duties under the ABA and CA rules.

1. Duty of Loyalty

Moreover, under both, a lawyer is deemed to have a conflict if they represent a party who is adverse to another party that is represented by one of the attorney's immediate family members. In such an instance, the lawyer is required to get the informed written consent of their client before pursuing the representation. (Such personal conflicts would not be imputed on other attorneys in a law firm, however.) Ignorance of a conflict is not an excuse for failing to obtain consent or notify about the conflict. An attorney can still represent a client, notwithstanding such a conflict of interest, so long as the client consents and the lawyer reasonably believes that the conflict will not infringe on his or her ability to zealously and competently advocate on behalf of her client. While the ABA would require written consent for such a conflict, California requires only written notification by the attorney because the conflict is only personal.

The issue, though, is whether a former fiancee of two years representing the other party is a conflict of interest at all that need be reported to the client for her consent. Under a strict framework, a former fiancee would not qualify as a family member. It is true that a current fiancee qualifies as a family member, but this rule is unlikely to apply to former fiancees from over two years ago. The rationale for the current fiancee rule is that they are engaged to be members of the family; a former fiancee has, on the other hand, specifically decided *not* to be a part of the family. Therefore, for purposes of this rule, Hannah was not a member of the family and thus this did not trigger an ethical situation

under this rule.

Nonetheless, a lawyer has a general duty to remain loyal to a client, and being close friends with the attorneys on the other side could warrant notification and consent. Here, Len and Hannah "amicably" decided to go their separate ways and Hannah seemed to "call" up Len as more of a friendly notice than as an opposing party counsel. Therefore, it seems that Len and Hannah were quite close. Indeed, in response to the notification, there is no indication that Len looked into the truthfulness of the representation, but rather accepted it at face value, showing that he still trusted Claire quite a bit. This goes to show that Len was not, in fact, able to maintain a fiduciary relationship with Claire notwithstanding the personal connection with Hannah. As a result, Len violated an ethical rule by not disclosing this conflict as it came to pass to Claire.

2. Duty to Represent a Client

A lawyer is free to (more or less without restriction) take or not take clients and causes of action (although is encouraged to do pro bono). But once they decide to do take a client, many ethical rules apply. CA and the ABA allow an attorney to withdraw from representation under certain circumstances and require an attorney to do so under others. For example, if an attorney is not receiving their fees or other obligations pursuant to the attorney-client relationship and they have notified the client and given the client a reasonable time to remedy the situation, then the attorney is permitted to withdraw. Additionally, attorneys may withdraw if the clients are using their legal services for illegal purposes. Moreover, if the attorney finds the representation of the individual repugnant to their sensibilities, they may withdraw so long as they do not materially harm the client's interests. If representing the client would require the attorney to violate other ethical rules or laws, then the attorney must withdraw. Thus, for example, if representing a client would require the attorney to file a frivolous lawsuit, then the attorney must withdraw.

a. *Frivolous lawsuits*

Here, Len will argue that he had to withdraw from representing Claire because failing to do so would violate the rule that attorneys are not allowed to file frivolous lawsuits. He will point to Hannah's representation--whom he had been engaged to and amicably decided not to marry, and thus trusted--that Claire was a serial litigant that had filed fourteen other lawsuits against the Hotel and that Hannah intended to move the court to declare Claire a vexatious litigant. But having been a vexatious litigant does not, in and of itself, show that *this* lawsuit was frivolous. In fact, Claire showed Len scars on her leg and clothes that were stained by the supposed cleaning solution that caused the scars. Opposing counsel's representation that Claire was a vexatious litigant did not even include any allegation that *this* lawsuit was frivolous. Instead, it was merely that other lawsuits filed by her might have been. And indeed, only that they *might* have been because Claire did not even represent that these lawsuits were frivolous or that a court had yet deemed her a vexatious litigant. A reasonable lawyer would not have relied solely on these representations in determining to no longer represent Claire. Instead, a reasonable attorney would have looked into whether these allegations by Claire were true by searching court documents or, at the very least, asking Claire about these cases. And Claire's later response saying "what 'thirteen prior lawsuits'" indicate that doing so might well have revealed that Claire did not actually file those, or that they were not frivolous. In sum, Len did not take reasonable precautions to ensure that the lawsuit that he was attempting to withdraw from representing Claire was, in fact, frivolous, and as such cannot rely on this rationale for withdrawing from representing her.

b. *Costs of representation*

Len might also argue that because Claire was a vexatious litigant, representing her would unreasonably financially burden him. Indeed, California allows the unreasonable financial burden on the attorney as a justification for discontinuing representation of a client. Len appears to be a solo practitioner, this making this claim more reasonable.

However, Len has not shown any financial burden that would necessarily result in trying to defend a claim that Claire was a vexatious litigant (or even that he would have to defend that claim in court). Therefore, it is unclear what financial burdens this revelation would reveal. Moreover, as discussed above, Len did not make any effort at all to determine if there was any basis for determining that Claire actually was vexatious.

c. *Lack of communication*

Len's best argument is that Claire's failure to respond to his numerous requests constitute a permissible reason for him not to continue representing her. Indeed, the rules allow a lawyer to withdraw from representing a client when the client fails to communicate with the lawyer. Much like a lawyer has a duty to communicate with the client (as Len effectively did here once he learned of the potential vexatious litigant problem), a client must fulfill their side of the bargain and communicate back. Len left a voicemail saying that he had an "important update" and asking to be called back. He sent her one e-mail a week with the same request, and received confirmation that Claire had read the e-mails. He then decided to send her a registered letter asking her to contact him. Notwithstanding the three forms of communication asking for a reply because of an "important" update and the *registered* letter, Claire did not respond at all. Importantly, though, Len failed to mention the reason for why he wanted her to contact him. He might respond that he could not have provided details in e-mail, voicemail, or letter because it might have violated his duty of confidentiality to keep all information he learned about her secret absent her consent (which we have no evidence of here). This will likely be sufficient, especially considering the read receipts and the registered letter confirm that Claire actually received the communications.

Even more importantly, though, is the fact that Len never made clear the ramification of failing to respond. Much as in failures to pay attorney fees, the attorney must reasonably notify the client of the consequences of failure to and give them a chance to respond before withdrawing from representation. Here, Len violated that duty by never telling Claire that he would withdraw from representing her unless she responded.

Instead, he simply repeated the same content in different methods asking for a response. This, in conjunction with the fact that he waited what seems like no more than a little over two weeks before withdrawing from representation. If this speed were justified in light of approaching deadlines, that might be reasonable. But there is no indication here that such a rapid action was necessary or, more importantly, that Claire had any reason to believe that such a rapid action was necessary. Len did not tell Claire that he would withdraw if she didn't respond (and he cannot rely on Hannah's representation that she was a vexatious litigant without actually looking into that at all, as a reasonable attorney would, to augment the implication of her nonresponse). Taken together, Len violated his duty of continued representation by withdrawing for this reason.

d. *Court's approval*

Moreover, in California after a lawsuit has been filed, an attorney cannot withdraw from representing a client without attaining the judge's permission to do so. While he likely would have gotten it here, because of the failure to communicate because the case had just been filed and there is no indication that allowing withdrawal would otherwise prejudice Claire, that does not excuse his not following this rule. Therefore, regardless of the merits of any justification for withdrawal, Len breaches this rule.

3. Duty to the Court to Investigate Positions

Even if Len were correct that Claire's lawsuit was entirely without merit, he would have still likely violated ABA and CA ethics rules by filing the lawsuit in the first place. An attorney is required to investigate legal positions and pleadings taken and represented to a court before doing so. The standard for this is what a reasonable attorney would do in similar circumstances. Thus, if the lawsuit was entirely without Merit, Len likely violated his ethical rules in filing it in the first place. Len will argue that the scars and stained clothing were sufficient to file the suit, but the record does not indicate that Len provided *any* additional investigation or research into the merits of the claim. Whether

that is reasonable depends on how a qualified attorney in like circumstances would have acted.

4. Returning Property

A lawyer has the obligation to keep any property of the client's that is in his possession in a safe and secure location. Moreover, the lawyer certainly cannot destroy evidence that the client entrusts to him. The lawyer must take reasonable protective measures to safeguard such evidence, if the lawyer chooses to accept responsibility for possessing it. Here, Len accepted responsibility for maintaining Claire's clothes and those clothes were relevant to the legal claim that Claire was pursuing. As such, he had a duty to his client to implement effective measures for ensuring the safeguarding of the property entrusted in his care. However, he "sent her clothes along with his to be dry-cleaned." Thus, it seems that he did not put her property in a separate location or otherwise implement methods to ensure that the inadvertent destruction or disclosure of the evidence would not occur. Len, therefore, violated this duty to Claire.

If Len received any money following the "properly executed retainer agreement," he violated his duty by not attempting to give it back to her when he sent her the letter saying that he would send her the clothing. However, since there is no evidence that he had any property but for the clothing, he likely did not violate this duty.

QUESTION 5: SELECTED ANSWER B

Attorney-Client Relationship

Len formed an attorney-client relationship with Claire. An attorney-client relationship is formed when the client reasonably believes the relationship formed. The attorney's beliefs are irrelevant. Within the scope of the representation, an attorney determines the means, including which claims to present and which witnesses to call, and a client determines the ends, including whether to accept a settlement offer and other duties.

Retainer

L and C executed a valid retainer agreement. In California, an agreement to represent that is worth more than $1,000 must be in writing. In ABA, it is strongly encouraged. Additionally, the fees must not be unreasonable under the ABA authorities, or unconscionable in California. Here, there is no indication that the fees were unreasonable/unconscionable. The retainer must describe the nature of the relationship, the responsibilities of the parties, and the method of determining fee. Here the facts tell us there was a properly executed retainer agreement.

Duty of Loyalty

An attorney owes a duty of loyalty to his clients, and cannot accept representation if it would result in a conflict of interest that would materially impair his representation of client. A conflict of interest may occur between an attorney and his client; between two clients, whether former and current or two or more current clients; between a third party and client; or between the members of an organization and the organization itself. A conflict of interest may occur between the attorney and his client when the attorney has a close relationship with opposing counsel in a case. Here, L has a close relationship with H, the Hotel's attorney. They were engaged for two years before amicably deciding to go their separate ways. L should have informed C of his relationship with H. In California, L needs to inform C in a written disclosure of his relationship with H. In the ABA authorities, L needs to obtain written consent from C with respect to his relationship with H. Because L did not inform C of his relationship with H or obtain

written consent, L violated his duty of loyalty to C by not disclosing his relationship with H.

Duty of Communication

An attorney must promptly and diligently communicate with his client. This duty includes a duty to inform the client of their responsibilities and obligations with respect to the representation. Here, L owed C a duty to tell her about the scope of her responsibilities, including communicating with him regarding material facts. When L met with C, he should have informed her about her duty to respond to his inquiries so that he could competently represent her. C's statement that "I didn't think calling you back was such a big deal" indicates that L neglected to tell her that she should promptly return his calls and inquiries because failure to do so may hurt her case. C has a responsibility to make decisions with respect to her representation. If L had received a settlement offer with a deadline, he could not have accepted it without C's permission. Because L failed to communicate her own responsibilities to C, L violated his duty of communication with C.

L also owed C a duty to communicate all of the material facts so that she could make an informed decision. L should have communicated with H regarding the "thirteen prior lawsuits" before attempting to withdraw from the representation. L called C and left her a message, and sent many emails and a registered letter. But none of the communications informed C that he was concerned about prior litigations or that he was considering withdrawing until he did attempt to withdraw. L owed a duty to C to communicate all of the material facts before he attempted to withdraw. Because L did not inform C of the material facts, L breached his duty of communication with C.

Duty of Competence

An attorney owes a client a duty of reasonable knowledge, skill, and ability in the scope of the representation. Here, L did not inquire into the prior lawsuits that C may have filed against Hotel. Instead, he relied on the word of opposing counsel and did not do his own research. Because L did not do his own inquiry, he violated the duty of

competence he owed to C.

Duty to Safeguard

L owed C a duty to safeguard the evidence she gave him. An attorney owes a duty to the client to safeguard possessions of the client, including money given as a retainer and any possessions or evidence entrusted to the attorney. Here, C gave L evidence related to her litigation, the clothes that were stained by the cleaning solution. L had a duty to diligently safeguard this possessions with reasonable competence. L placed the evidence in a closet and negligently sent them to the dry-cleaners, where they were cleaned. Placing material evidence in a closet is not a reasonable way to diligently safeguard important items. L should have placed them in a safe deposit box or other manner of safekeeping. Material evidence with respect to C's case was destroyed. L violated his duty to safeguard C's evidence and possessions entrusted to him.

Mandatory Withdrawal

An attorney may withdraw if representation will necessarily cause a violation of an ethical rule. Under the ABA, this extends to any law. An attorney must also withdraw if, because of his physical or mental condition, continued representation would materially impact the client. In California, an attorney must withdraw if the client insists on pursuing a claim without probable cause and with the purpose of harassing or maliciously injuring another person. Under the ABA authorities, an attorney must withdraw if he is fired. None of these events have occurred and L does not have a reason that would support mandatory withdrawal.

Permissive Withdrawal

An attorney is permitted to withdraw if a client insists on pursuing an illegal course of conduct. An attorney is also permitted to withdraw if they insist the attorney take actions against the attorney's judgment, violating the scope of the relationship so that the attorney is no longer dictating the means of the litigation. An attorney may also permissively withdraw if the client does not pay her fees or for any other "good cause shown." An attorney is also permitted to withdraw if the client makes representation

unreasonably difficult.

Here, L may argue that C has made the representation unreasonably difficult. He attempted on numerous occasions to contact C in order to inquire about the prior litigations and discuss the case with her. He called her and left a message, sent at least 7 emails that he knows she read but did not respond to, and sent a registered letter with a return receipt requested. A reasonable client would likely have understood that L had a matter of some urgency to discuss with L and would have returned his call. But a week is too short of a time for L to say that this behavior made the representation unreasonably difficult. C could have been on vacation or with limited access to email and phones, and she did not want to take the time to respond to L. A week or two is not an unreasonable amount of time for a client not to respond. He at least should have waited to withdraw until he had discussed with her the importance of returning his calls and communicating with him. It was perhaps L's failure to communicate the responsibilities of the client to C, to inform her of her responsibility to also communicate with him so that he could adequately represent her, that caused the breakdown in communication in the first place. Therefore, C's lack of communication for two weeks does not make L's representation of her unreasonably difficult.

There is no indication that C did not pay her fees. Her statement to L that "Hotel's got more money than I do" may suggest an inability to pay her fees in the future, but this is not a reason to permissively withdraw. Additionally, there does not appear to be any other "good cause shown" to permissively withdraw. L did not have any reason to permissively withdraw from the representation and therefore violated the ethics rules.

Additionally, in California, an attorney may not permissively withdraw if the matter is currently pending before a tribunal. Because L filed the lawsuit in state court, the matter is currently pending before a tribunal and L must seek court permission to withdraw. Because L did not seek court permission to withdraw, he violated the California ethics rules.

Withdrawal from Representation

When an attorney withdraws, either permissively or because the withdrawal is mandatory, he owes a duty to the client to mitigate the harm from the withdrawal. An attorney must timely inform the client of the withdrawal and give the client time to seek new representation. Here, L simply told C he was withdrawing. He did not give her adequate time to find new representation and she may therefore be prejudiced in her case if there are upcoming deadlines or other issues in the case and she is not adequately represented.

Additionally, an attorney must mitigate the harm by returning all papers or possessions to the client. Here, because he did not competently and diligently safeguard C's evidence, it was destroyed when he negligently sent it to the dry-cleaners.

An attorney may collect fees for reasonable compensation, but must return any remainder of fees to the client. In California, an attorney may retain a true retainer, meant to ensure the attorney's availability. Here there is no indication that L retained any unearned fees or was paid a true retainer.

Because L did not give C adequate notice and time to find new counsel, and failed to return C's possessions, his withdrawal from representation violated the ethics rules.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

QUESTION 2

Claire had been a customer of Home Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home Inc. and Don in California state court, alleging that they had defrauded her.

Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home Inc. in Claire's action. Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else, before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him too that he had defrauded Claire. Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire.

Shortly before trial, Don fired Luke. Don soon died unexpectedly.

Claire filed a claim against Don's estate and a claim against Home Inc., alleging as in her action that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate, but not against Home Inc.

At trial against Home Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work-product doctrine.

1. Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law.

2. Should the court compel Luke to produce his memorandum:

    a. To the extent it recounts what Wendy told him? Discuss. Answer according to California law.

    b. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.

3. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

1. Should the court compel Luke to testify about what Wendy told him?

Attorney-Client Privilege: Don and Luke

The attorney-client privilege protects confidential communications made to facilitate legal representation. It is narrower than the duty of confidentiality, which applies to any information related to the representation of a client, even if no attorney-client relationship is formed. The attorney-client privilege protects communications made by the client or the client's agent to the lawyer or the lawyer's agents. In the corporate context, the attorney-client privilege, in California, protects communications made by a spokesman for the corporation or by someone whose actions could be imputed to the corporations for purposes of liability.

The attorney-client privilege attaches and applies even if a lawyer is subsequently removed from a case. Thus, here, Don's decision to fire Luke did not prevent the privilege from applying to confidential communications made to facilitate legal representation. However, in California, the attorney-client privilege ends when the client dies and his estate is entirely disposed of. Consequently, here, the attorney-client relationship between Luke and Don ended when Don died and his estate settled Claire's claim against the estate. In California court, Luke would not be able to claim attorney-client privilege.

Moreover, the issue here is whether the attorney-client privilege covers communications between Wendy and Luke in the first place. As noted, in order for the privilege to apply, the communication must be confidential and it must be made for the purposes of facilitating a legal relationship. Additionally it must be communicated by either the client or the client's agents. Here, it does not appear that the communication was confidential or that Wendy was Don's agent. Wendy told Luke that Don had admitted to her that he

had defrauded Claire. By sharing this information with a third party, Don arguably made it unprotected because it was no longer confidential. Consequently, the attorney-client privilege would not apply on that basis.

Second, it does not appear that Wendy was Don's agent. The attorney-client privilege will potentially protect communications made by a client to the lawyer's agent, such as a physician hired to examine the client, or by the client's agent, such as an employee speaking on behalf of the corporation. But it does not cover statements made by everyone who knows the client or is in a familial relationship with him or her. Here, Wendy does not appear to have been acting in any way as an agent of Don, nor is she an agent of Luke. Consequently, the attorney-client privilege between Luke and Don would not apply.

Attorney-Client Privilege: Wendy and Luke

Additionally, Wendy was not speaking with Luke for the purpose of facilitating his legal representation of her--she was not a client. Moreover, as noted above, it does not appear the communication was confidential. Consequently, there does not appear to be an argument for an independent attorney-client privilege between Wendy and Luke.

Given that Wendy's statement does not appear to have been protected by the attorney-client privilege based on Luke's representation of Don or any purported attorney-client relationship between Luke and Wendy, the court should likely compel Luke to testify about what Wendy told him.

2. Luke's Memorandum

Attorney-Client Privilege

As noted above, the attorney-client privilege does not seem applicable here, either based on Luke's representation of Don or any purported attorney-client relationship

between Luke and Wendy. Consequently, the attorney-client privilege is not a basis for the court to refuse to compel production of the memorandum.

Work Product

In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere.

a. Wendy's Statements

To the extent the memorandum recounts what Wendy told Luke, it is qualified work product. This portion of the memorandum would not constitute Luke's mental impressions or opinions regarding the interview. It is merely a factual recounting of the interview. Consequently, this portion of the memorandum would likely receive qualified protection. If Claire can show substantial needs and inability to acquire the information contained in the interview without compelled disclosure, then the court should compel Luke to produce his memorandum. However, this seems unlikely to apply here. The facts indicate Don died, but they do not state that Wendy died. Based on the facts, it appears that Claire could easily subpoena Wendy in order to ask her questions and try to establish the same information she is seeking from Luke. Without this showing of inability to get the information without compelled disclosure, it appears unlikely the court should compel Luke to turn over the memorandum.

b. Luke's Belief That Wendy Would be a Good Witness for Claire

To the extent the memorandum expresses Luke's belief that Wendy would be a good witness for Claire, it is absolutely privileged. This portion of the memorandum is made up of Luke's mental impressions and opinions. The court should absolutely not compel Luke to produce this portion of the memorandum. It is worth noting that the mere presence of an absolutely protected mental impression or opinion in a document does not make the entire document or the information contained therein absolutely privileged. If the court did determine there was substantial need and unavailability, and chose to compel Luke to produce the memorandum to the extent it recounts his interview with Wendy, then it could redact or eliminate the portions of the memorandum that are absolutely privileged.

3. What ethical violations, if any, has Luke committed?

Fee Agreement--Financial Duties

In California, fee agreements must be in writing unless the amount is less than $1,000, the work is for a corporation, the client agrees to forego a written agreement, the work is routine, or there is an emergency. Here, Don entered into a valid retainer agreement. Thus, there is an assumption that this requirement is satisfied. But if the retainer agreement was not in writing, it would likely be a violation of California ethical rules because none of the exceptions appear applicable. The ABA does not have a similar requirement for non-contingent fee agreements--they do not have to be in writing, although it is encouraged. Consequently, there is no ABA violation regardless of whether the fee agreement is in writing.

Luke's Decision to Tell Wendy about the Fraud--Duty of Confidentiality

The duty of confidentiality requires a lawyer not to disclose information learned in the course of representation. It attaches even when no attorney-client relationship is

formed, unless there is a disclaimer in plain English, so long as the information is related to legal representation. It survives the representation and the client.

Here, Luke violated the duty of confidentiality by telling Wendy that Don had admitted to defrauding Claire. Luke learned of this information in the course of representing Don, thereby making the information confidential. Luke then failed to safeguard this information by actively revealing it to Wendy.

California and ABA authorities provide exceptions to the duty of confidentiality when a client makes a claim against a lawyer, when the information relates to the services provided by the attorney, when disclosure is required by the court, and when the lawyer learns information relating to imminent death or substantial bodily injury of a third-party. An attorney is also allowed to reveal information that is necessary to represent the client or that the client consents to him revealing. The ABA permits disclosure when a client is using the lawyer's services to perpetrate fraud or commit a crime that is likely to result in substantial financial loss. It also permits disclosure when seeking an ethical opinion on a matter. California does not have an exception for financial loss. Here, none of these exceptions seem applicable. It does not appear that Don consented to Luke telling Wendy that Don had defrauded Claire, nor does it appear that such an admission to Wendy was necessary for Luke's representation of Don. Luke may argue that there was implied consent because Wendy told him that Don had admitted the fraud to her, but it does not appear that Don ever instructed Luke to share this information prior to the interview. Under ABA authorities, Luke could argue that his disclosure was necessary to prevent financial loss, but this argument would not prevail because Don was not using Luke's services to defraud anyone and, since the fraud had already occurred, there was no imminent, substantial financial loss to any party. Moreover, this exception is inapplicable in California.

Consequently, Don likely breached his duty of confidentiality by telling Wendy about the fraud.

Luke Testifying at Trial--Duty of Fairness

Under ABA authorities, a witness may not represent a client if he is likely to have to testify at trial. A client generally may not testify at his client's trial unless his testimony relates to his services, a breach of his duties, or his testimony is necessary to prevent undue hardship. In California, an attorney may testify at a bench trial and may testify if his client consents at a jury trial. Here, Luke would not breach his duty by testifying in the suit against Home Inc. because it was not his client.

Duty of Competence

An attorney owes a duty of competence to his clients. He must have the necessary skill, thoroughness, and preparation required for competent representation. The duty requires the attorney to communicate with the client about important matters. Here, Don fired Luke shortly before trial. Although these facts do not themselves implicate the duty of competence, it suggests that Luke may not have been acting competently in his representation of Don, leading Don to fire him from the case. Moreover, the fact that Luke chose to reveal confidential information, apparently without consulting with Don, further suggests a violation of the duty of competence. California punishes intentional, repeated, or reckless violations of the duty of competence. Here, the facts do not suggest one way or another whether Luke intentionally, repeatedly, or recklessly violated his duty of competence. Thus, it is unclear whether he would be subject to any discipline even if he did act incompetently according to ABA authorities.

Duty of Loyalty

The duty of loyalty requires an attorney not to use non-public information against a client in a subsequent proceeding. According to ABA authorities, if there is a significant likelihood that an attorney will be materially limited in his representation of a client by professional or personal interest, the attorney can only take on the representation if: he reasonably believes he can provide representation unaffected by the conflict, he informs

the client, and he receives consent. The informed consent must be memorialized in writing. In California, there is no reasonable belief requirement, both potential and actual conflicts require disclosure, and consent must be in writing unless it is based on an attorney's past representations or personal conflicts. Here, Luke took on the representation of Don, independent of Home Inc. If Luke had tried to represent both Home and Don, then he would have had a significant risk of material limitation and a potential conflict, which would have required informed written consent under the ABA and consent in writing in CA. Given that he did not appear to have any conflicts here, he is likely not in violation. However, if he testifies at Home Inc.'s trial, he may violate his continuing duty of loyalty if he reveals any non-public information he learned in the course of representing Don.

Duties on Withdrawal

When an attorney is fired, he must return all unspent retainer money as well as the client's papers and documents necessary for representation. California authorities specifically prohibit holding on to client documents for the purpose of getting paid. Here, so long as Luke returned Don's papers and any unspent retainer money, he likely did not commit a breach of his duties upon withdrawal from representation.

QUESTION 2: SELECTED ANSWER B

1. LUKE'S TESTIMONY ABOUT WENDY'S STATEMENT

Protection by Attorney Client Privilege

At issue is whether Luke's interview of Wendy is protected by the attorney-client privilege.

In California, the attorney-client privilege attaches to a communication made in confidence between a client and his lawyer in the course of the representation. The client, the sole holder of the privilege, can bar the lawyer from testifying as to the content of the communication. However, the privilege does not survive the death of the client after the client's executor has finished distributing his estate. There are certain exceptions to the attorney-client privilege, including when the lawyer reasonably believes that disclosure would be necessary to avert serious bodily harm to others, and when the client is attempting to use the lawyer's services to perpetrate a crime or fraud.

Here, as part of his preparation for trial, Luke interviewed Don's sister, Wendy. Wendy told Luke that Don had admitted to her that he had defrauded Claire, but never anyone else. Nothing in the facts indicates that Wendy did not tell Luke this information in confidence. Her statement, however, was not a communication between a lawyer and client, but between a lawyer and a third party. It therefore falls outside the scope of the attorney-client privilege. Moreover, by the time Claire was attempting to compel Luke to testify at trial, Don had died. We also know that his executor had closed his estate, since the executor had settled Claire's claim against Don. Therefore, Don's ability to invoke the privilege died along with him, and there is no bar under the attorney client privilege to Luke's testimony. The court should compel Luke to testify.

2. LUKE'S MEMORANDUM

Attorney-Client Privilege with Regard to Wendy's Statement and Luke's Belief

At issue is whether Luke's description of Wendy's statement or Luke's belief about Wendy's suitability as a witness is protected by the attorney-client privilege.

As noted above, the attorney client privilege only attaches to confidential communications between lawyers and clients, and it does not survive the death of the client. Here, Luke wrote a memorandum after interviewing Wendy that contains two components: Wendy's statements, described above, that Don had admitted he had defrauded Claire; and Luke's belief that Wendy would make a good witness for Claire. Neither of these is a communication between Don, the client, and Luke, the lawyer. Moreover, because Don is deceased and his estate has been closed, no one survives to invoke the privilege. The attorney-client privilege does not provide a justification for Luke to refuse to produce the memorandum.

Work Product Doctrine with Regard to Wendy's Statement

At issue is whether Luke's memorandum, to the extent that it recounts Wendy's statement, is protected by the work product doctrine. California law privileges from discovery documents produced in anticipation of litigation. It also draws a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and an absolute privilege, which attaches to statements of belief or opinion by an attorney contained in work product. The qualified privilege may be overcome by a showing that there is a substantial need for the facts contained in the work product and that they are unavailable through other means, whereas the absolute privilege cannot be overcome. The work product doctrine survives the death of the client.

Here, Luke's memorandum contains Wendy's statement that Luke had defrauded Claire. Luke prepared this memorandum after Don retained him to defend him in the fraud action, causing him to interview Wendy. It was therefore made in anticipation of litigation, placing it within the scope of the work product doctrine. The description of what Wendy told Luke, however, is a factual one. It is therefore subject only to a qualified privilege, and Claire may be able to overcome it. Don's admission that he defrauded Luke would be damning evidence against Home Inc., the remaining defendant at trial. Claire can likely show that there is a substantial need for the testimony. However, it does not appear on these facts that Claire would not be able to

obtain this testimony by other means. She could simply subpoena Wendy, or she could have noticed Wendy's deposition during discovery, to obtain Don's admission from Wendy herself. If Wendy is for some reason unavailable, then Claire may be able to compel production.

Therefore, the qualified privilege that attaches to Wendy's statement likely protects the memorandum from discovery.

Work Product Doctrine with Regard to Luke's Belief

At issue is whether Luke's belief about Wendy's suitability as a witness is protected by the work product doctrine. As noted above, this belief is expressed in a memorandum that Luke prepared in anticipation of litigation; indeed, there would be no other reason to speculate as to whether Wendy would make a good witness. Luke's belief, however, is absolutely protected by the work product doctrine, since it expresses a lawyer's beliefs and opinions about the proper strategy for trial. Therefore, regardless of what showing Claire makes at trial, it is protected, and the court should not compel production.

Overall Conclusion

Neither Wendy's statement nor Luke's belief is protected by the attorney-client privilege, but both are likely protected by the work product doctrine. The court should deny the motion to compel.

3. LUKE'S ETHICAL VIOLATIONS

Duty of Confidentiality

At issue is whether Luke breached his duty of confidentiality to Don.

Under the ABA and California rules, a lawyer owes his client a duty of confidentiality. This duty prohibits a lawyer from revealing to any third party information learned from or about the client in the course of the representation, unless an exception applies. It attaches as soon as a lawyer-client relationship begins. Here, Luke and Don entered into a lawyer client relationship when they executed a valid retainer agreement. Luke

then interviewed Don and learned that Don had defrauded Claire-a fact learned about Don during the course of the representation. Luke then, in his conversation with Wendy, revealed this fact to Wendy. This was thus a disclosure of a client's confidential information, so unless an exception applies, Luke is subject to discipline under both the ABA and California rules.

Exceptions to the Duty of Confidentiality

i. Implied consent

A client may impliedly consent to a lawyer's use of his confidential information, when such disclosure would be a natural and necessary feature of the representation. Here, Luke could argue that Don impliedly consented for him to reveal this information to Wendy, since Wendy was Don's sister and Luke might need the information to build a rapport with her. However, especially since Luke only revealed the information after Wendy had told him what Don had told her, this exception does not apply.

ii. Averting physical harm

A lawyer may reveal a client's confidential information under the ABA and California rules if he reasonably believes that disclosure is necessary to avoid imminent bodily harm to a third person. In California, the harm must arise out of a criminal act, and the lawyer must first attempt to dissuade the client and inform him of the lawyer's intent to reveal. Here, Don admitted to past fraud, which seems to pose no risk of bodily harm-criminal or otherwise-to anyone. Therefore, this exception does not apply.

iii. Serious financial harm using the lawyer's services

The ABA, but not California authorities, allow disclosure if the lawyer believes it to be reasonably necessary to avoid serious financial harm to a third party, and the harm would be perpetrated using the lawyer's services. Here, Don admitted to fraud in the past, but said he had not defrauded anyone else since. Nor does he appear to have sought Luke's help in perpetrating any such fraud. Therefore, this exception does not apply.

iv. Fact has become generally known

Under both ABA and California rules, a lawyer may reveal a client's confidential information if that information is no longer confidential because it has become generally known. Here, Luke can argue that because Wendy already knew that Don had admitted to defrauding Claire, there was no breach of confidence by revealing what Don had told Luke. However, although this fact might have been known to Wendy, it was not *generally* known in the world. Therefore, this exception does not apply.

Conclusion

Luke is subject to discipline because he breached his duty of confidentiality and no exception applies.

Safeguarding the Client's Property

At issue is whether Luke violated any ethical rules by not returning the memorandum to Don when Don fired him.

A lawyer owes his client a duty to safeguard the client's property under both ABA and California law. This includes a duty to return to the client all materials related to the representation upon the end of representation. A lawyer may not retain a client's case file, including for the purposes of recovering his fee. Here, Don fired Luke before trial, but Luke appears to have kept possession of the memorandum recounting his meeting with Wendy until the time of trial. Therefore, by failing to return the memorandum to Don or his estate, Luke breached his duty to safeguard client property.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 1

Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called "Top-Tile." During negotiations, Beverly asked if the roof was in good condition, and Austin replied, "I've never had a problem with it." In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks. The valid written contract to sell the warehouse specified that the property was being sold "as is, with no warranties as to the condition of the structure."

After Beverly bought the warehouse, the roof immediately started leaking. Beverly hired Lou, an experienced trial lawyer, and executed a valid retainer agreement. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

At trial, Lou offered the expert testimony of Dr. Crest, a chemical engineer who had testified in other litigation concerning Top-Tile roofs. Lou knew that Dr. Crest had previously testified that, "Top-Tile roofs always last at least five years." Lou also knew from the manufacturer's specifications that Top-Tile roofs seem to last indefinitely, but not in some climates. On cross-examination, Dr. Crest testified that, "Top-Tile roofs never last five years," and that, "Climate is not a factor; Top-Tile roofs fail within five years everywhere in the world." During closing argument, Lou repeated Dr. Crest's statements and also said that Lou's own inspection of the roof confirmed Dr. Crest's testimony.

1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non-disclosure? Discuss.

2. What, if any, ethical violations has Lou committed? Discuss. Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

I. Contract dispute

The first issue is whether Beverly will be able to rescind the contract with Austin based upon misrepresentation.

A valid contract requires mutual assent (offer and acceptance) and consideration. Mutual assent means that there is a meeting of the minds as to the basis of the contract or bargain and the terms of the contract. Consideration requires a bargained-for exchange of legal detriment. Where the parties to a contract do not have a meeting of the minds, that is, there is no mutual assent, then the validity of the contract can be challenged. Put another way, if the parties do not have mutual assent then no contract was formed.

Rescission is a contract remedy available where one party seeks to void a contract. Lack of mutual assent is a basis for rescission of a contract where one party shows misrepresentation, mutual mistake or non-disclosure. The result is though the contract did not exist. A misrepresentation may make a contract unenforceable where one party makes a material misrepresentation, that was a basic assumption of the contract and the other party relies on that statement and was damaged. Non-disclosure arises where a party fails to disclose a material fact of the contract which forms the basis of the contract and the other party has no reason to know of the failure to disclose.

Generally, courts look to the terms contract in determining the terms of the contract. Moreover, parol evidence is generally not available to supplement or contradict the terms of a contract. However, the parol evidence rule against extrinsic evidence does not apply to evidence regarding the formation of a contract. Thus, oral

statements made at the time of entering into a contract may be admissible to show a condition on performance or misrepresentation.

Here, the facts state that Austin and Beverly entered into a valid written contract to sell the warehouse. Thus, there is a valid contract that can be the subject of a rescission claim. We are told that during negotiations, Beverly asked if the roof was in good condition and Austin responded that he had never had a problem with it, despite having been notified a year earlier by the manufacturer of the roof tiles, Top-Tile, that the roof would soon develop leaks. Thus, Austin made a misrepresentation of fact regarding the condition of the roof in response to Beverly's inquiry on that exact topic. Finally, the parties agreement included an "as is" clause which stated that Beverly was buying the warehouse in its current condition. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract, and that had the roof been in poor condition Beverly would not have purchased the warehouse. Beverly will argue that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain because the condition of a roof is quite important in the purchase of a warehouse, or any structure. It is likely that Beverly would succeed on this point that the misrepresentation was a basic assumption of the contract. Moreover, as Beverly is challenging the formation of the contract itself, parol evidence of Austin's oral statement to her is admissible.

If the court believes that Beverly should have inspected the roof independently of Austin's representations, then Beverly will be hard pressed to survive a claim by Austin that the contract stated the property was sold "as is". Where a contract states that property is purchased "as is" at common law, this was strictly construed. However, the modern trend is to relax the enforcement of "as is" clauses where one party misrepresented or committed fraud. That is the case here given that Austin was informed the prior year by the manufacturer that the roof would soon leak, though it does not appear from the facts that Beverly made her own independent inquiry into the

condition of the roof. Again, Austin will argue that the "as is" clause is controlling and that it would be prudent for a purchaser of property to have an inspection done to inform the buyer of any potential defects in the property, including those that even the seller was unaware of. Finally, had the roof been of such a concern to Beverly, she could have made the condition of the roof a term of the contract and not executed an "as is" provision. Yet, given his misrepresentation of fact, which he clearly knew to be false as we know from the facts, a court may find that the misrepresentation was significant enough to void any mutual assent despite the "as is" provision in the interests of justice. Finally, Beverly can show damages in that immediately after she bought the warehouse, the roof started leaking.

Thus, Beverly may be able to rescind the contract based upon misrepresentation.

With respect to the defense of non-disclosure, Beverly will be required to show that Austin did not disclose a material fact that formed the basic assumption of the agreement and that Beverly relied on his statement. Non-disclosure is different from misrepresentation in that with non-disclosure, the party makes no comment or disclosure with respect to a material fact that is known to be material to the other party. Moreover, Austin must not have any defenses.

Here, as stated above, Austin failed to disclose the actual condition of the roof in addition to misrepresenting the condition of the roof. Austin will make the same arguments as above that Beverly did not make it known - in words or actions - that the condition of the roof was a material fact of the contract that formed a basic assumption of the contract. Moreover, Austin will argue that the "as is" clause bars Beverly from recovery and that Beverly had a duty to do her own inspection of the property to discover the condition of the roof.

However, given the facts presented, and a court's ability to relax the strict construction of an "as is" clause where a party has misrepresented, or failed to disclose a material

fact, or committed fraud, a court may rescind the contract. Thus, Beverly may have a successful claim of rescission based upon misrepresentation.

II. The next issue is what, if any, ethical violations Lou committed.

Under both the ABA and California ethics code (CA rules), a lawyer, as an officer of the court, has a duty of candor. Under both the ABA and CA rules, a lawyer also has a duty to disclose law that is contrary to the client's position. However, a lawyer is not required to disclose facts that are not helpful to the client. Moreover, a lawyer must not offer evidence that he knows to be false or misleading and must seek to rectify any false evidence presented. If a lawyer reasonably believes that a witness will testify falsely, the lawyer must try to convince the witness or client not to testify falsely. If that fails, the lawyer must not allow the witness or client to testify. Under ABA and CA rules, a lawyer may then seek to withdraw. If a witness or client does testify falsely, in addition to seeking to rectify the false evidence, under the ABA rules the lawyer may notify the court or appropriate tribunal.

Here, Lou was an experienced trial lawyer who entered into a valid retainer agreement with Beverly. Lou hired an expert who he knew had previously testified regarding Top-Tile roofs. Lou apparently knew that the expert, Dr. Crest, had previously testified that the roofs last at least 5 years. Lou also knew, based upon review of Top-Tile's specifications, that Top-Tile stated that their tiles do not last indefinitely in some climates. However, at trial Dr. Crest testified differently, testifying on Beverly's behalf, that Top-Tile never lasted five years. If Lou knew that Dr. Crest was going to testify falsely, Lou must not have permitted him to testify. If Lou reasonably believed that Dr. Crest intended to testify falsely he should have tried to convince him to testify truthfully. Finally, if Lou knew that Dr. Crest had indeed testified falsely he must rectify the false testimony. This is particularly the case here, which is a civil case and one in which Lou retained Dr. Crest as an expert. Lou likely could have found an expert who would testify in support of Beverly's claim. Thus, under both ABA and CA rules, if Lou

knew that Dr. Crest was going to testify falsely and did nothing about it, then Lou is subject to discipline. Moreover, once Dr. Crest testified that Top-Tile roofs "never last five years", if Lou knew this to be false testimony, he had an obligation to neutralize the testimony.

This is also the case with respect to Dr. Crest's statement that "climate is not a factor." The fact that Lou was aware of Top-Tile's manufacturer's specifications that climate did affect the condition of the roofs does not mean under the ABA and CA rules that Lou was obligated to disclose that fact. This is a fact that is not in his client's favor, and under the ethical rules Lou was not obligated to disclose that. The obligation under ABA and CA rules is to disclose legal principles that are not in your client's favor. Thus, there is no ethical violation for failing to disclose that fact. However, if Lou knew that Dr. Crest's statement was false based upon the available data and his expert opinion, he had an ethical duty to clarify.

Thus, based on the facts presented, if Lou knew that Dr. Crest testified falsely, he has an ethical violation to clarify and rectify any false evidence, which he appears not to have done. Thus, he is subject to discipline.

Finally, with respect to Lou's closing argument. Lou would also be subject to discipline because he essentially ratified testimony which he likely knew was false. Thus, he did the opposite of what he is ethically obligated to do under ABA and CA rules. Moreover, Lou offered personal opinion and observation which was not the subject of evidence in the case. This was also unethical. Here, Lou inserted his own opinion and "evidence" that his inspection of the warehouse roof confirmed Dr. Crest's testimony. Lou was essentially giving testimony during his closing examination, based upon his own observations. A closing argument is not considered evidence and a lawyer is not permitted to raise issues, facts or evidence that were not presented at trial. Lou clearly violated this rule and is subject to discipline.

Finally, under both ABA and CA rules, when retaining an expert, a lawyer is required to get the client's informed consent (which must be in writing under the CA rules) which includes a clear statement of how the expert is going to be paid. The client is to be fully informed as to the terms of the retainer of an expert, before the expert is, in fact, retained. It does not appear from the facts that Lou did this. Thus, he is subject to discipline.

QUESTION 1: SELECTED ANSWER B

1.) Applicable Law

There are two general bodies of law which apply to cases involving a breach of contract: The Common law, and the Uniform Commercial Code (UCC). The UCC applies to all contracts with respect to the sale of goods, and the common law generally applies to all other contracts. "Goods" for the purpose of this determination are movable objects.

Here, Austin sold a warehouse to Beverly. A warehouse is real property, not a "movable good." Thus, the Common Law would apply to this transaction.

2.) Will Beverly be able to Rescind the Contract with Austin on the Basis of Misrepresentation and/or Non-Disclosure

As a result of the alleged misrepresentation, Beverly seeks to rescind her contract with Austin. Rescission is an equitable remedy which a court may grant under certain circumstances where a valid, enforceable contract has been created, but monetary damages would be inadequate, and equity requires a different remedy. If a court grants rescission as a form of relief, the contract is effectively cancelled, and parties are returned to the position they were prior to the formation of the contract (with possibly some form of incidental damages recovered).

A.) Mutual Mistake

The first ground on which Beverly may seek to rescind this contract is the grounds of mutual mistake. Generally, under the common law, a contract cannot be rescinded due to the mistakes of the forming parties. However, a court may grant the remedy if rescission if it can be shown that (1) there was a mistake as to a material fact, and (2) neither party bore the risk of that mistake.

Here, Austin told Beverly that he had "never had a problem" with Top Tile, indicating that the roof was in good condition. However, the roof ultimately leaked. Thus, there

was a mistake as to whether the roof would leak. Moreover, this is a material fact as it substantially affects the value of the property. Thus, a court would likely find a mistake of material fact.

However, Austin appears to have known about the issue. The Manufacturer of Top Tile had recently reached out to him and informed him that the warehouse roof would soon develop leaks. Thus, Austin knew about the problem, so this would not be considered a "mutual mistake."

B.) Unilateral Mistake

While there is no "mutual mistake" which could have formed a basis for rescinding the contract, there has been a "unilateral mistake." A court allows rescission based on a unilateral mistake as long as (1) the mistaken party did not bear the risk of that mistake, (2) the mistake was as to something material, and (3) the other party had reason to know of that mistake.

Here, Beverly was mistaken about the quality of the roof. She believed that it was in good condition and would not break soon. As discussed above, whether or not it would break is a material fact. Thus, she was mistaken as to a material fact.

Moreover, Beverly likely did not bear the risk of that mistake. A court generally will find a party to have born the risk of the mistake only if they have some superior knowledge. Here, it was in fact the seller, Austin, who had better knowledge because he owned the property and had spoken with the Top-Tile manufacturer. Thus, Austin would have been the party to bear the risk of the mistake here.

Moreover, Austin had reason to know of Beverly's mistake. Beverly specifically asked if the roof was in good condition, and Austin induced that mistake by informing her that he had "never had a problem with it" while being fully aware that the manufacturer had warned him that it would start leaking soon.

Thus, a court would likely find that Beverly may rescind the contract on the grounds of a mutual mistake because (1) she was mistaken as to the condition of the roof, (2) she did not bear the risk as to that mistake, and (3) Austin had reason to know of that mistake.

C.) Misrepresentation

Courts may also grant rescission when a contract was formed based on a material misrepresentation. Under this rule, a court will rescind a contract if they can show that one party (1) intentionally, (2) made a misrepresentation of material fact, (3) intending that the other party rely on that misstatement, (4) the other party did in fact rely on that misstatement, and (5) damages were suffered as a result.

i. *Intentional Misrepresentation*

Here, a court would likely find that there was an intentional misrepresentation. As discussed above, Beverly specifically asked whether the roof was in "good condition." Despite knowing that Top-Tile, the manufacturer of the roof tiles, believed that the roof would soon develop leaks, Austin responded that he "never had a problem with it." While this was not a direct misstatement of fact, it was an omission.

While a seller of property generally has no duty to disclose issue on the property due to the common law doctrine of Caveat Emptor, a seller may not omit a material fact upon inquiry of the buyer. Thus, while he technically did not lie, he committed an intentional misrepresentation for these purposes.

ii. Material Fact

This omission was also material. A fact is "material" if a reasonable person would consider that information when deciding whether or not to enter into a contract.

Here, the omitted fact related to the quality of the roof. Because repairing roofs is expensive, a reasonable person would want to know that information when deciding whether or not to enter into a contract. Thus, this term would be deemed material.

iii. Intending That the Other Party Rely

Austin likely made this statement knowing or intending that Beverly would rely on it. He wanted to sell the property (possibly because it would soon start leaking). Thus, he would likely have intended that Beverly rely on that statement.

iv. Other Party Did In Fact Rely

It also appears that Beverly did rely on that misstatement. She ultimately purchased

the property. The fact that she asked about the roof's condition prior to the purchase indicates that it was an important fact to her. Thus, she likely relied on that statement. Moreover, there is no evidence that she made an independent inspection, further lending credence to the idea that she relied on this misrepresentation.

v. Damages

Beverly was also damaged. She now has to pay for the repairs.

Because all of these elements are satisfied, a court would likely find that Beverly can rescind the contract on the grounds of a misrepresentation.

D.) Rescission Based on Non-Disclosure

A contract may also be rescinded on the grounds of non-disclosure if (1) there was a duty to disclose information, and (2) the seller failed to disclose.

As discussed above, there generally is no duty to disclose conditions on the premises due to the doctrine of caveat emptor. However, if a buyer makes an inquiry, a seller is not permitted to omit and fail to disclose a material fact related to that question.

Here, Austin would not have had a general duty to disclose the statement made by Top-Tile regarding the impending leak on the premises. However, Beverly asked if the roof was in good condition. This question created a duty for Austin to disclose known conditions in the roofing, which he failed to do when he deflected the question by stating "I've never had a problem with it."

Thus, Austin had a duty to disclose, and failed to do so. Thus, Beverly may properly seek rescission on the grounds of non-disclosure.

E.) The "As Is Warranty."

Generally, when property is sold, certain warranties are contained within the sale contract. These include warranties of habitability (in a residential property), covenants of quiet enjoyment, and warranties related to the condition of the property. However, parties are free to waive such provisions in the contract.

Here, Beverly purchased a warehouse from Austin. Thus, generally she would be granted certain warranties which would have protected against things such as a leaky roof. However, the parties waived those warranties. The written contract explicitly stated that the property was being sold "as is, with no warranties as to the condition of the structure." Thus, there appears to have been a valid waiver of warranties with regards to the condition of the structure. Such a waiver would be applicable even to express conditions.

Arguably, Austin gave an express warranty to Beverly when he implied that there were no conditions with the roof. Thus, generally, this would protect against Beverly's contemplated rescission claims. However, warranties cannot overcome explicit misstatements, omissions, and fraud used to induce into the contract.

As discussed above, Austin made a material omission. Thus, while the waiver generally would be considered valid, the waiver cannot be applied to the condition of the roof.

F.) Parol Evidence

Austin may argue that evidence of his Statements are inadmissible under the "parol evidence rule." This rule state that, when there is a written, "integrated" contract, statements not contained within the writing cannot be used to contradict terms in the writing.

Here, there is a written contract. Assuming there was a proper merger clause, the parol evidence rule would apply to this contract. Moreover, Beverly would be attempting to introduce Austin's statements regarding the roof. This would contradict the "no warranty" provision." Thus, it is being introduced to alter the terms of the writing.

However, this is being introduced not to change the terms, but to show that the contract is invalid. Thus, the parol evidence rule would not bar introduction of this evidence.

III.) What Ethical Violations has Lou Committed

Lou has committed multiple ethical violations related to this representation.

1.) Duty of Candor to the Court & Opposing Counsel

Under both the ABA and CA ethics rules, attorneys own a duty of candor and truthfulness to both the court and to opposing counsel. This means that, while an attorney is required to zealously advocate for the interests of their clients, they may not introduce testimony which they know to be false.

Here, Lou offered the expert testimony of Dr. Crest. Lou knew that Dr. Crest had previously testified that "Top-Tile roofs always last at least five years" and that the manufacturer's specifications indicated that Top-Tile roofs last indefinitely, except in certain climates. However, during cross examination, Dr. Crest testified that "Top-Tile Roofs never last five years" and that "climate is not a factor." Thus, Lou's witness introduced testimony which Lou knew to be false. Moreover, Lou chose to repeat those statements in his closing argument.

By doing this, Lou introduced facts known to be inaccurate to the court and to opposing counsel. This is impermissible. Thus, he violated his duties of candor under both the CA and ABA Rules.

Lou may argue, in his defense, that the testimony was elicited on cross-examination, not in the direct. This means that Lou did not directly induce the fraudulent testimony. However, his duties would require him to communicate this fact to the judge, and would prohibit him from referencing those facts in his closing arguments (which he did.) Thus, even though he did not personally elicit the fraudulent testimony, he will have been found to have violated this ethical obligation.

2.) Attorney as a Witness

Lou also violated his ethical duties when he effectively served as a witness in this case. Under the ABA rules, an attorney is not permitted to act as a witness in a case which they are litigating unless their testimony (1) relates to a non-disputed issue, or (2) the attorney is so critical to the case, that they cannot be removed as counsel, and their testimony is critical. Under the CA rules, an attorney may only testify if

Here, during his closing arguments, Lou testified that his "own inspection of the roof confirmed Dr. Crest's testimony." This is opinion testimony. Thus, while he was not

technically called as a witness, he did serve as one. Therefore, this testimony is only permissible if one of the exceptions apply.

It is unclear if this is a disputed issue. The central issue in the case was the nature of the representation about the leaky roof. However, it does not seem to be in dispute whether the roof was leaking, just whether there was a warranty. Lou's testimony only seems to state that he confirmed there were leaks. It is unlikely that he was testifying about the chemical makeup of the roof, or its propensity to leak. Thus, arguably he was not testifying regarding a disputed issue. However, because what he is talking about comes so dangerously close to the central issue in the case, it is likely impermissible. Thus, by stating that he did his own inspection and confirmed the results, he violated the rule prohibiting attorneys from acting as witnesses.

1. Duty of Competence

Lou also may have violated his duty of competence. Under the ABA rules, an attorney must carry out a representation in a competent manner. Under the CA rules, an attorney must not repeatedly carry out a representation in a negligent, reckless, or incompetent manner.

Here, Lou hired an attorney who had regularly testified about the opposite of the position he sought to assert. This information would almost certainly come out in a proper cross examination. Thus, his witness would have been thoroughly discredited. A competent attorney does not hire an expert witness who will easily be discredited and impeached. Thus, under the ABA rules, he violated his duty of competence.

Under the CA rules, he likely violated no duties. There is no evidence that this was a repeated pattern. Thus, under the CA rules, he likely would not be found to have violated his duty of competence.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

QUESTION 3

Betty and Sheila, who have been friends for a long time, were charged with armed robbery, allegedly committed in a convenience store. They decided to hire Betty's uncle, Lou, as their lawyer. Lou is an estate planning attorney and has never represented defendants in criminal cases before.

Both Betty and Sheila met with Lou together. In that meeting, both of them emphatically denied that they robbed anyone. Lou agreed to represent them in their criminal cases and gave them a retainer agreement, which states:

> **Scope of representation.** Lawyer agrees to represent Clients through any settlement or trial.
>
> **No conflicts of interest.** From time to time, Lawyer may represent someone whose interests may not align with that of Clients. Lawyer will make every effort to inform Clients of any potentially conflicting representations.
>
> **Fees and expenses.** Lawyer will advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting Clients' interests, but Clients are ultimately responsible for repaying Lawyer for all costs that Lawyer advances. If Clients are unsuccessful at trial, Clients will owe only costs advanced by Lawyer and zero fees. If Clients are successful either before or at trial, Lawyer will be paid $10,000 plus any costs incurred.

Betty and Sheila each signed the retainer agreement.

Two days later, Lou represented both defendants at the joint arraignment. He angered the court during the arraignment because of his unfamiliarity with criminal procedure, and the court relieved Lou and appointed new counsel for Betty and Sheila. Betty and Sheila agreed to new counsel.

Although Lou had not incurred any costs by that point, Lou asked Betty and Sheila to pay him a total of $2,000, divided up however they wanted, to reimburse him for his time spent on the case.

What, if any, ethical violations has Lou committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Lou (L) has committed a number of ethical violations that would subject him to discipline under both the CA and the ABA rules.

Duty of Loyalty

The first issue is L's breaches of the duty of loyalty. A lawyer has a duty to act in the best interests of their client, which means avoiding potential and actual conflicts of interest.

Potential Conflicts of Interest

L's representation raises a potential conflict of interest by representing two criminal co-defendants.

Representing two co-defendants raises the significant possibility that their interests will become adverse to each other in the future.

Under the ABA and CA rules, an attorney may represent two clients with a potential conflict of interest if he (1) reasonably believes that the representation of either client, the lawyer's own personal interests, or the interests of his family will not materially limit his duties to the other; (2) informs the client in understandable language of the conflict; and (3) obtains written consent. Under the CA rules, the belief that representation won't be materially limited doesn't have to be objectively reasonable (it can be subjectively reasonable based on what the attorney knew).

So under the ABA rules, an attorney must advise a client of any conflict of interest, and obtain consent, memorialized in writing (if the client consent was initially oral). CA requires written consent to all conflicts of interest. Additionally, CA requires the lawyer to

advise on all potential and actual conflicts, and obtain additional consent if a conflict actualizes.

Here, L was representing two co-defendants in a criminal case. Even if both maintain innocence now, there's a strong possibility that one might want to testify against the other in exchange for favorable sentencing, or to mitigate their own culpability as compared to the co-defendant. A disciplinary board might view that as making representation unreasonable. L might point to the fact that Betty (B) and Sheila (S) have been friends for a long time, and both emphatically deny guilt, so they are less likely to become adverse. But that argument is weak, since L has a duty to convey to each client the best possible legal course of action, and it's very likely that B and S will have conflicting interests. Under the CA rule, L probably has a stronger argument that he subjectively believed it was possible, given his knowledge of B and S, and the defenses they were making.

More information about the strength of their relative cases might be useful here. But on the whole, under the ABA standard, it's probably a close call but representation is likely unreasonable, and under the CA rule, L can probably prevail under the subjective test.

But, L likely failed to adequately warn of conflicts. L's retainer contains general language about conflicts of interest. But he doesn't specifically warn B and S about the risk that his representation would be limited. Nor does he inform them that information between them won't be protected by attorney-client privilege if he represents both, so there's a real risk their statements to him would be used against them.

Because his retainer is wholly inadequate at advising B and S about the risk, the fact that they signed the retainer likely doesn't constitute consent. Therefore, L would likely be subject to discipline under both the ABA and CA rules for failing to get adequate consent to a potential conflict of interest.

Actual Conflicts of Interest

The next issue is that L failed to reveal an actual conflict of interest, because he has a personal conflict.

An actual conflict of interest is treated under the same standard as above. But under the CA rules an attorney just needs to advise a client of a personal conflict in writing. They don't need written consent.

Here, L is Betty's uncle, so they are close family. That raises an actual personal conflict of interest. L is much more likely to favor B's representation; he is likely to be uncomfortable with taking action that will harm B's position, and he likely faces family pressure to ensure that B gets the best possible outcome. He doesn't face similar pressure with S.

So that's an actual personal conflict of interest.

L failed to advise either client of that risk, let alone in writing, because the retainer is completely silent on that issue.

Therefore, L would also be subject to discipline under both ABA and CA authorities for failing to adequately disclose an actual, personal conflict of interest.

Duty of Confidentiality

L's representation also raises an issue with the duty of confidentiality.

A lawyer has an obligation to keep all of a client's non-public information private, and not to use that information against them. There are limited exceptions for: (1) when legally

required to do so by a statute, ethical rule, or court order, when the client consents, when the representation is at issue (i.e. in a fee or malpractice dispute); when necessary to prevent death or serious bodily injury; or under the ABA to prevent your services from being used to commit a financial crime or fraud.

When an attorney represents co-clients, attorney client privilege and confidentiality is waived as between them. So B and S would be able to use the confidential information of the other against each other. An attorney may represent co-defendants, but must advise them of the risk from losing confidentiality, and obtain written consent.

Here, L made no mention of confidentiality. There's no indication, though, that L has yet disclosed any information, so this is probably more a violation of the duty of loyalty, than a direct violation of the duty of confidentiality: L failed to warn his clients about the risk, and adequately protect their confidentiality, and act in their best interests.

Therefore, L would likely be subject to discipline under the ABA and CA rules for failing to receive informed consent for this part of the arrangement as well.

Financial Duties

A lawyer also owes a client a number of financial duties. Here L would likely be subject to discipline for violations of these as well.

Improper Fee Agreement

The issue here is whether L entered into an improper fee arrangement, and made the appropriate disclosures, under the ABA and CA rules.

The ABA prohibits contingent fees in criminal and domestic cases. CA prohibits contingent fees in criminal cases, or in a domestic case where the contingent fee "promotes the dissolution of a savable marriage."

A contingent fee is a fee where payment depends on the outcome. Usually the lawyer is only paid upon the resolution of a favorable result.

Here, L entered into a fee agreement where he was only paid if they were successful at trial. L might argue that he wasn't recovering a percentage, just a flat fee for certain results. But since this is a criminal case, making the fee contingent on the outcome of the case seems like the only way to enter into such an arrangement. So the ABA and CA disciplinary boards would probably find this was a contingent fee.

Therefore, L entered into an impermissible contingent fee arrangement in a criminal case.

The next issue is whether L complied with the formal requirements for a fee arrangement. CA requires all fee agreements to be in writing, unless the client is a corporation, the fee is less than $1000, or the fee is for routine work for a regular client.

None of these exceptions apply, so the fee would have to be in writing signed by the client, with informed consent. Here, that information is contained in the retainer, and it was signed by B and S. But there is still a potential issue with the informed consent. It's unclear whether L went over the fee arrangement, and it's not clear the retainer is in sufficiently plain language.

So in all, the retainer could satisfy the writing requirement, but more information about the nature of the fee meeting would probably be necessary.

Next, both the ABA and CA require certain information in a contingent fee arrangement. The ABA requires the attorney's percentage of recovery; whether it's taken out before or after expenses; and who pays for which expenses. CA also requires the lawyer to advise the client how work not paid for under the contingency will be compensated.

Here, L arguably meets neither requirement. Specifically, he does not explain how work outside the contingency will be paid for. For example, the agreement is completely silent about how L will be compensated in the event that one of the clients pleads guilty. It's unclear whether that would be counted as success at trial, or whether L would recover nothing. That information would be highly relevant to the clients in determining the veracity of L's advice. Under the ABA, by analogy to a civil case, it's like L is only explaining what his percentage would be with the best and worst possible outcomes. Under the CA rules, he's failing to explain how work outside the contingency will be compensated.

Therefore, L is likely subject to discipline under both these rules as well.

Excessive Fee

The size of L's fee also raises an issue. Under the ABA rules a lawyer's fee must be reasonable in light of the experience of the lawyer, time and preparation required, nature of the case, and the result achieved. Under the CA rules the fee must not be unconscionable.

Here, a board might argue that L was unqualified for the case, and didn't plan on doing much work, $10000 is unreasonable. On the other hand L might argue that this is a complex robbery case, where he represents 2 defendants, and he is charging a flat fee, so $10,000 makes sense through trial. The outcome likely depends on more facts. Under the higher CA standard that's obviously a harder argument. But the board would likely look to the fees for similar work to see if this is unreasonable/unconscionable.

So this might be grounds for discipline depending on additional facts.

Request for Payment After Discharge

L also requested payment for $2000 for the work already performed. Generally, when a

lawyer is discharged by a client they represent on contingency, they may recover through quantum meruit for the work already done. Here though, L appears to have added almost no value to B and S's case. Additionally, if a lawyer is discharged by the court they may not be able to recover. Finally, this was an unethical fee arrangement, so it's unlikely the court would enforce a portion of it to compensate L.

Therefore, although a lawyer might ordinarily be entitled to quantum meruit, L probably isn't entitled to the $2000, and demanding that payment is unreasonable.

Duty of Competence

Finally, L has violated his duty of competence. A lawyer has an obligation to competently represent his clients.

Under the ABA rules, a client must employ the time, preparation, skill, expertise, knowledge, and experience necessary to reasonably represent the client. If a client does not have those factors, he must learn the relevant material if possible without undue delay or associate with a competent attorney.

CA looks to a similar standard, but will only discipline a lawyer for repeated or reckless violations of the duty of competence.

Here, L was an estate lawyer, with no criminal experience. There's no indication he associated with a competent attorney. And it seems unlikely that he took time to prepare since the court was so frustrated with him they dismissed him as counsel. Under the ABA standard then, it's very likely that L failed to employ the requisite experience, skill, knowledge, time, and preparation in the case.

Therefore under the ABA rules, it's highly likely that L would be subject to discipline. Under the CA rules it's unclear whether this is L's first violation, so he might argue that his conduct is not repeated. But there's a strong argument he acted recklessly. An

armed robbery prosecution has a potential to seriously and permanently harm the interests of the lawyer's client(s). Failing to act competently at any stage could waive issues on appeal, or cause a host of problems that lead to long-term incarceration, and a felony conviction. That risk would be apparent to any attorney undertaking a serious criminal case. Taking on such a case without apparently any preparation, or association when you have no prior background in that area is arguably disregarding a substantial and known risk.

Therefore, even under CA's standard, L probably not only violated the duty of competence, but would be subject to discipline for reckless conduct.

Duty of Decorum in the Court

A lawyer also owes duties to the court.

Among others, a lawyer has a duty to uphold decorum in the court, and behave professionally and appropriately at all times. They should act in a way that builds the confidence in the legal profession. Arriving at an arraignment with such serious lack of preparation that the court was forced to appoint alternative counsel, and discharge the lawyer arguably violates those duties.

The lack of preparation is clearly disruptive to the court proceedings, and inconveniences the court and the parties, so it violates the duty to uphold decorum in the court. Such flagrant lack of preparation also undermines public confidence in the judicial system, by appearing to undermine the integrity of counsel. That's particularly important in a criminal prosecution, where there's a strong interest in ensuring adequate representation on both sides.

Therefore, L may be subject to discipline for violating (some of) his duties to the court as well.

In all, under both the ABA and CA rules, L is likely subject to discipline for violations of the duty of loyalty, the duty of confidentiality, financial duties, duty of competence, and duty of decorum in the court.

QUESTION 3: SELECTED ANSWER B

Duty of loyalty

A lawyer has a duty of loyalty to his clients. The duty of loyalty prohibits a lawyer from representing an individual with interests that are adverse to that of a current or former client. A lawyer may nevertheless represent parties with conflicting interests if he reasonably believes that he can provide adequate representation despite the conflict, if he can inform both clients of the conflict without breaching his duty of confidentiality, and if he obtains the consent of both clients to proceed. In California, the lawyer needs only a subjective belief that he can provide adequate representation. Additionally, California requires that the lawyer obtain written consent from the clients. Moreover, the California rules require a lawyer to get the consent of the clients when the potential is merely a potential conflict and again when the conflict ripens into an existing conflict.

Here, a potential conflict exists between the clients because they are co-defendants. During the course of the criminal trial, it is possible for the interests of Betty and Sheila to become adverse to each other. For example, Betty and Sheila might not agree on a defense to assert or they might not agree on plea deal. Because there is a potential conflict of interest, Lou is required to inform the clients of the conflict of interest and to get their written consent before proceeding. There is nothing in the facts to indicate that the clients consented to the potential conflict of interest. However, under the ABA rules, Lou has not breached his ethical duties because the conflict is merely a potential and not an existing conflict.

Therefore, it is likely that Lou breached his ethical duty in CA by not obtaining written consent from the clients. However, it does not appear that he has breached his duties under the ABA rules.

Personal conflicts of interest.

The duty of loyalty also requires that the lawyer disclose his clients of personal conflicts that he has. In California, personal conflicts simply require disclosure and not consent and personal conflicts are not imputed to other lawyers at the attorney's firm.

Here, Lou likely has a personal conflict of interest because Lou is Betty's uncle. The fact that Lou is Betty's uncle indicates that he might tend to act more in Betty's best interest rather than acting in the best interest of Sheila. This is purely a personal conflict of interest. In California, Lou is simply required to disclose the conflict to Sheila. Under the ABA rules, however, Sheila is required to consent to the conflict and the consent must be memorialized in writing. The facts here do not indicate that there has been disclosure and do not indicate that Sheila has consented to the conflict.

Therefore, Lou has breached his ethical duty by not disclosing her personal relationship to Betty to Sheila.

Lou's retainer agreement

The facts here indicate that L will make every effort to inform clients of potentially conflicting representations. This disclaimer is not enough to satisfy the consent requirement for a conflict of interest and does not relieve Lou of any liability for not receiving consent for conflicts of interest. This disclaimer has no effect on Lou's duty of loyalty to Betty and Sheila.

Moreover, the agreement states that the lawyer will make every effort to inform clients of any potentially conflicting representations. According to the CA rules, this is not sufficient and Lou must obtain written consent from the clients for any potential conflicts of interest.

Duty of competence

A lawyer has a duty of competence which requires him to provide competent representation to his clients by using the appropriate skills, knowledge, and thoroughness. A lawyer who is not competent in a particular area may nevertheless take a case in that area if he can either 1) become competent before trial through research and familiarizing himself with the area of law or 2) associating with a lawyer who is competent in the area. Additionally, in an emergency, a lawyer may act in an area in which he is not competent, as long as he stops the representation when the emergency is over. In California, a lawyer breaches his duty of competence only if he intentionally, recklessly, or repeatedly acts without competence.

Here, Lou is an estate planning attorney who has never represented defendants in a criminal case before. Lou has not breached his duty of competence merely by taking the case because he can potentially become competent in the area or he can associate with an attorney who is competent in the area. The facts, however, do not indicate the Lou has done either of these things. Lou clearly has not familiarized himself with the area of law because the court was angered during the arraignment with Lou's unfamiliarity with criminal procedure. Additionally, there is nothing in the facts that indicates that Lou has associated with a competent attorney. Therefore, under the ABA rules, it is likely that Lou has breached his duty of competence.

Under the CA rules, a lawyer breaches his duty of competence only if he acts incompetently intentionally, recklessly, or repeatedly. In this instance, Lou has not repeatedly acted without competence because there is no indication that it was Lou's normal practice to accept representation for clients in areas in which he is not competent. There is a strong argument that Lou has intentionally or recklessly acted without competence. If Lou has not made any effort to familiarize himself with the area of law, then he has intentionally acted incompetently. However, if Lou truly made an effort to become competent but nevertheless was unable to become competent, it is unlikely that he acted intentionally or recklessly.

Therefore, Lou has clearly breached the ABA rules by acting incompetently. His actions preceding the arraignment would indicate whether or not he has breached his duty under the CA rules by intentionally or recklessly acting incompetently.

Fee agreement

Contingent fees

In a contingent case, the lawyer must give the client a written fee agreement that states 1) the lawyers % of the recovery, 2) expenses to be paid out of the recovery, 3) whether the lawyer's fee will be taken before or after expenses are taken out, 4) other expenses that the client will be required to pay. Additionally, under both the ABA and CA rules, contingent fee agreements are not permitted in criminal cases.

Here, Lou clearly has a contingent fee agreement because his payment is contingent on whether or not the clients are successful either before or after trial. Additionally, this is a criminal case because Betty and Sheila were charged with armed robbery. Therefore, it was not proper under either the ABA or the CA rules for Lou to enter into a contingency agreement with Betty and Sheila because of the criminal nature of their case. Moreover, even if it were proper for Lou to enter into a contingency agreement with his clients in this instance, the contingency agreement would not meet the requirements under the ABA and CA rules because the agreement states that Lou will be paid $10,000, which is not a percentage of the recovery.

Non-contingent fees

If this is not a contingent agreement but rather is a fee agreement, certain requirements must be met. The agreement must state how the lawyer's fee is calculated, what the duties of the clients and the lawyer are, and what expenses will be paid out of the fee. In

California, the agreement is required to be in writing unless it is for 1) less than $1000, 2) a corporation, 3) regularly performed services for a regular client, 4) it is impracticable, or 5) there is an emergency.

Here, the fee agreement does not indicate how L's fee is calculated: it merely states what the fee is, $10,000, and when the fee is incurred: if the client is successful in their case. Although the fee agreement is in writing in this instance as it was contained in the retainer agreement, it does not meet all the requirements for a fee agreement because it does not provide enough details about how the fee is calculated and it does not provide information about the lawyer's and client's duties.

Therefore, Lou has breached his ethical duties because he has used a contingent agreement in a criminal case. Even if the agreement were not contingent, he has breached his ethical duties because he did not include enough information about how the fee is calculated to satisfy the CA and ABA rules.

Fee amount

The $10,000 flat fee

Under the ABA, the fees that a lawyer charges must be reasonable. Under the ABA, a lawyer's fees cannot be unconscionably high. Some factors used to determine whether a lawyer's fees are reasonable are the time he spends on the case, his expertise and experience, the difficulty and novelty of the matter, and the result obtained.

Here, it is difficult to determine whether Lou's fee of $10,000 is unconscionable or unreasonable. Given that the fee is obtained only if the client is successful at trial, it could be considered reasonable. However given that it is a flat fee instead of a percentage of the client's recovery indicates that it might not be reasonable or conscionable, depending

on what the client actually recovers at trial. Additionally, the fee does not take into account how much work that Lou puts in the case. Under the agreement, it is possible for Lou to get the $10,000 fee if the case is dismissed early on in the proceeding before Lou has performed any work.

Given all these facts, it is likely that the $10,000 flat fee is not reasonable or conscionable under the CA and ABA rules.

The $2,000 charge

The $2,000 charge that Lou eventually charged to Betty and Sheila likely is not reasonable or conscionable since he had not yet incurred any costs. Additionally, the arraignment was only 2 days after Betty and Sheila came to Lou for help. This means that Lou is seeking to be paid $1,000 per day. This fee is definitely unreasonable and unconscionable, especially given that Lou apparently made no effort to learn criminal procedure or criminal law since the judge was angered during the arraignment due to Lou's unfamiliarity with criminal procedure.

Therefore, Lou violated his ethical duty by asking Betty and Sheila to pay him $2,000 for a mere 2 days of incompetent work.

Loans to clients

Under the ABA rules, a lawyer is prohibited from making loans to his client unless 1) the loan is an advance of litigation costs to an indigent client or 2) the loan is an advance of litigation fees in a contingent case. Under the CA rules, a lawyer is allowed to make a loan to his client for any reason so long as the client and the lawyer enter into a written loan agreement. Additionally, in CA, a lawyer is prohibited from promising to pay a client's debts in order to persuade the client to agree to have the lawyer represent them.

Here, Lou has promised to advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interest. The facts here do not indicate that either Betty or Sheila are indigent, so this agreement would not be permitted on this grounds. However, the fee arrangement here is appears to be a contingent fee basis since Lou will recover only if the clients are successful at trial. Therefore, the lawyer could appropriately advance the litigation costs in this instance under the ABA rules.

This agreement is likely valid under the CA rules because the clients have entered into a written loan agreement with Lou. The agreement is written because it is contained in the retained agreement, which was signed by both Betty and Sheila.

Therefore, Lou has not breached his ethical duties under the CA rules because he has entered into a written loan agreement with the clients. Additionally, he has not breached his duties under the ABA rules if this agreement can validly be classified as a contingent fee agreement.

Withdrawal

A lawyer is required to withdraw from a case when he is fired or when continuing representation would violate a law or ethical duty. Upon withdrawal, the lawyer must return all materials related to the representation to the clients. In CA, the lawyer is prohibited from keeping the materials in order to persuade the client to pay the lawyer any fees owed.

In this instance, Lou has been removed from the case by the judge. This is likely akin to being fired. If this act is not alone enough to constitute Lou being fired, it is likely that the clients agreeing to representation by new counsel is enough for Lou to be considered fired, thus requiring that he withdraw from the case. The fact that Lou's retainer agreement states that the Lawyer agrees to represent Clients through any settlement or

trial does not affect his ability to withdraw from or to be fired in the case. Here, Lou contends that Betty and Sheila owe him $2000 to reimburse Lou for the time that he spent on the case. Under the CA rules, Lou would not be permitted to hold the materials of the clients hostage while he waits for them to pay this amount. Under both the ABA and CA rules, Lou is required to give the materials related to the representation back to the clients.

Therefore, it is not clear that Lou has breached an ethical duty yet. But it is possible for him to breach an ethical duty by not withdrawing or by not promptly returning the clients' materials.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 5

Attorney Anne shared a law practice with Kelly representing professional athletes. In the past Kelly represented professional athlete Player, but Kelly was disbarred several months ago. Kelly immediately resigned from the firm, and was re-hired by Anne as a litigation support clerk. Anne now represents Player.

Player is currently involved in a dispute with the professional team that employs him. Despite a valid and enforceable contract, Player refused to play because he wanted to re-negotiate his salary. The team obtained a preliminary injunction requiring Player to play under the terms of his current contract. Player sent Kelly an email asking for advice as to his next move.

Kelly referred Player to Anne who told Player to ignore the court order and to continue to refuse to play. To put pressure on the team to re-negotiate Player's contract, Anne also called the team owner, and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne and Kelly agreed that there wasn't really a basis to file this complaint.

After the team refused to re-negotiate Player's contract, Anne filed a counterclaim drafted primarily by Kelly so as to "get the team owner's attention" for "tortious interference with contractual relations."

As part of the civil lawsuit, the team owner (Owner) was deposed. Before the deposition, Kelly drafted questions for Anne to ask Owner. During the deposition, Kelly sat next to Anne and passed her notes with further suggested questions for Owner.

What ethical violations, if any, has Anne committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

The issue is whether Anne committed any ethical violations. Based on the facts, Anne has in fact committed several violations.

Hiring and Use of Kelly's Services

Under both the ABA and California rules, a lawyer may not assist another in the unauthorized practice of law. This rule extends to the hiring and employment of disbarred attorneys. Here, Anne engaged in several activities involving Kelly, who was disbarred several months ago. Thus, these actions must be examined to determine whether Anne violated any ethical obligations.

Hiring of Kelly.

A lawyer may employ a disbarred lawyer as a clerk or paralegal to assist in certain activities that do not involve the practice of law, However, the lawyer must take care to prevent the disbarred attorney from conducting activities that constitute the unauthorized practice of law. For example, a disbarred attorney can conduct research, draft documents reviewed and supervised by the lawyer, and conduct other administrative tasks such as communicating with the client concerning billing. The disbarred lawyer may not engage in counseling of the client, appear before any tribunal, or communicate with the client or adversaries concerning substantive matters that constitute the practice of law.

Here, Kelly previously shared a law practice with Anne but, after being disbarred, Kelly resigned from the firm (as required). Anne hired Kelly as a litigation support clerk. There is nothing inherently improper about Anne's hiring of Kelly. However, under the California rules, where a lawyer retains a disbarred attorney as an employee, the lawyer must notify the state bar of the employment, as well as the client. Here, there are no facts indicating that Anne notified the bar that Kelly was employed by Anne, or disclosed to Player that Anne had retained a disbarred attorney to perform clerical duties. To the contrary, Player appears to have believed that Kelly was still a lawyer because he emailed Kelly for advice regarding the preliminary injunction. Anne should not have

permitted Kelly to communicate with Player directly about substantive legal advice, although it appears that Kelly properly referred Player to Anne to answer his question. Nevertheless, Anne should have made it clear to Player that Kelly was disbarred and that all substantive communications should be directed to Anne.

Therefore, although Anne's retention of Kelly did not itself constitute an ethical violation, Anne failed to notify the bar and the client of Kelly's involvement. This constituted an ethical violation under California law.

Filing of Counterclaim Drafted by Kelly

After the team refused to renegotiate Player's contract, Anne filed a counterclaim that was drafted primarily by Kelly. As a disbarred attorney, Kelly cannot engage in activities that constitute the unauthorized practice of law.

As stated above, a lawyer may allow a disbarred attorney to draft documents so long as the attorney properly reviews, supervises, and takes ownership of the activity. Here, it appears that Kelly primarily drafted the counterclaim, but it is not clear whether Anne provided appropriate supervision and review of Kelly's work. If Kelly was the sole drafter and Anne did not review or supervise her work, which is possible given that they were formerly partners and/or co-workers, then Anne will have committed an ethical violation by allowing Kelly to engage in the unauthorized practice of law. If, however, Anne closely reviewed, edited, and supervised Kelly's work, and had the ultimate authority over the filing of the counterclaim, she will not likely have committed any ethical violations by permitting Kelly to engage in the drafting.

Based on the facts, it appears that Anne may have also committed an ethical violation if Kelly was primarily responsible for the filing.

Kelly's presence at deposition

As part of the civil lawsuit between Player and the professional team that employs him, the team owner (Owner) was deposed. Kelly assisted Anne in preparing for the deposition by preparing draft questions for Anne to ask Owner during the deposition. Here, Kelly's assistance in drafting deposition questions may have violated the ABA and

California rules depending on the level of supervision and management by Anne, similar to the drafting of the counterclaim. A lawyer may use a non-lawyer (including a disbarred lawyer) to draft documents and conduct research. However, the disbarred lawyer may not engage in activities that constitute the practice of law. Drafting deposition questions requires legal skill and judgment and would likely constitute the unauthorized practice of law unless Anne merely used Kelly's work for reference and supervised and edited her work. However, it is not clear from the facts the extent to which Anne played a part.

Kelly also attended the deposition, and sat next to Anne and passed her notes with further suggested questions for Owner. This likely constituted an ethical violation under the ABA and California rules because Kelly was participating in the deposition, even though she was not directly asking questions. Depositions are typically limited to counsel, the witness, and the court reporter; the parties also typically make their appearance on the record, and the opposing side would have understood Kelly to be second-chairing the deposition on the facts. Therefore, Kelly's appearance at - and passing of notes to Anne during - the deposition likely constituted an ethical violation. Even though she was not directly asking questions, Kelly's feeding of questions to Anne and serving as the second chair would likely be deemed to be the unauthorized practice of law.

In short, it is likely that Anne did not violate any ethical duties in using Kelly to prepare for the deposition, but her presence and assistance at the deposition likely constituted an ethical violation.

Filing of Counterclaim

A lawyer may not assert a legal claim for the purpose of harassing another party or gaining an unfair litigation advantage. Here, after the team refused to re-negotiate her client's contract, Anne filed a counterclaim with the purpose of "get[ting] the team owner's attention" for "tortious interference with contractual relations."

Accordingly, because the purpose of the claim was solely to get the team's attention, Anne likely committed a violation when she filed the counterclaim for tortious interference with contractual relations.

Advising Player to Ignore the Court Order

Here, after the team obtained a preliminary injunction requiring Player to play under the terms of his current contract, Anne told Player to ignore the court order and to continue to refuse to play. This likely constituted a violation of both the ABA and California rules.

A lawyer must not counsel a client to violate a court order. Although Anne could have counseled Player to push back on his contractual obligations if she had a good faith basis for doing so, here the court had imposed a preliminary injunction requiring Player to perform under the contract. Thus, Anne directly advised her client to violate the court order without any good faith basis for doing so.

In addition to breaching her duty to the tribunal, this likely constituted a breach of her duty of competence owed to Player because a reasonably prudent lawyer would not counsel their client to disregard a court order that is likely to subject them to contempt charges.

Accordingly, Anne likely committed an ethical violation when she advised Player to ignore the court order.

Threatening to file a discrimination complaint

In order to put pressure on the team to re-negotiate Player's contract, Anne called Owner and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne knew that there was not a legal basis to file the complaint but made the threat in order to put pressure on the team.

Under California rules, a lawyer may not threaten to report another person for disciplinary purposes in order to gain an advantage in a litigation. Where the lawyer has a good faith belief that a violation has occurred, the lawyer may advise the party that they might file a complaint. But the lawyer must not do so in order to gain a litigation advantage.

Here, Anne knew that there was no basis to file a discrimination complaint, yet made the complaint in order to put pressure on the team. This constituted a violation of the California rules because Anne lacked any good faith basis for making the complaint and did so solely in order to advance her client's position in the contractual negotiations.

QUESTION 5: SELECTED ANSWER B

Anne (A) has committed several ethical violations, as discussed below.

Disbarred Attorney/Resigning

A disbarred attorney must resign from their law firm and cannot associate with that firm as an attorney.

Here, A and K shared a law practice. Thereafter, K was disbarred and immediately resigned from the firm. Assuming that the firm name was changed to recognize that K was no longer associated with the firm then A did violate the ABA or CA RPC.

Employing Disbarred Attorney

The issue is whether it is permissible to hire a disbarred attorney to work in one's law firm. In CA, a disbarred attorney can be hired to work as a litigation support clerk or in a similar support. The disbarred attorney can only work in this limited capacity; moreover, the CA State Bar must be notified if an attorney seeks to hire a disbarred attorney. Additionally, the disbarred attorney is prohibited from interacting with clients in a manner that would reasonably lead the client to believe the disbarred attorney was an attorney. Therefore, their client contact must be minimal.

Here, A hired K to work as a litigation support clerk. A did not notify the CA bar that she had hired K, who was a disbarred attorney. A was required to notify the CA State Bar, but failed to do so. Therefore, she violated her duties under the Cal RPC.

Also, the facts indicate that K's former clients may have still been contacting her for legal advice. As a disbarred attorney, K is prohibited from providing legal advice and can only interact with clients in an administrative capacity. Because K referred Player to A after he emailed her, this conduct would likely not create separate grounds for an ethical violation.

Telling Client to Ignore Court Order

A lawyer has a duty to the court and the profession to act with integrity, in good-faith, and ethically. Failure to do is a violation of both the CA and ABA RPC.

Here, A told Player that he should ignore the court order that required him to play under the terms of his current contract. This advice by A was in direct contravention to a legitimate court order. There are no facts - such as a stay of the court's order - that indicate that Player was bound by the court order and obligated to comply with. The fact that he disagreed with what it required, or that A may have believed that his noncompliance would create leverage in the negotiation of his contract are not sufficient bases for not complying with a lawful court order. Moreover, a litigant is liable to be held in contempt for failing to comply with a preliminary injunction. Therefore, A's legal advice to Player was to ignore a court order, the consequences of which could result in her client being ordered to jail or to pay a fine until he begins to comply with the order. Consequently, A did not act with integrity because she told her client to ignore the court's order without a legitimate basis for doing so.

This conduct by A violated both the ABA and CA RPC.

A lawyer also has a duty of competence. A lawyer must act with the knowledge and skill reasonably necessary to provide competent and diligent legal services. Under the ABA, the standard for a breach of this duty is reasonableness. In CA, a lawyer breaches their duty of competence if they act intentionally, recklessly, or with gross negligence.

Based on the above facts, A acted intentionally when she told Player not to comply with the order. Because failure to comply with a lawful order of a preliminary injunction has the consequences of contempt, it seems grossly negligent by A to give her client legal advice that would result in him violating the law.

As a result, A breached her duty of competence under both the ABA and CA RPC.

Calling and Threatening Team Owner

A lawyer cannot have contact with an opposing party that the lawyer knows is represented by counsel, unless opposing counsel consents.

Here, A called Team Owner and spoke with him without his lawyer present. A likely knew that Team Owner had retained counsel since he was engaged in a contract dispute with Player. There are also no facts that show that Team Owner's counsel consented to this call without him.

A also threatened Team Owner that she would file a civil rights complaint against him. The purpose of this threat was to create leverage in her dispute with Team Owner, as A and K "agreed there wasn't really any basis for the complaint." A lawyer must not threaten to bring an administrative complaint against a lawyer or non-lawyer absent a good-faith basis for filing the complaint. It is unethical to threaten or pursue such a complaint purely for the purposes of harassing the subject of the complaint.

As a result, A violated her ethical duties under both ABA and CA RPC by talking with an opposing party who has counsel and also by threatening someone with filing an administrative complaint against solely as a means of negotiating.

Duty of Good-faith/Candor re Counter Claim

A lawyer must have a reasonable, good-faith basis for pursing a legal claim. In other words, they must have a reasonable belief in the merits of the claim and they must be pursuing the litigation for a legitimate basis (i.e., remedying a legal right and not to harass)

Here, A filed a counter claim against Team Owner. Presumably, this counter claim was filed as part of strategy by A and K to be in a better position to negotiate Player's contract dispute. Generally, such a counter claim would be permissible and not constitute an ethics violation. However, it is not clear that A believed the claims asserted had merit. The fact that the court ruled in the PI in Team Owner's favor weighs against a finding that this counter claim had merit. Moreover, if the only purpose for bringing the claim was to "get the team owner's attention", then it seems likely that A's

motivation was not to necessarily vindicate Player's contract rights, but to impermissibly harass and create leverage in negotiating a better contract for Player. In sum, it is not clear that A had a good faith basis in prosecuting this action.

Therefore, A may have committed an ethical violation if she filed this counter claim with a good faith based as to the merits of the case. If it was done purely to harass, then A committed an ethical violation under both the ABA and CA RPC.

Duty to Supervise

A lawyer may delegate tasks to their nonlawyer employees. However, the lawyer must closely supervise the nonlawyer's work and the lawyer remains ultimately responsible for the work product.

- Drafting Complaint

Here, K was primarily responsible for drafting the complaint. For the reasons discussed above, the filing of this counter claim could be the basis for a violation of the ABA and CA RPC. If so, then A clearly failed to supervise K. If she had done so, they would have thoroughly discussed the theory of the counter claim and whether the facts support that theory. A should not have filed the counter claim if this was not satisfied. Moreover, because an attorney is ultimately responsible for the work delegated to a nonlawyer, A can argue as a defense that K was "primarily responsible."

Therefore, A may have breached her duty to supervise her nonlawyer employee.

- Drafting deposition questions

Here, A's nonlawyer employee K drafted questions for A to ask during the depositions. The facts do not indicate how closely, or whether at all, A supervised K in this process. It is likely that A provided limited oversight over K in this process since she probably reasoned that this was something that K had experience doing and could be trusted. It is not impermissible for the nonlawyer to provide a draft of deposition questions to the attorney. A likely exercised supervision by using her discretion as to which questions drafted by K she chose to ask. However, if A did not do this and simply followed K's

deposition outline without exercising her own independent judgment and, as a result, she asked impermissible questions, there could be a basis for finding that A breached her duty to supervise. Moreover, although K is a disbarred attorney, this type of conduct is not impermissible for a disbarred attorney. A litigation support clerk, under the supervision of an attorney, can draft deposition questions to help the attorney prepare for a deposition.

Therefore, it was likely permissible for A to allow her non-lawyer employee to draft the deposition questions.

K's participation in the Depo

A lawyer is liable for ethical violations of their employees. Moreover, as discussed above, a disbarred attorney is limited in the type of employment that they may engage in as it relates to working for a law firm.

Here, A and K jointly participated in the deposition of Team Owner. K is carrying on in the capacity as a licensed attorney would during a deposition - actively participating and thinking of additional questions to ask the deponent. This type of conduct would lead a reasonable person to believe that K was an attorney. However, it is not clear that a nonlawyer cannot participate and assist during a deposition.

As a result, this conduct may have violated the CA RPC because the CA state bar was not notified that a disbarred attorney was being employed by A and A allowed her to work in a capacity greater than administrative.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

QUESTION 4

Larry is an associate lawyer at the ABC Firm (ABC). Larry has been defending Jones Manufacturing, Inc. (Jones) in a suit brought by Smith Tools, Inc. (Smith) for failure to properly manufacture tools ordered by Smith. XYZ Firm (XYZ) represents Smith. Larry has prepared Jones' responses to Smith's discovery requests.

Peter is the partner supervising Larry at ABC in the Smith v. Jones case. Peter has instructed Larry to file a motion to compel discovery of documents that Smith claimed contains its trade secrets. Larry researched the matter and told Peter that he thought that the motion would be denied and may give rise to sanctions. Peter, who had more experience with trade secrets, told Larry to file the motion.

Larry also told Peter about a damaging document that Larry found in the Jones file that would be very helpful to Smith's case. Larry knows that the document has not been produced in discovery. The document falls into a class of papers that have been requested by Smith. Larry knows of no basis to refuse the production of the document. Peter told Larry to interpose hearsay, trade secrets, and overbreadth objections and not to produce the document.

Larry recently received an attractive job offer from XYZ.

1. May Larry ethically follow Peter's instructions to file the motion? Discuss.

2. What are Larry's obligations in relation to the damaging document? Discuss.

3. What ethical obligations must Larry respect with regard to XYZ's job offer? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

An attorney owes his clients the duty of loyalty, confidentiality, competence, and financial responsibility. A lawyer also owes third parties, the public, and the court the duties of fairness, dignity, and candor.

I. FOLLOWING PETER'S INSTRUCTIONS TO FILE THE MOTION

FILING THE MOTION

The issue here is whether Larry, who is an associate lawyer at ABC, must follow the supervising partner Peter's instructions to file a motion to compel discovery of documents that Smith claims contains trade secrets. The second issue is whether there is a questionable issue of law as to whether it is proper to file the motion to compel.

A lawyer owes the duty to supervise attorneys and staff that work under the lawyer and ensure they do not commit any ethical violations. A lawyer who is being supervised still must follow the ethical rules despite being told otherwise from supervising attorneys. If there is an arguable question of law/duty regarding the ethical violation, then the lawyer may rely on supervising attorneys for advice and instruction. If there is no questionable issue of law or duty, the attorney must adhere to the ethical rules of the ABA and California, even if it goes against what the partner says. If the attorney violates the rules, both the associate lawyer and the partner will have committed ethical violations. Here, Peter has instructed Larry to file a motion to compel discovery of documents that Smith believes contains trade secrets. Larry believes that the motion would be denied and may give rise to sanctions. It appears that Larry is less experienced in trade secrets than Peter, who is a partner and has likely been a practicing attorney longer

than Larry. Thus, there appears to be a questionable issue of law; therefore, Larry can rely on Peter's advice as a supervising attorney and file the motion to compel.

If Larry does further research and discovers that there are no grounds to file the motion, and therefore no questionable issue of law, then Larry must not file the motion to compel despite Peter's instructions. If Larry does further research and learns that there are no grounds to file the motion to compel, he will be violating the duty of competence to Jones. The duty of competence requires an attorney to act with the legal knowledge and skill necessary to perform for the client. In California, the duty of competence is looked at under a reckless standard; a lawyer will not violate the rules for a single issue that breaches the duty of competence. Here, if Larry knows the motion to compel should not be filed, and files it anyway because of Peter's instructions, he is violating his duty of competence to Jones. He is also violating the duty of fairness to Smith, the opposing party, and the duty of candor and dignity to the court.

Because there likely is a questionable issue of law, Larry may rely on Peter as the supervising attorney and file the motion. However, if Larry further learns that the motion to compel discovery is unwarranted and may give rise to sanctions, then he cannot rely on Peter's instructions and must not file the motion; if he does, he will have committed an ethical violation.

RESEARCHING TRADE SECRETS

There is a possibility that Larry has violated the duty of competence for failing to familiarize himself with trade secret law adequate enough to represent Jones. The duty of loyalty requires an attorney to act with the legal skill and knowledge necessary to

represent the client. If the area of law is unfamiliar to the attorney, they have a duty to familiarize themselves with the area of law in order to adequately represent the client. Though Larry is an associate, he still must familiarize himself with trade secret law in order to competently represent Jones, or must associate with a lawyer who has sufficient experience in trade secret law. Here, Peter appears to have adequate knowledge of trade secret law to assist Larry. However, Larry may need to speak with someone else at the firm or conduct further research to ensure that the trade secret law is properly followed in relation to filing the motion to compel. Under California rules, Larry likely has not violated the duty of competency since California follows a reckless standard and does not punish for a single isolated event of incompetency.

Additionally, there is a possibility that Larry will violate his duty of competency if he files the motion, knowing that sanctions are likely, and the court imposes trade secrets, thus hurting his client Jones. This may give rise to reckless behavior. As such, Larry could violate the duty of competency under both ABA and California rules for filing a motion he thinks will bring sanctions.

II. LARRY'S OBLIGATIONS IN RELATION TO DAMAGING DOCUMENTS:

PRODUCING DAMAGING DOCUMENTS

Here, the issue is whether Larry will commit an ethical violation if he fails to produce the damaging document he has discovered.

A lawyer owes a duty of fairness, dignity, and candor to the court and opposing party. Simultaneously, a lawyer owes the duty of confidentiality and loyalty to their client. A lawyer has a duty to follow court orders, including discovery request, and to not assert frivolous litigation claims or defenses. Here, Larry has found a damaging document that

has not been produced in discovery. The document is damaging to Larry's client, Jones. However, the document falls into a class of papers that have been requested by Smith. Larry has a duty to turn over the document to Smith because it has been requested by Smith. This does not violate the duty of loyalty to Jones because the duty of loyalty does not ask an attorney to withhold evidence from a proper discovery request. Additionally, while the duty of competency requires attorneys to fight zealously for their clients, it does not allow an attorney to assert false, misleading or frivolous defenses. Here, there does not seem to be a reason for Larry to claim hearsay, trade secrets, or any other defense to keep the document from being produced to Smith. Thus, Larry has a duty to turn over the document to Smith. If Larry were to assert these frivolous claims to try and avoid turning over the document, Larry will be violating his duties of candor, fairness and dignity to the court and Smith. Additionally, asserting a false claim is likely considered reckless, as it could lead to sanctions on Larry, Peter, ABC, and Jones. As such, Larry will likely be violating his duty of competence to Jones if he asserts a frivolous and false defense to try and protect the document. Therefore, Larry must turn over the document.

As explained above, if there is a questionable issue of law, an attorney may rely on a supervising partner to determine how to proceed. Here, Larry knows of no basis to refuse the production of the damaging document. Even though his supervising attorney, Peter, is ordering Larry to refuse to produce the document, Larry must go against Peter's wishes and produce the document in order to avoid committing an ethical violation.

DUTY REPORT VIOLATIONS OF OTHER LAWYERS

The issue here is whether Larry must report Peter's ethical violation to the bar.

The ABA rules require that an attorney report any ethical violations of another attorney or judge to the bar. Here Peter has committed an ethical violation by refusing to produce the document and making up frivolous and meritless defenses to avoid producing the document. Therefore, Peter has breached his duties of fairness, candor, and dignity to the court and to Smith. Thus, Larry must report Peter's actions to the bar. California does not follow the same rule, so Larry will not need to report Peter's violations to the California bar. However California has a duty to self-report violations, malpractice claims, or other ethical violations/cases that may arise. Larry may need to self- report if he commits any ethical violations under California rules.

III. XYZ'S JOB OFFER

At issue here is whether Larry must disclose his job offer from XYZ to Jones in order to avoid committing any ethical violations.

CONFLICT OF INTEREST - DUTY OF LOYALTY

A lawyer owes their current clients the duty of loyalty. A conflict of interest may give rise to breaching the duty of loyalty. A conflict of interest exists when a lawyer represents two clients in the same suit as adverse parties or when there is a significant risk that the lawyer's personal life, duties to current clients, or duties to former clients may materially limit the attorney's ability to act in the best interests of his client. If there is a conflict of interest, an attorney may still represent the client if the attorney reasonably believes he can still represent the client without breaching any duties and acting in the client's best

interests and the client is aware of the conflict and gives informed, written consent. The attorney cannot represent the adverse clients in the same case in a tribunal, and the representation cannot be prohibited by law. In California, the client's consent must be in writing.

Here, Larry is representing Jones in a suit against Smith. Larry works for ABC, who is representing Jones, and Smith is represented by the firm XYZ. Larry has received a job offer from the law firm XYZ, which is directly adverse to his client Jones in a current case. This creates a conflict of interest for Larry. Even if Larry decides not to take the job from XYZ, he still must disclose the job offer to Jones, as it gives rise to a conflict of interest. Here, a conflict of interest has occurred because there is a significant risk that Larry's personal life will impact his duty of loyalty to Jones. (Additionally, there is the potential that, should Larry accept the job with XYZ, it could impact his duty of confidentiality to Jones.) Larry may reasonably believe that he can still represent Jones competently and diligently without violating his duties of loyalty and confidentiality despite the job offer from XYZ. Even if he reasonably believes this to be the case, Larry must still disclose the conflict of interest to Jones. He must get Jones' informed, written consent before proceeding with the representation. Additionally, in California, the disclosure must be in writing and the client must confirm in writing that they are consenting to the representation. It is unlikely this conflict of interest would be prohibited by law. If Larry does not reasonably believe that he can continue representing Jones due to the job offer, even if he does not take the job offer, then he must cease representing Jones and allow another attorney at his firm to take over the case. He will likely need to be screened off from the case, and not share in a portion of fees earned

from the Jones v Smith case.

In California, an attorney must disclose, in writing, to his client any personal relationship the attorney may have with another party, witness or lawyer in the case. Here, Larry has created a personal relationship with XYZ because of the job offer. Because of this personal relationship, he must disclose, in writing, the relationship to Jones.

CONFLICT OF INTEREST - DUTIES TO FORMER CLIENTS

At issue here is what duties Larry will breach if he accepts the job offer from XYZ. If Larry leaves ABC and goes to XYZ, he will now be adverse to former client Jones and ABC. This gives rise to a conflict of interest. A lawyer owes the continuing duty of confidentiality to former clients. A lawyer's conflict may be imputed to the firm if it is not personal in interest. Here, if Larry took the job, Larry's conflict with Jones at his new firm XYZ would not be personal and would therefore be imputed to the firm since he worked significantly and substantially on the case Jones v. Smith. Larry has learned significant confidential information from Jones about the case. If Larry were to go to XYZ, then he must be screened off from the case, not share in any fees earned from the case, and XYZ must give notice to ABC. Under the ABA rules, Larry may be allowed to take the job if he is properly screened, shares no fees from the Jones v Smith case, and does not give any confidential information about Jones to XYZ or Smith; additionally, notice must be given to Jones. In California, if an attorney has worked on the same matter in a substantial way, the conflict cannot be cured from screening off the client. Therefore, in California, Larry would likely not be able to take the job because XYZ would have to stop representing Smith, since Larry's conflict would be imputed to the firm.

QUESTION 4: SELECTED ANSWER B

<u>May Larry Ethically Follow Peter's instructions to file the motion</u>

Associate attorney's duties with regard to following a supervising attorney's instructions

Under both the ABA Model Rules (MR) and the California Rules of Professional Conduct (RPC), an attorney that is working under the supervision of a partner or other attorney has a duty to abide by the instructions that the supervising attorney gives, while still maintaining her duty to maintain independent professional judgment and to avoid committing a clear ethical violation.

Here, it could be argued that, by filing this motion to compel, L is bringing a frivolous claim in violation of the MR and RPC.

Duty to avoid frivolous claims

Under both the MR and the RPC, an attorney must not bring a cause of action or claim that has no basis in law or fact, or where the attorney has no good faith argument for an extension of existing law or a change in existing law.

Here, Peter (P) is instructing Larry (L) to file a motion to compel discovery documents that Smith (S) claimed contain trade secrets. It could be argued that if L files this motion after doing the research and believing that the motion will be denied, filing that motion

would constitute a frivolous claim and would thus violate both the MR and the RPC. However, on the other hand, L could argue that he only "thought" that the motion would be denied and "may give rise to sanctions," not that it absolutely would be denied. He could note that, because it wasn't absolutely clear that this would be denied, there is a basis in law for obtaining the discovery and that the claim is therefore not frivolous. He can further note that P is much more experienced with trade secrets, and he told L to file the motion. Note that the efficacy of following P's instructions in this instance is discussed in more detail below.

On balance, a court is likely to find that this is not a frivolous claim because there is some basis in law for making the request.

Duty with regard to following P's instructions

This balance between following the instructions of the supervising attorney and maintaining that independent professional judgment turns on whether the action sought by the supervising attorney is clearly an ethical violation or whether it is a reasonable question of law or fact. If the reasonable minds of attorneys would differ as to whether the action ordered by the supervising attorney would constitute a violation of an ethical duty, then the attorney must abide by the supervising attorney's instructions and will not be liable for an ethics violation. If no reasonable minds would differ as to the propriety of an action, or if it is clearly a request for a violation of an ethical rule or law, then the associate attorney must refuse to take the action.

Here, Larry (L) has been instructed to follow through with filing this motion to compel. As noted above, this may constitute a violation of the duty to avoid frivolous claims.

However, L has an argument that reasonable minds could differ as to whether this is a frivolous claim, as well as whether this request could lead to sanctions. Furthermore, he could note that, because reasonable minds could differ, in this instance, he was under a duty to follow his supervising attorney's instructions.

Conclusion

On balance, a court is likely to agree that this is an arguable question of law in which reasonable minds could differ, and L therefore did not violate any ethical duties by following P's instructions and filing the motion to compel.

Duty to report ethical violations

Under the MR, an attorney has a duty to report any ethical violations that they know another attorney has committed. The RPC does not have a corresponding duty to report ethical violations of others, but it does impose a duty on attorneys to self- report when they know that they have committed ethical violations.

Duty to report others under MR

Here, it could be argued that L violated MR's duty to report by not reporting P for ordering him to file this motion to compel, a possible frivolous claim. However, as discussed above, this is likely not a frivolous claim, and if it is, he did not know it with a certainty, so he is not under a duty to report.

Duty to self-report under RPC

Furthermore, under the RPC, it could be argued that L has a duty to self- report after filing the possibly frivolous claim. However, again, this is a close call, and likely not a

frivolous claim, so L was not under a duty to report.

As such, L has not violated his duty to report ethical violations under the MR or under CA.

Larry's obligations in relation to the damaging document

Duty of Confidentiality

Generally speaking, under both the MR and the CA, an attorney must not disclose any information relating to the representation of a client unless authorized by the express written consent (informed written consent in CA, informed consent confirmed in writing under the MR), or unless impliedly authorized in order to carry out the representation.

Here, L has discovered a document that contains information relating to the representation of Jones. However, this information has likely been legitimately requested in discovery, and one situation in which an attorney is impliedly authorized to disclose such information in order to carry out the representation is in response to a discovery request.

Therefore, L would not be violating his duty of confidentiality to Jones by turning this document over in disclosure.

Duty of Diligence

Under both the MR and CA RPC, an attorney owes a client a duty to provide reasonably diligent and prompt representation. Under the RPC, an attorney must be committed and dedicated to their client's cause. However, this duty does not require an attorney to

press for every available advantage. And as discussed below, an attorney must not violate the duty of fairness in an effort to zealously advocate for their client.

Here, L may need to balance the need to protect his client's interests against disclosing this information. He must be dedicated to protecting his client's interests. However, this duty may give way to the duty of fairness to opposing counsel, as discussed more below.

Duty of Fairness

The duty of fairness requires that an attorney act with fairness to opposing counsel during the courts of litigation. This requires that an attorney not knowingly obstruct another party's access to evidence, nor alter, conceal, or destroy evidence, or counsel or instruct another to obstruct access to evidence, or conceal, alter, or destroy evidence in the course of litigation.

Here, L has discovered a damaging document in the Jones file. He knows that the document has not been produced in discovery, but he also knows that it falls into the class of papers that have been requested by Smith, and he knows of no basis for refusing to produce the document. It could therefore be argued that, by failing to disclose this document, and by "interposing hearsay, trade secrets, and overbreadth objections" in order to not produce the document, he is intentionally and knowingly obstructing Smith's access to evidence. Although L could argue that P told him to do this and that he should trust P's judgment on this issue, it should also be noted that L himself "knows of no basis to refuse the production of the document."

A court is therefore likely to find that L has violated his duty of fairness by obstructing Smith's access to the evidence.

Duties following a supervising attorney's instructions

See rule above.

Here, claiming hearsay, trade secrets, and overbreadth with regard to this document could be a frivolous claim. L can only avoid liability for violating an ethical duty if this is a question of law in which reasonable minds would differ. If they would not, then L has a duty to avoid committing the ethical violation.

Duty to avoid frivolous claims

See rule above.

Here, L clearly "knows of no basis to refuse the production of the document." When P instructed L to "interpose hearsay, trade secrets, and overbreadth," L likely should have executed some research to determine whether this would be an adequate basis for claiming that they should not be required to turn over the document. If not, then no reasonable minds could differ as to whether or not they had an obligation to do so. Following P's instructions in this instance would constitute making a frivolous claim, and therefore violating both the MR and CA RPC.

For this reason, L must either turn over the document or refuse to offer those objections.

Duty of candor

Under both the CA RPC and MR, an attorney owes a duty of candor to the court, and must not knowingly make a false statement of law or fact to the court. If such a false statement is made and the attorney learns of it, an attorney must promptly correct such false statements.

Here, if L files these objections, or raises them in opposition of a motion to compel, then it is possible that he is violating his duty of candor to the court. This would be the case if the documents do not legitimately contain hearsay, trade secrets, or if the request for the document is not overbroad. In such a case, making those claims would be false statements of law and fact, and L will have violated his duty of candor to the court.

For this reason, L should exercise great caution in ensuring that he does not violate his duty of candor.

Duty to report

See MR and RPC rules above.

MR duty to report

Under the MR, L may have a duty to report P if L refuses to file those objections and P follows through with them, because they may constitute a violation of the duty of candor and the duty of fairness.

CA duty to self- report

Under the RPC, L will not be under a duty to report P if P files such objections, but L would be under a duty to self- report if he does so.

Larry's ethical obligations with regard to XYZ's job offer

Duty of loyalty

Under both the MR and the RPC, an attorney owes all clients, past and present, a duty of loyalty and independent professional judgment. When there is a substantial risk that the attorney's representation will be materially limited due to their own interests, or the interests of past or present clients, then a conflict of interest may exist that could hinder the attorney's ability to provide competent and diligent representation. If a conflict of interest exists, then the attorney may be in breach of their duty of loyalty.

Duties of loyalty and confidentiality of past clients

An attorney owes continuing duties of both loyalty and confidentiality to past clients, even after the representation of those clients has ceased. The duty of confidentiality to past clients means that an attorney may not reveal information relating to the representation of that client, regardless of the source, unless authorized by the express written consent of the client. The duty of loyalty to past clients means that the attorney may not participate in an action against that client, or use information relating to the representation of the client, unless under the MR, the client provides informed consent confirmed in writing, or under the CA RPC, the client provides informed written consent.

Here, L has been in the process of representing Jones in a suit between Jones and

Smith. L is now entertaining an offer to join XYZ, the firm that is currently representing Smith in the same suit against Jones. Regardless of whether L takes on the case or works on it personally, L is under an absolute duty not to use or disclose any information relating to his representation of Jones.

Conflict of Interest - When moving to new firms Past and Present Client Conflicts

Under both the MR and the RPC, where an attorney has worked on the same or substantially similar matter for one client, and then moves to a new firm that is working on the same or substantially similar matter for the adverse party of that representation, a conflict of interest exists. That conflict of interest is imputed onto the other attorneys in the firm, and the firm must not take on the case, regardless of who works on it, unless (1) the former client gives informed written consent (under CA) or informed consent confirmed in writing (under the MR), or (2) the new attorney is properly screened.

Informed Written Consent/Informed Consent Confirmed in Writing

Note while informed consent confirmed in writing only requires an attorney give full disclosure orally before the client provides written notice of consent, informed written consent requires that the disclosure of the conflict is in writing, and the client's consent is also in writing.

Screening procedure

An alternative for the firm exists where the new attorney is properly screened. This requires that the new attorney with the conflict does not work on the case in any way, does not have access to the case files nor discuss the case with any of the parties working on the case, and is not apportioned any fee for that case. Additionally, the firm

must provide notice of the decision to screen and the screening procedures put in place to the former client, and must certify compliance with those screening procedures if requested by the former client.

Here, if L wants to take the job at XYZ, he should let them know that this is a likely consequence of taking the new work. The firm will either need to inform Jones of the new conflict or implement appropriate screening procedures. However, as discussed in more detail below, this will not work under the CA RPC.

California exception for personal and substantial work

Under the CA RPC, a new lawyer's conflict is imputed into the entire firm, and the entire firm may not take on or continue a case, even with appropriate screening procedures or informed written consent, if the new and conflicted attorney worked substantially and personally on the same matter for the other client.

Here, it could be argued that L worked personally and substantially on the Jones v. Smith case. Although just an associate, "he has been defendant Jones" and prepared Jones's responses to Smith's discovery requests. He has consulted significantly with P, the partner, on issues involving sensitive materials.

It is therefore likely that L's conflict will be imputed to XYZ, and he should inform XYZ that this could cause problems with their representation. The best course of action would be to seek a delay in hiring until after the conclusion of the case.

Duty of confidentiality

See rule above. The duty of confidentiality applies to past clients as well as present ones.

Therefore, L will have a continuing duty to maintain confidentiality to Jones, even if he is able to take on the new work at XYZ.

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CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS
February 2020

This publication contains the five essay questions from the February 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

QUESTION 2

Linda is a lawyer with experience in representing small businesses, both for-profit and nonprofit. Nonprofit, Inc. (Nonprofit) is a newly formed California nonprofit corporation with few assets and limited income. Nonprofit is governed by a volunteer board of three directors, one of whom holds the position of board chair. Nonprofit's only employee is Ellen, who has no official title.

Ellen contacted Linda and said that Nonprofit would like to retain Linda to help it develop a formal employment agreement with Ellen, to make Ellen officially the Executive Director of Nonprofit. Ellen's position as Executive Director would be as an officer of the company, but not as a board member. Linda agreed to accept the matter. Linda did not memorialize her retainer agreement in writing.

Ellen drafted an employment agreement that included a proposed salary and sent the agreement to Linda. Ellen told Linda that her proposed salary was data-driven from a survey of similar positions, but based in the for-profit field. Ellen asked Linda not to tell the Board about the source of the survey data. Linda saw many other provisions in the draft agreement that were more favorable to Ellen than those in a typical employment agreement. Linda arranged a meeting with the Nonprofit board to discuss the terms of Ellen's employment agreement. The board chair asked Linda to invite Ellen to attend the board meeting and join their discussions.

1. With whom did Linda establish an attorney-client relationship and what ethical violations, if any, did Linda commit at the time the attorney-client relationship was created? Discuss.

2. What are Linda's ethical obligations with regard to:

    a. Ellen's employment agreement? Discuss.

    b. Ellen's request for confidentiality regarding the source of the survey data? Discuss.

Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

1. In order to have an effective attorney-client relationship, particularly when dealing with business associations, identification of the client is critical. The fact pattern is unclear as to the identity of the client. The potential clients are (1) Ellen individually, (2) Nonprofit, Inc., and (3) both.

Based on the facts presented, it is likely that Linda was representing Nonprofit only. Ellen said "*Nonprofit* would like to *retain* Linda to help it develop a formal employment agreement with Ellen." At the same time, Linda has experience representing "small businesses," and it does not indicate that she has experience representing employees individually in negotiations with such businesses.

Importantly, a lawyer representing a corporation does not represent that corporation's employees, including senior officers and even if there is only one employee. The corporation is a distinct legal entity entitled to independent and zealous counsel. Therefore, on the facts presented, Nonprofit is probably the only client at the inception of the attorney-client relationship.

It does not matter that Ellen was the company's only employee, because there is no merger in such a situation–not even when the sole employee is also the sole shareholder. Here, it was a nonprofit, and therefore it is all the more clear that the attorney-client relationship was with Nonprofit only.

A very important (but missing) fact is Linda's fee. The client can often (but not always) be identified based on who is paying the fee. There is no reference to any fee arrangement. It thus appears that Linda is doing this work pro bono. The ABA does not require written fee agreements. If Linda was receiving a fee and more than $1000, she might have violated the California rule requiring such agreements to be in writing if not for the fact that Nonprofit is a corporation, because that is an exception to the rule on written fee agreements (other, inapplicable exceptions include when the client in writing says it does not want a written fee agreement or there is a prior relationship and an exigent circumstance arises requiring prompt action by the lawyer to protect the client's interests). If Ellen paid the fee personally, however, that would materially alter the analysis and suggest either (1) an unethical dual representation of parties with an actual conflict without a waiver (which would have had to be obtained from members of the Nonprofit board since Ellen couldn't authorize that herself due to her own conflict), and also it would have required the fee agreement in writing as to Linda if over $1,000, or (2) improper payment of legal expenses by a third party, without taking adequate precautions to ensure independent representation and preservation of confidentiality.

Despite the fact that the representation is for the company and, the absence of a written retainer agreement clearly identifying the client and the scope of representation is problematic. Indeed, it is clear that Ellen is receiving personal legal advice from Linda. Ellen also asked Linda to advance her personal interests and withhold information from the board. Although this

happened after the initial attorney-client relationship was formed, it could arguably have created a reasonable expectation by Ellen that Linda was her personal lawyer, too. To the extent that this rose to the level of creating an attorney-client relationship with Ellen individually, as noted above, that would be unethical. It is an improper dual representation of clients with actually conflicting interests in the absence of an effective disclosure and consent. The ABA rules apply a reasonable lawyer standard that prohibits representing actually conflicting clients unless the lawyer reasonably believes that it will not materially impair their ability to perform the required legal services competently and diligently. That conflict waiver must be confirmed in writing by both clients affected by the joint representation, after receiving complete disclosure of the risks from the lawyer. In California, there is no reasonable lawyer standard; the rule applies to both potential and actual conflicts; in case of conflicts between clients (as here), the disclosure must be in writing as well as the clients' consent to it; and in case of personal and professional conflicts, the disclosure must be in writing. Here, no such waiver occurred. Again, Ellen could not have authorized it herself on behalf of the corporation, even though she was the only employee, because she was conflicted. Consent to the dual representation could only have come from the board (since it's a nonprofit, there are no shareholders to potentially consent instead).

Moreover, Linda should have advised Ellen to retain independent counsel (though Ellen was free not to do so if she chose). From the fact that Ellen drafted an employment agreement, it is unclear whether Ellen herself was a lawyer but it certainly suggests that she did not believe she needed a lawyer of her own. Still, especially in this situation, Linda should have told Ellen this suggestion.

In conclusion, on the facts presented (though some important ones are missing), the client was Nonprofit only and Linda did not *clearly* violate any ethical rules at the point when the relationship was created. Based on Linda's subsequent discussions with Ellen, however, it seems clear that Ellen did not understand the scope of Linda's duties and may have believed Linda to be her personal attorney, and therefore under the circumstances, Linda should have disclosed the scope of representation more clearly and ideally had a written retainer agreement making that clear to Ellen.

2.a. **With respect to the employment agreement, Linda was obligated to zealously and competently represent Nonprofit's interests.**

The fact that Ellen drafted the employment agreement is not necessarily unethical in and of itself. A lawyer is entitled to rely on their employees and independent contractors to perform services subject to their supervision. A lawyer can also allow a client (or in this case, the employee of a client) to prepare documents so long as the lawyer exercises diligent and competent review and independent legal judgment in rendering advice. Here, because Ellen was on the other side of the transaction, it was essentially her opening offer to Nonprofit.

Upon receiving the draft from Ellen, Linda was required to review the document carefully and to attempt to revise and negotiate the terms to benefit Nonprofit. Because it was drafted by a nonlawyer (presumably), Linda was also required to review the draft to ensure compliance with all applicable laws. (The most significant issue presented in these facts is the salary, based on

the source of the info, and that is discussed in part b.)

When Linda recognized that the terms were unusually favorable to Ellen, she should have pushed back on those provisions and attempted to at least get them to conform to what is standard in the typical employment agreement.

At the minimum, if Linda did not seek to negotiate or revise the draft herself, Linda was right to call for a board meeting because she is obligated to tell the board about the provisions that she has recognized as too favorable to Ellen. A lawyer has the duty to communicate with the client, and where, as here, the only employee is in an adverse position, the board represents the interests of the corporation.

As a lawyer, Linda is not obligated to make business decisions for her client. The decision about the terms and how much ultimately to pay to Ellen is one for the board, not Linda.

Linda is also required to inform that board that it cannot have a privileged conversation with her about the employment agreement if Ellen is present. Accordingly, Linda should probably recommend that the board chair retract his invitation to Ellen, or at the very least ensure at the outset of the meeting that they all understand that there will be no privilege between them.

2.b. **The duty to communicate includes the duty of candor and honesty to the client. Here, Linda could not honor Ellen's request for confidentiality because Nonprofit is her client, not Ellen. Linda is obligated to ensure that Nonprofit has all material facts relevant to the contract when deciding whether to agree to Ellen's requested salary.**

Even if this were a dual representation situation, where Linda represented both Ellen and Nonprofit, she would have a duty to disclose this fact to Nonprofit's board because the fact is material to the representation. It is one of the reasons why disclosures in such situations are so critical, because it puts the duty to protect confidentiality in tension with the duty to communicate, and in a joint representation, that means disclosing all facts material to the representation.

Linda should have told Ellen that she could not honor her request.

Linda would not have to tell the board that Ellen violated her duty of loyalty to Nonprofit, however, because the duty of loyalty is not implicated when negotiating employment agreements. That said, Linda should tell the Board that Ellen asked her to keep the information secret, as that is important for the board to know when making the decision about whether to expand Ellen's current untitled role.

QUESTION 2: SELECTED ANSWER B

1. With whom did Linda establish an attorney-client relationship, and what ethical violations did Linda commit at the time the Attorney-client relationship was created

Attorney Client Relationship

Organizational Client

When a lawyer is hired to represent a corporation or organization, the lawyer's fiduciary duties are to the organization and not to the individual members, directors, or officers. A lawyer has a duty to act on the best interests of the organization and can, therefore, not engage in conduct which would benefit any individual or group of individuals at the expense of the organization.

Here, Linda was contacted by Ellen, who said that Nonprofit would like to hire her. Linda was further told that this was for the purpose of creating a formal employment agreement with Ellen, to make her the Executive Director of the Nonprofit. Therefore, Linda was hired by Nonprofit and as such, owed fiduciary duties to Nonprofit and not to Ellen.

Linda's Ethical Violations

Fee Agreement

Under ABA, a lawyer who agrees to represent a client must not put the agreement in writing, unless it is for contingency fees. However, California Rules of Professional Conduct, mandate that lawyers must put the agreement in writing if it is over $1000. However, when the client is an organization, or a repeat client (or if there is an emergency) a lawyer does not have to write up the agreement.

Here, since Linda is representing Nonprofit, which is an organization, Linda did not violate the ABA or CA rules by failing to put the retainer agreement in writing for the purpose of the fees.

Duty of Loyalty

A lawyer owes her client a duty of loyalty, which includes the duty to avoid a conflict of interest. A conflict can arise where the lawyer knows that her client's interest will be materially adverse to that of the lawyer's own interest, or another client. When such a conflict arises, a Lawyer might still be allowed to represent the clients so long as there is no claim by one client against the other, such representation is not prohibited by law, and the lawyer's lawyer gets the informed written consent of both clients. California also allows a lawyer who has a potential conflict of interest to continue to represent the clients so long as there is informed written consent.

Here, Linda is not officially representing Ellen. However, the fact that Ellen is the one who

reached out to Linda, and the fact that the representation was for the purposes of drafting up an employment agreement between Nonprofit and Ellen, suggests that Linda was at least informally also representing Ellen. This would create a concurrent conflict of interest. As such, Linda should have sought the informed written consent of the board of Nonprofit, before she agreed to represent t Nonprofit in the manner Ellen asked. There are no facts to suggest that Linda did this and therefore, she was likely in violation of her duty of loyalty to Nonprofit.

Duty of Diligence

Under both ABA and CA, a lawyer has to promptly, adequately and zealously represent her client.

Here, Linda failed to adequately represent her client, Nonprofit, when she failed to inform Nonprofit of the potential conflict of interest that could arise. Given the fact that Linda had experience in representing businesses, both nonprofit as well as for profit, further gives rise to the fact that she should have sought t the written consent of Nonprofit before agreeing to representing them in the matter regarding Ellen's employment agreement.

At this point, Linda should have informed both Ellen, as well as the Board of Nonprofit, that this might give rise to some conflict of interest issues as she was retained by Ellen, but to work on Nonprofit's behalf in forming a formal agreement with Ellen.

2.a. Linda's ethical obligations with regard to the Employment agreement

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individual's conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC a lawyer has the duty to first report up the chain to the board of directors ,for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, the employment agreement which Ellen prepared would clearly cause financial harm to the nonprofit because it would pay Ellen based on the appropriate payment for a for-profit company. Linda's client, will therefore be forced to pay more than they should for Ellen's job. Linda should immediately report this to the board of directors. Although Linda did set a meeting with the board to discuss Ellen's financial compensation. she should refuse to allow Ellen to attend so that she could discuss the fact that the employment agreement contained a number of provisions that were more favorable to Ellen than those in typical employment agreements.

Duty to Communicate

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, Linda has a duty to tell the board about the fact that Ellen drafted up the employment agreement herself. Furthermore Linda must tell the board that there are provisions in the agreements that are more favorable to Ellen than usual. These are all things that are material to Linda's representation because she is representing Nonprofit for the purpose of drafting up the employment agreement.

Linda's failure to promptly notify the board as to these matters will surely result in her committing an ethical violation.

Duty of Competence/ Diligence

(See rules above)

Under ABA, a lawyer must be competent, in terms of skill, knowledge and experience to represent her client. Under California rules, a lawyer may not intentionally, recklessly represent a client. California punishes repeated acts of incompetence in representing clients.

Here, although Linda seems to have plenty of experience representing businesses, she seems to have failed to.

(See rule above)

In addition to the rule above, a lawyer owes her client the absolute duty to act in the clients' best interest. A lawyer may not benefit herself or anyone else at the expense of her client

Here, Linda is allowing Ellen to draft up the agreement. She should not allow Ellen to do this as this would constitute a violation of her duty of competence and diligence because 3

2.b. Ellen's request for confidentiality regarding the source of the survey data

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individuals' conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC, a lawyer has the duty to first report up the chain, to the board of directors for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, Linda should certainly not keep the source of the date confidential from her own client. As discussed above, she is representing the Nonprofit and, as such, owes it her duties of loyalty. Linda should immediately report the source of the data to the board. If, for some reason, the board decided not do anything with the information, then under ABA, Linda would have to report this to a relevant agency, such as the Secretary of the State in this case. Although the nonprofit might not have shareholders, it is a 501c3 corporation which is in essence not paying taxes precisely because of its nonprofit nature. Ellen, is seeking to have the nonprofit pay her the salary that she would have earned had it been a for profit. This would potentially be a violation of the nonprofit's tax obligations and could devastate the nonprofit if was caught doing it (not to mention the harm it causes on the taxpayers as a whole). Therefore, Under ABA authorities, Linda should have reported this first to the board, and if it failed to act,. to the Secretary of State. Under CA authorities, however, Linda would not be allowed to go the extra step of reporting outside of the organization if the board fails to act. She should then seek to withdraw from representing the nonprofit.

Duty to Communicate/Duty of Diligence

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, again, Linda should communicate the source of Ellen's survey data to the board. Failing to do so will result in her being in violation of her duty to communicate as well as loyalty and diligence.

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ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the October 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

QUESTION 1

Mary is a lawyer and represents Peg in a lawsuit alleging sexual harassment against Doug. Doug's lawyer is Len and the case is set for trial in Superior Court. Mary and Len dated and were intimate in the 1990s while in law school. They remain good friends, but are no longer romantically involved. Mary has not told Peg anything about her relationship, past or present, with Len.

Mary has determined that Doug will have to pay Peg damages after trial and that the primary issue in the litigation is the amount of damages. Mary estimates that, at trial, a court could award as little as $50,000 or as much as $150,000.

Doug testified in a deposition a month ago that he had never been unfaithful to his wife. Peg confided to Mary that she has solid evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. Peg instructed Mary to use the information about the affair as leverage in settlement discussions to get the maximum amount in damages.

Mary agrees that, if she uses the fact of the affair in her negotiations with Len, the case will likely settle for a larger amount to Peg than if she doesn't mention the affair. Mary, however, strongly dislikes the idea of using that information. She is especially uncomfortable using this tactic in a case involving her good friend, Len.

1. What ethical violations, if any, has Mary committed by not telling Peg about her past and present relationship with Len? Discuss.

2. Should Mary use the fact of Doug's affair in settlement negotiations? Discuss.

3. If Peg persists, can Mary ethically withdraw from representing Peg? Discuss.

Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

I. Mary's Past and Present Relationship with Len

Duty of Loyalty

Under both the ABA rules and the California rules, an attorney has a duty of loyalty to her client. This duty includes an obligation to avoid conflicts of interest between current clients, current and former clients, clients and third parties, clients and the attorney herself, and organizational conflicts when representing an entity such as a corporation. There are two duties relevant to Mary's past relationship with opposing counsel. First, an attorney cannot represent a client when one of her personal interests materially conflicts with an interest of the client in a way that could impair the attorney's representation of the client. However, if the attorney reasonably believes -- that is, subjectively believes in an objectively reasonable way -- that she can diligently and competently represent the interests of the client, she can still represent the client as long as she discloses the issue and receives informed consent. Under the ABA, informed consent may be oral and confirmed in writing, while under the California rules there must be written informed consent. Second, there is a specific duty with respect to relationships involving opposing counsel. If the attorney has a close personal relationship with opposing counsel such as a familial relationship or close friendship, the attorney must disclose that potential conflict to the client. As with the general rule, in order to press forward with the representation, the attorney must reasonably believe that she can adequately represent the interests of the client. Under the ABA, the attorney must receive informed consent, while under the California rules the attorney

must provide the client with a written disclosure of her relationship to opposing counsel.

Here, Mary previously dated Len and was intimate with him during law school. She also considers him a "good friend." Under both the ABA and California rules, this arguably qualifies as a close personal relationship with opposing counsel akin to a familiar relationship or close friendship. As a result, out of an abundance of caution in attempting to comply with the "close relationship with opposing counsel" rule, Mary should provide Peg with written disclosure of this potential conflict under the California rules and receive informed consent under the ABA rules. Further, even if her former relationship with Len does not constitute a close relationship with opposing counsel (say, because it is less close than a best friend or parent), Mary must still receive informed consent under the broader and more general personal interest rule. Under the broader rule, she must receive informed consent confirmed in writing for the ABA rules, or informed written consent for the California rules.

Another problem worth mentioning is that Mary may not be permitted to represent Peg in this matter whatsoever, as it appears she may not be able to competently and diligently represent Peg. The problem states that Mary is deeply uncomfortable with mentioning Doug's affair even though this maneuver would likely lead to a better settlement award for her client. Specifically, it says she doesn't want to use this tactic against her good friend, Len. This suggests that even if Mary does believe that she can adequately represent Peg, that belief may be objectively unreasonable. Unless she is able to overcome her personal misgivings and zealously represent Peg, then Mary should withdraw from the representation. Further, given that litigation is ongoing, Mary would need to seek approval from the court in order to withdraw from the

representation.

II. Using Doug's Affair In Settlement Negotiations

Candor to the Tribunal

Under both the ABA rules and the California rules, an attorney owes a duty of candor to the tribunal. This means that an attorney may not knowingly offer false evidence and must correct any material misstatements or misrepresentations on the record. While an attorney may offer evidence to the tribunal if they worry, but are not certain, that the evidence may be false, in general an attorney should strive to represent their clients with candor and honesty to the court. That said, an attorney must balance this obligation against a duty to zealously represent the interests of their client within the ethical bounds of the law.

Here, it is possible that Peg's claim about the affair is true. It does not appear that Mary has investigated the truth of this claim. This means that Mary does not know for certain that the evidence is false, and she likely can offer the evidence to the tribunal without violating her duty of candor to the tribunal. That said, some courts interpret the duty of candor to the tribunal to include properly investigating the factual basis for any assertions. If so, Mary would need to look into the validity of Peg's assertion before bringing it up in court in order to comply with her duty of candor to the tribunal.

Duty of Fairness

Under both the ABA rules and the California rules, an attorney owes a duty of fairness to opposing counsel. This means that the attorney may not suppress evidence she is required to disclose, and ought not to lie to opposing counsel or make dishonest

representations to opposing counsel with the goal of misleading opposing counsel.

Here, as mentioned, there is no reason to think that Peg's discussion of Doug's affair is false. As a result, it would not violate the duty of fairness to bring up the affair during settlement negotiations. Thus, discussing the affair during settlement negotiations would not violate the duty of fairness to opposing counsel (unless there is reason to think Peg is lying, or Mary investigates the claim and discovers it is false).

Duty of Honesty

Under both the ABA rules and the California rules, an attorney owes a general duty of honesty to those they interact with in their role as an attorney. This means the attorney must not make material misrepresentations or state falsehoods within the scope of their role as an attorney.

Here, Mary needs to investigate the foundation of Peg's claim that Doug has had an affair. Once she investigates the claim and determines whether it is certainly false or may be true, she can rely on the evidence during settlement negotiations without violating the duty of honesty. But if it turns out that Doug is not having an affair, then Mary could not rely on this assertion without violating the duty of honesty.

Duty to Avoid Frivolous Claims

Under the ABA rules, an attorney ought not press a claim or argument unless there is a good faith basis in the law (or a good faith argument for extending or changing the law) in support of the claim or argument. In contrast, under the California rules an attorney must not press a claim when she lacks probable cause for the claim and has a purpose of harassment for pressing the claim. Part of this duty is investigating claims to ensure

that they have a proper foundation under the law.

As mentioned above, Mary needs to investigate the foundation of Peg's claim about Doug having an affair. If it turns out that the alleged affair is not real and Peg's allegation is false, then pressing this claim in order to increase a potential settlement award would be a frivolous claim or an argument without a good faith basis. That would violate the ABA rules. It may also violate the California rules, if the court believes that Mary lacks probable cause (given that she did not investigate the claim or she did or that she did and it turned out to be false or highly unlikely) and that she had a purpose of harassing opposing counsel in order to raise the settlement award. Thus, Mary needs to investigate the claim and ensure she has a good faith basis and probable cause to support bringing up the alleged affair during settlement negotiations.

Duty of Competence

Under both the ABA rules and California rules, all attorneys have a duty of competence to their clients. This includes having the relevant skills, knowledge, and preparation to adequately represent the client. In California, this also includes having the relevant mental and physical capacity, and an attorney must not recklessly, intentionally, grossly negligent, or repeatedly violate this duty.

Here, the idea that Mary must investigate Peg's claims goes in two directions. If she fails to investigate the claim, then she is not competently representing the client under the ABA rules and she is arguably reckless or grossly negligent with regard to her duty to investigate, and is thereby failing to adequately represent Peg under the California rules as well. On the other hand, if she investigates the claim and it does have a factual foundation in the truth, then Mary would arguably be incompetent if she did not raise

this claim during settlement negotiations as she would be failing to zealously represent the interests of her client within the bounds of the ethical rules. Thus, Mary must investigate Peg's claim and if it is true, she must press the claim in order to avoid violating the duty of competence.

Scope of Representation

Under both the ABA rules and California rules, an attorney must follow the bounds of the scope of representation. Some issues are solely up to the discretion of the client, including whether to accept a settlement offer, whether to testify, and whether to waive a jury trial right. The client also has full control over the goals and ends of the representation. However, the attorney has control over the means of representation, subject to a duty to consult with the client and communicate with the client about the means of the representation.

Here, whether to bring up the affair during settlement negotiations is arguably a "scope of representation" issue that falls within the means of representation, much like what questions to ask during a deposition and what witnesses to call during a case. However, Mary must consult with Peg and must communicate with Peg about this strategic issue. Thus, in order to comply with her ethical duties, Mary must discuss and consult with Peg regarding this issue.

Duty of Communication

Under both the ABA rules and the California rules, an attorney has a duty to communicate with the client. This includes keeping the client apprised of any

developments in the case, letting them know about written settlement offers or other major settlement offers, and generally consulting with the client and keeping in regular contact.

Here, Mary must communicate with Peg regarding whether to disclose the affair during settlement negotiations, as this is a strategy that she must discuss with Peg and consult with Peg given her duty of communication.

Duty Involving Leverage in a Civil Case

Under the California rules, an attorney must not threaten criminal or disciplinary action in order to obtain an advantage or leverage in a civil case. Here, if it is possible that Doug's affair could subject him to disciplinary or criminal risk, then Mary must not leverage that risk in order to obtain a larger settlement award for Peg. On the other hand, if the affair would not subject Doug to criminal or disciplinary risk, then Mary must leverage these facts in order to fulfill her duty to zealously represent her client.

Duty to "Tattle" On Opposing Counsel

Under the ABA rules, if an attorney has actual knowledge that another attorney has violated the ethical rules or has taken some action that materially reflects poorly on their fitness as an attorney, they must disclose these facts to the state bar association or other ethical authority. In contrast, the California rules do not have a similar provision except that an attorney must disclose certain issues related to their own ethical standing. For example, an attorney must disclose if three or more malpractice suits have been filed against them within one year, or if they have been convicted of fraud or a felony involving moral turpitude.

Here, Mary has not violated the California rule, but she may violate the ABA rule if she thinks that Len allowed his client to knowingly lie during his deposition testimony when he said that he had never been unfaithful to his wife. If Mary knows that Len was aware of Doug's affair, then she also knows that Len violated his duty of candor to the tribunal and his duty of fairness and honesty, and she must disclose that fact to comply with her duty to "snitch" or "tattle" on other attorneys.

III. Withdrawal From Representation

Mandatory Withdrawal

Under the ABA and California rules, an attorney must withdraw from representation in a few circumstances. First, an attorney must withdraw from representation if their health impairs their ability to represent the client. Under the California rules, that impairment must make the representation "unreasonably difficult," while under the ABA rules it must materially impair the attorney's ability to represent the client. Second, an attorney must withdraw from representation if the representation would necessarily lead to or facilitate a crime or fraud. Third, an attorney must withdraw from representation if the representation would violate an ethical rule (in California) or would violate an ethical rule, a civil law, or a criminal law (under the ABA). Fourth, an attorney must withdraw if they are fired by the client. Finally, an attorney must withdraw if the client is asking them to press a frivolous claim, under the definitions provided above (e.g., probable cause and harassment in California, or lack of good faith under the ABA).

Here, none of the mandatory bases for withdrawal have arisen as of yet unless Mary cannot competently represent Peg given her prior relationship with Len, in which case she must withdraw from representation. Additionally, if Mary investigates Peg's claim

about the affair and it turns out to be false, but Peg insists on raising it during settlement negotiations, then Mary must withdraw if continuing would lead to fraud. She must also withdraw if continuing would violate the duty to avoid frivolous claims, or any other ethical duty (under California rules) or ethical duty, criminal law, or civil law (under the ABA rules). If any of those scenarios occur, then Mary must withdraw from representation.

Permissive Withdrawal

Additionally, there are circumstances where an attorney may withdraw from representation permissively. These include when the client materially violates the retainer agreement and the attorney provides a warning that they will withdraw if the client does not cease their violation, lesser forms of crime or fraud such as if the client is seeking to commit a crime or fraud in the future or if the client is trying to force the attorney to engage in a crime or fraud, if the attorney's health impairs the representation to a lesser degree, if there is good cause shown, if representing the client has become unreasonably difficult (including under the ABA if the client and attorney have a fundamental disagreement), and for a variety of other reasons. Under the ABA, an attorney can withdraw for financial reasons or for any reason that won't materially harm the client, and under the California rules an attorney can withdraw if they have a serious disagreement with co-counsel such that withdrawing is in the best interest of the client, or if the client wants to press an unwarranted claim or argument.

Here, even if the mandatory withdrawal criteria outlined above are not met, Mary could withdraw from representation if she feels too morally conflicted about raising the affair during settlement negotiations, assuming this is a fundamental disagreement (under the

ABA) or means that the client has made representation unreasonably difficult (California rules). She can also withdraw if she investigates the affair claim and believes it does not have a strong basis in the truth and may therefore represent a crime or fraud. If she is so overwhelmed with her own guilt, she might also be able to withdraw permissively if she feels her personal mental health is so affected that her ability to represent Peg has been impaired. She also might be able to withdraw from representation if the court believes that a disagreement on this point with the client represents "good cause." And under the ABA, if she can show that withdrawal would not harm Peg, then she can also permissively withdraw on that basis alone.

Steps After Withdrawal

After withdrawing from representation, an attorney must take four steps under both the ABA rules and the California rules. First, an attorney must return any unearned fees, although in California they may retain any true retainer fees or referral fees. Second, an attorney must return all of the client's personal property and papers, which they must have carefully safeguarded in the meantime. Third, an attorney must mitigate any potential harm to the client. Finally, an attorney must give the client proper notice and a reasonable amount of time to find new counsel.

Further, during ongoing litigation, an attorney must seek leave from the court before withdrawing. If the court denies the request, then the attorney must continue to zealously represent the client.

Here, if Mary does withdraw from representation, then she must comply with these requirements.

QUESTION 1: SELECTED ANSWER B

1. Mary and Len's Relationship

Duty of loyalty--conflict of interest in accordance with both the ABA and CA rules

A lawyer owes their client an undivided duty of loyalty. This includes the duty to avoid conflicts of interest. A conflict of interest can be actual or potential, and arises when the representation is directly adverse to the interest of another client whom the lawyer represents in the same or substantially similar matter, or when there is a significant risk that the representation will be materially limited by the lawyer's own personal interests, the interests of a former client, or a third person.

Significant risk of material limitation--Mary and Len's Past relationship

Here, the case does not involve a situation where Mary is representing one who has an interest directly adverse to another client of hers, but rather there is a situation where there could be a significant risk of material limitation in Mary's ability to represent Peg due to Mary's own personal interests with having previously been romantically involved with Len.

Because Mary could be inhibited by her prior romance with Len by not representing Peg with the utmost loyalty, and because it could potentially cause issues with Mary's ability to effectively represent Peg, Mary had a duty to disclose the conflict to Peg.

Significant risk of material limitation--Mary and Len's current relationship

In addition to the prior romance, there is also likely an actual conflict of interest here and

thus likely an actual significant risk of material limitation in her ability to represent Peg as the facts tell us that despite not being romantically involved anymore, Mary and Len remain "good friends". The facts further evidence this later on by Mary's discomfort in using the facts and tactic that Peg is suggesting (to be discussed further below) due to the case involving her "good friend Len."

Once again, because Mary's relationship with Len is likely impacting her ability to zealously represent Peg and causes her to not have her sole focus and attention on loyally and faithfully representing Peg, Mary had a duty to disclose the conflict to Peg.

Waiving the conflict--ABA rules and CA rules

Even though a conflict persists, a lawyer still may be able to represent the client if they take the proper measures in addressing the conflict and waiving it. The lawyer may only continue the representation if: (1) they reasonably believe they can diligently and competently represent both clients; (2) the representation is not prohibited by law; (3) the claims do not involve a direct assertion by one client against the other; and (4) the client gives informed consent, confirmed in writing. The California rules are the same, except that it requires both the disclosure and the consent to be in writing, as opposed to just 'confirmed' in writing like the ABA.

Here, Mary may argue that she was able to diligently represent both clients since she was still assessing the case, determining that Doug would have to pay Peg damages after trial, and that the primary issue was the amount to be given, and was making estimates etc. Although, there is also a counter to this in the sense that Mary was considering how Len would feel when considering tactics to use in settlement negotiations (to be discussed more below.)

Although there are no facts that the representation is prohibited by law, regardless, Mary had a duty to disclose the actual and potential conflicts to Peg and to get her informed consent, confirmed in writing (ABA) or to disclose in writing and get Peg's consent in writing. Mary failed to do this.

Conclusion

Mary violated the ABA rules and committed an ethical violation when she did not disclose her past and current relationship with Len and did not get Peg's informed consent, confirmed in writing, to continue the representation.

Mary violated the CA rules for not disclosing the same issues, as well as not disclosing in writing and getting Peg's consent in writing.

California duty to disclose despite no significant risk of material limitation

California has a specific rule that despite when there is no significant risk of material limitation in the representation, the lawyer still must disclose, in writing, to the client, when they or someone at their firm, has a personal, professional, financial or business relationship with another party or witness, or the lawyer of the other party or witness is a family member, spouse, or lives with the lawyer, or the lawyer has an intimate or sexual relationship with the other party or lawyer.

Here, even if Mary wanted to argue that her past or current relationship with Len did not raise any significant risk of material limitation in her representation of Peg, under the CA rules, because Mary has a past and current relationship with Len, this constitutes a 'personal relationship' with the other party, specifically the other party's lawyer, and in addition she had a prior intimate relationship with him.

Thus, regardless of what Mary felt about the risk, she still had a duty to disclose her relationship with Len, in writing, to Peg.

Conclusion

Because Mary did not disclose her relationship with Len in writing to Peg, she committed an ethical violation of the CA rules.

2. Mary's use or non-use of the facts of Doug's affair in settlement negotiations

Duty of care/diligence in accordance with both ABA and CA rules

A lawyer has a duty to pursue a case with the care and diligence that one would bring to their own personal matters. This includes the duty to: (1) research facts; (2) investigate matters; and (3) put in the time needed to present an adequate representation of their client's case.

Here, Mary would have a duty to investigate the facts of the evidence that Peg is presenting to her. Mary should not ignore what Peg is saying to her, as discussed below. Mary has a duty to pursue all legally available avenues in the representation, and because Mary has a duty not to present dishonest or frivolous or lies to opposing parties, Mary should look into what Peg is disclosing to her in order to make sure she is doing her due diligence.

Mary agrees that the fact of the affair would help Peg in settlement negotiations, and further, as discussed below, Doug alleged under oath that he has not been unfaithful to his wife which goes directly to the claim of his sexual harassment of Peg because that could be construed as the same thing as him saying he did not sexually harass Peg.

Mary had a duty to research the facts that Peg is presenting to her and investigate it, and take the time needed to adequately prepare the case for Peg.

Conclusion

Mary should take the care and diligence to pursue the use of the facts of the settlement negotiations, and as long as she has no reason to believe it is something made up by Peg in order to just humiliate and embarrass Doug (something which would be in violation of the professional rules), Mary should use the facts in settlement negotiations.

Scope of representation

A lawyer has a duty to pursue all legally available avenues in representing the client and defending their case. The client has authority to decide whether or not to accept a settlement, whether or not to take a plea deal in a case, etc. The client controls the objectives of the case, while the lawyer decides the tactics and the strategic moves of the case.

Here, Peg is telling Mary that she has 'solid' evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which is wife is unaware. The facts tell us that this is a claim about sexual harassment by Peg against Doug, and in addition, the facts tell us that Doug testified in a deposition (thus under oath) that he has never been unfaithful to his wife. This statement by Doug goes directly to Peg's allegation because if Doug had never been unfaithful, that means he would have never sexually harassed Peg. Thus, the fact regarding whether or not Doug has been unfaithful to his wife is relevant. Mary has determined that Doug is going to owe Peg damages, but it is just a matter of how much, and agrees that using the facts of the affair in her negotiations with Len will likely result in a larger amount, which as the

lawyer for Peg, should be what Mary wants to pursue.

Further, because the facts are actually relevant to the litigation, it would not be unethical for Mary to use the facts. Doug put it at issue by stating under oath he has not been unfaithful to his wife. Although Mary has the authority to control the tactics for litigation, Peg as the client determines the objectives and the theory of the case and Mary should be pursuing all legally available matters, and it is not a violation to use the facts.

Conclusion

Mary should use the facts (subject to the above conclusion that she reasonably believes there is some merit to them) since it is a legally available avenue that would help defend her client's case and provide her with the best results in a way that does not violate the rules.

3. Mary's ability to withdraw if Peg persists

Withdrawal

One only needs to mandatorily withdraw from representation, in accordance with both ABA and CA rules, if the representation will result in a violation of the ABA or CA rules or statute, if the lawyer's physical or mental ability will impair the representation, or if the lawyer is discharged. In addition, in CA, a lawyer must withdraw if they know the client does not have probable cause for their case and it is solely malicious.

Here, none of those facts are present so we must look to permissive withdrawal.

Permissive withdrawal

Under the ABA, a lawyer may withdraw if they reasonably believe the representation will result in an ethical violation, if the client has already used their services to commit a

crime or fraud, if the client has failed to substantially fulfill an obligation to the lawyer, such as pay their fee, if the client is insisting on pursuing a matter in a way the lawyer finds morally repugnant or fundamentally disagrees with, or if they can do so without material adverse effect on the client, or any other good cause.

California is similar except it does not allow withdrawal solely because the lawyer fundamentally disagrees with the way the client wants to pursue the case, or even if they can do so without causing material adverse effect on the client. However, it does allow the lawyer to withdraw for good cause.

Here, Mary agrees the facts would help the settlement negotiations, but she strongly dislikes the idea of using that information, and especially feels uncomfortable because of her relationship with Len. “Strongly disliking” is likely not sufficient under the ABA rules as it has to be a fundamental disagreement or something she finds morally repugnant, and it is certainly not sufficient for withdrawal under CA rules. Further, the fact that she is especially uncomfortable because of her friendship with Len is not grounds under either rule.

There are not a lot of facts about whether Mary can withdraw without causing Peg material adverse effect, which is only allowed under ABA, however, it seems they are already well into litigation and have already taken depositions and Mary has already determined what is needed for the case, it would likely be difficult for Peg to find effective new and efficient representation.

Further there is ultimately no good cause to withdraw at all.

Conclusion

Mary likely cannot ethically withdraw under either ABA or CA rules as there is no good cause to withdraw under either rule, and Mary disliking a course of representation is not sufficient under the ABA rules.

The State Bar of California

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 4

Linda Lawyer is just starting out in practice. She arranges with Chiro, a chiropractor, to give Linda's name to his patients who have been in car accidents or falls. When Linda recovers money in contingent-fee lawsuits for Chiro's patients, she gives Chiro a gift, which they have agreed will be 5% of Linda's fee. If Linda recovers nothing, Chiro receives no gift. They also form a partnership, in which Chiro's services are described as "marketing."

Pete is one of Chiro's chiropractic partners. Chiro sends Pete to Linda because Pete is seeking a divorce from his wife Alice.

Pete tells Linda he can never forgive Alice because she was unfaithful. Pete tells Linda that he's having money problems and asks that she take the case on a contingency basis. Linda tells him she'll consider it if he'll have drinks with her. Pete feels he has little choice, and goes out with her. Linda initiates a sexual relationship with Pete, and agrees to take the case. Linda is increasingly distracted from Pete's case by her desire to spend time with him, sometimes filing papers hurriedly and narrowly avoiding deadlines.

Tom, Alice's divorce lawyer, calls Linda one day and says, "I know you're having sex with Pete. Either you settle this case cheaply, or I'll report you to the Bar." Linda decides to beat Tom at his own game and, without telling him, calls the Bar herself and reports his threat.

1. What ethical violations, if any, has Linda committed with respect to her:

    a. Financial arrangement with Chiro? Discuss.

    b. Partnership with Chiro? Discuss.

    c. Relationship with Pete? Discuss.

    d. Accepting Pete's case on a contingency basis? Discuss.

2. What ethical violations, if any, has Tom committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Q1. What ethical violations, if any, has Linda committed with respect to her:

a. Financial arrangement with Chiro?

Fee for referral

Under ABA and California rules, a lawyer may not arrange referral agreements with non-lawyers for a fee unless it is a qualified reciprocal referral service.

Here, Linda made an arrangement with Chiro, a chiropractor who gives Linda names of his patients who have been in car accidents. This is not a qualified referral service and it involves procuring clients from a chiropractor who would see patients who come following car accidents. Their names would then be given to Linda who would then presumably contact the clients.

Thus, Linda violated the rules by engaging a non-qualified referral arrangement.

Gifts

Under ABA rules, lawyers are not permitted to solicit substantial gifts. Under California rules, gifts for past referrals are permitted as long as there is an understanding that the gift is **not a consideration** for future referrals and the gift is "fair".

Here, Linda gives the gift of 5% for the names. They do have an understanding that Chiro will continue to receive "gifts" if he keeps giving her name and she recovers fees from those representations. Thus, the arrangement with "gift" is prohibited under California rules.

Solicitation

Under ABA rules, solicitation, whether personally or through an agent, is prohibited. Solicitation is direct communication with a person in order to gain representation for a **financial gain**. Under California rules, direct solicitations in hospitals and medical facilities are **presumed** unethical.

Here, Chiro is referring the clients to Linda. In effect, Linda is soliciting injured clients directly after she gets their names from Chiro, knowing that they might need a lawyer following an accident for a financial gain of representing them in a case for a fee. This is especially egregious as recognized by California rules because the clients are vulnerable in these situations when they were involved in a car accident and are easily manipulated, especially when the clients are not aware of the arrangements.

Thus, Linda violates both ABA and California rules by soliciting these patients.

b. Partnership with Chiro?

Partnership with a non-lawyer

Under both ABA and California rules, a partnership with a non-lawyer is strictly prohibited to **avoid** any improper influence on a lawyer.

Here, Linda has formed some sort of partnership with Chiro, who is a non-lawyer that they call "marketing" whereby Chiro would provide Linda with the names of the patients that Linda would then contact in order to win representing them. Because partnership would involve both partners having a say in a strategy of the law firm, influencing strategic and legal decisions and otherwise influencing legal services, such arrangements are violative of ethical rules.

Thus, Linda violated both ABA and California rules by engaging in such partnership.

Sharing fees with non-lawyers

Under both ABA and California rules, sharing fees with non-lawyers is **prohibited**, unless it is for employees within a firm as part of a compensation plan.

Here, as Linda is sharing a fee with Chiro, a non-lawyer, whereby he acquires 5% of the fee for giving her names of the clients. Because Chiro is not an employee of Linda and it's not part of a compensation plan and is otherwise for an improper purpose, such fee sharing is prohibited under both ABA and California rules.

Thus, Linda violated both ABA and California rules by sharing fees in this "partnership".

c. Relationship with Pete?

Sexual relations with a client

Under ABA rules, sexual relations with a client are prohibited, unless they **pre-date** the lawyer-client relationship. Under California rules, lawyer is prohibited from coercing or otherwise **unduly influencing** a client into sexual relations.

Here, Linda started dating Pete after she took him on as a client. Their relationship started at the same time and did not pre-date the lawyer-client relationship. Additionally, Pete felt like he "had no choice" indicating that there was a coercion and the relationship was not entirely voluntary. This is especially egregious because she knew that Pete and Alice were divorcing, and he would be in a vulnerable situation from his wife being unfaithful. These circumstances in total show that sexual relations resulted from an improper influence and coercion.

Thus, under both ABA and California rules, sexual relations with Pete was a violation of ethical duties by Linda.

Competence

Under both ABA and California rules, a lawyer must represent a client and act with a **skill, effort, preparation** and diligence of a r**easonable attorne**y in the like circumstances. If the lawyer cannot competently represent a client, s/he must 1) withdraw from representation, 2) acquire knowledge and skill before performance arrives, or 3) associate him/herself with a competent lawyer or seek advice from an experienced lawyer.

Here, Linda let her relations with Pete affect her performance as an attorney. She was distracted by Pete and because she wanted to spend more time with him, she frequently underperformed, filing papers in a hurry and only narrowly avoiding deadlines. That would be below what a reasonable attorney would do under the circumstances. Thus, Linda violated her duty of competently representing a client. Additionally, she likely should not have taken the case in the first place. She is a new attorney, she is taking accident cases and Pete's case was a divorce case. Ordinarily, it would not be a violation if she acquired the knowledge and expertise. However, she is frequently missing deadlines and otherwise not engaging in an exemplary competence.

Thus, Linda violated her duty of competent representation under both California and ABA rules.

Current conflict

Under ABA rules, a current conflict exists if 1) representation is adverse to one of the clients, or 2) representation is **materially limited** by responsibilities to other clients, third parties, or l**awyer's own interests**. Lawyer may still continue to represent despite a conflict, if 1) the lawyer reasonably believes that s/he may still competently represent a client, 2) obtains written consent from a client. California rules are similar but do not have a "reasonableness" requirement.

Here, Linda's own interest in sexual relations with Pete are likely in conflict with Pete's divorce case. Her own interest in him is likely to be in conflict with a representation in a divorce case where she would have to be impartial. She has a personal interest in the case, creating a conflict.

Thus, Linda likely violated her duty to Pete under both California and ABA rules.

d. Accepting Pete's case on a contingency basis?

Contingency fee agreements

Contingency fee agreements are agreements whereby a lawyer recovers a percentage fee of the recovered amount. Generally, contingency fee agreements are permitted. They must be in writing and clearly indicating how the fee is calculated. However, contingency fees are **prohibited in domestic relations** cases for policy reasons because there is a danger that such agreements would promote divorces. There are certain exceptions such as recovering alimony judgment due.

Here, Linda said that he would take a case on a contingency basis because Pete is having money problems. Because the case involves divorce, such arrangement is

prohibited.

Thus, Linda violated ethical rules under both ABA and California rules.

Q2. What ethical violations, if any, has Tom committed?

Threatening with administrative action to gain advantage in a current litigation

Under California rules, threatening with administrative action or any other civil action or prosecution to **gain advantage** in a current litigation is prohibited. Under ABA there are no such rules.

Here, Tom threatened that he would report Linda to the Bar about her relations with Pete in order to gain advantage in the current divorce proceedings where Linda is an adversary attorney. Such threat is strictly prohibited under California rules.

Thus, Tom violated California rules by making such threats.

Reporting violations of the rules to the authorities

Under ABA, a lawyer must report violations of the ethical rules. Under California, there is no such reporting requirement. However, under California rules, the lawyer him/herself must report to the bar of any own professional misconduct.

Here, it would be a violation for Tom not to report Linda's misconduct to the bar under the ABA rules but not under California rules.

Thus, Tom violated ABA rules by not reporting the misconduct.

QUESTION 4: SELECTED ANSWER B

1. Ethical Violations of Linda

In California, lawyers are obligated to comply with the ethical rules promulgated by the Rules of Professional Conduct (RPC) and the State Bar Act (SBA). The ABA also promulgates the Model Rules (MR) which CA will take under advisement in conjunction with the CA rules.

a. Financial arrangement with Chiro

Referral fees

Under the MR, lawyers are prohibited from engaging in exclusive referral arrangements that result in a pecuniary gain for the lawyer, absent participation in an approved attorney referral program. Here, L has made an agreement with C to give L's name to his patients when they suffer personal injuries and when L recovers for these patients, she will pay him a gift of 5% of Linda's fees. Under the MR, referral fees are strictly prohibited and as such, L is in violation of the rules regarding referral fees as they are prohibited under the MR.

Under the CA rules, lawyers may not engage in straight referral fee arrangements; however, they may provide a gift as a gesture of thanks when a referral is provided. The gift must be given as purely a gesture of thanks and not for the purpose of a quid pro quo or for securing future referrals. Here, L has arranged with C to give him a gift that amounts to 5% of L's fee in contingent fee lawsuits. Even though they

call this a gift, it is clearly not a gift. There is a clear quid pro quo arrangement whereby L is paying C for referring business. L is likely to argue this as well. She will argue that it is a gift pure and simple and she has called it as such, but this argument will not succeed. A referral fee disguised as a gift is not permitted under the CA rules. As such, L has violated the CA ethical rules by agreeing to pay a referral fee to C in exchange for his referral of clients.

Additionally, any referrals cannot be exclusive. It is not clear that the arrangement is exclusive, but to the extent that it is, it is not permitted. L may also attempt to argue that there is no quid pro quo because she is not offering to send patients to C, but this will fail because the exchange of money for the referral of patients is the quid pro quo and thus, is a violation of the rules.

Fee Splitting

Under the MR and the CA rules, lawyers are strictly prohibited from splitting fees with non- lawyers. The exception to this rule is where fees are paid to non- lawyers for compensation, as retirement benefits, and the like. Here, L is purporting to split the fees she earns as a lawyer with a non- lawyer, the chiropractor, C. This is strictly prohibited under the MR and the CA rules. L will likely attempt to argue that she is permitted to compensate staff for wages and earnings resulting from the work they perform on behalf of her and in assisting her in her cases, but this argument will fail. C is a chiropractor and even though it seems that L and P have agreed to form a partnership, it does not change the fact that lawyers are not permitted to split fees with non- lawyers.

Solicitation

Under the MR and CA rules, solicitation is prohibited when it is in person or live direct telephone or internet chat in nature. Here, the facts indicate that C's services are described as marketing services, meaning that C is likely conducting in person solicitation of L's services as a result of the in person patients C meets as part of his job as a chiropractor. While L might argue that C is merely a conduit and there is no guarantee that C's clients will turn to L for legal services, C will be deemed to be engaging in solicitations on L's behalf. As such, this marketing/solicitation agreement will be another of L's violations of ethical rules.

b. Partnership with Chiro

Formation of Law Partnership

Under the MR and CA rules, lawyers are not permitted to form law partnerships with non-lawyers. Here, the facts indicate that L and C formed a partnership and C's services are described as marketing. While law firms do typically have marketing departments whereby they market themselves outside of the firm, a law partnership between a lawyer and a non-lawyer is strictly prohibited.

Here, the facts indicate that C is a chiropractor, not a lawyer. There is no information to suggest that C is a lawyer and as such, the joining of L and C as partners as a lawyer and marketer is a violation of the ethical rules under both MR and CA analyses.

Splitting Fees

As discussed above, L and P's partnership, which by implication means they are sharing in the profits and losses of their respective businesses, is a violation of the fee

splitting rules promulgated by the CA rules and the MR. C and L's partnership is improper between a lawyer, and also due to the fact that C is sharing in the profits of L's cases potentially, L's partnership arrangement is a violation of the ethical rules under both CA and MR.

c. Relationship with Pete

Duty of Loyalty

A lawyer has a duty of loyalty to act in the best interests of their clients and exercise independent professional judgment. When a personal conflict of a lawyer may materially limit their ability to represent a client to the best of their ability, they may be in violation of their duty of loyalty. A lawyer may represent a client when there is a personal conflict if he or she believes objectively and subjectively that he can provide representation that is not limited, it is not prohibited by law, it is not in violation of the ethical rules, and the client gives informed written consent (CA) or informed consent, confirmed in writing (MR). Here, while it is highly unlikely that a lawyer engaged in sexual relationship with a client can give objectively solid representation, this representation is likely in violation of the ethical rules that prohibit sexual relationships with clients.

Sexual Relationships with Clients

Under both the MR and CA rules, lawyers are prohibited in engaging in sexual relationships with their clients, unless the sexual relationship existed prior to the attorney client relationship. California also has a specific exclusion that applies to lawyers who are married. The conflict of interest that arises due to a sexual relationship

with a client is not waivable.

Here, the facts indicate that L met P through a referral from C. As such, P and L did not have a relationship prior to commencing their relationship as attorney and client. They clearly were not married; in fact, L was hired by P to help him secure a divorce and as such, the married couple exception is not applicable. Additionally, L may argue that P will agree to sign a waiver and indicate that he is fine with the concurrent sexual relationship and representation, but this prohibition cannot be waived by client consent. As such, L will be in violation of the ethical rules by engaging in a sexual relationship with her client that began after the representation had started.

Start of Attorney Client Relationship

The attorney client relationship begins when the client reasonably believes that the attorney client relationship begins. Attorneys and clients may meet prior to deciding to formally engage as attorney and client, but to the extent that the relationship is confirmed, the conversations that took place prior to a formal engagement will likely be deemed to comprise the start of the attorney client relationship.

Here, the facts indicate that P confided in her regarding his relationship with his former spouse, A. This initial meeting whereby P clearly gave L confidential information and conducted himself such that the relationship was likely to have started, would probably be deemed to have begun the attorney client relationship between L and P. Although L states that she'll consider the case if he has drinks with her, P's actions indicate that he believed the attorney client relationship had already begun. After the drinks outing, L initiated a sexual relationship with P, who at that point, after drinks and an initial

consultation, likely believed he was her client, even though those acts occurred before she agreed to take the case.

L will attempt to argue that she began her relationship with P prior to the attorney client relationship, but this argument will likely fail. The facts seem to indicate that P likely believed the relationship had already begun and, thus, the exception for preexisting sexual relationships is likely not applicable. As such, L likely abused her position of power and is in violation of the ethical rules to not engage in a sexual relationship with a client.

Even if L was successful in arguing that the attorney client relationship began after the sexual relationship, there are no facts indicating that P, as the client, disclosed in writing that he was comfortable to continue with the representation in light of their sexual relationship. As such, L is likely in violation of the ethical rules.

Duty to Decline Representation

A lawyer is under a duty to decline representation if the representation would lead to a violation of the ethical rules of conduct. Here, by representing P, a client L is in a sexual relationship with, L is violating the rules of professional conduct under MR and CA principles as discussed above. As such, L is under an obligation to decline representation in accordance with the expected violation of ethical rules. L is in violation of her duty to decline representation when she is in a sexual relationship with P before, in her mind, she formally undertakes the representation. She should not have undertaken the representation of P and has violated her ethical duty by doing so.

d. Accepting Pete's case on contingency basis

Interest in Cases

Under the MR and CA rules, an attorney may only obtain a financial interest in a case to the extent that it doesn't involve criminal or divorce matters. Here, the case is a divorce matter and this i *[sic]*

Contingency Fee Arrangements

Under the MR and CA rules, contingency fee arrangements are permissible so long as they are not unreasonable or unconscionable and they are not for compensation related to criminal cases or conditioned upon fees that would be awarded in securing a divorce. To be valid in CA, a contingency fee arrangement must be in writing, must include the duties and responsibilities of the lawyer and the client, must set forth the details regarding the calculation of the fee, and the fee must be reasonable. Here, L has agreed to take P's divorce case on a contingency fee basis and as such, this is a violation of the MR and CA rules. P's case is a divorce case and L is clearly working to secure a favorable divorce settlement.

L might argue that P having money problems and as such, she agreed to take on his case on a contingency fee basis to help him, but under CA rules, this is not permissible. Under CA rules, lawyers may not advance costs or fees. As L has engaged in a contingency fee agreement for P's divorce, this is a violation of both CA and MR.

Duty of Competence

Under the MR, a lawyer is under a duty to represent a client with the appropriate

knowledge, skill, and experience such that they can provide the client with competent representation. A lawyer may become competent by putting in the time necessary to gain competence or by associating with a competent lawyer. In CA, a lawyer must not knowingly, recklessly, or intentionally fail to represent their client with competence. Here, all of the other relationship issues aside, it is necessary that a lawyer be competent in the representation of the client. Here, the facts indicate that L is just starting out in practice and she seems to have perhaps some experience in the field of personal injury. She agreed to take on P's case for a divorce and it is not clear that she has any experience in this field. The facts are silent as to whether she had undertaken any steps to gain competence in the field of divorce law and whether she has associated with an experienced lawyer. Unless L becomes competent in this field or associates herself with a competent lawyer in this field, she will be in violation of her duty of competence to P under both MR and CA rules. Additionally, L is being distracted by her relationship with P, which means she is not providing the most competent representation possible. She clearly is not undertaking time and efforts necessary to competently represent P.

L might argue that P doesn't mind and will waive her incompetence, but unfortunately, waiver of competence is not permitted under either CA rules or MR. L has clearly violated the duty of competence to her client, P.

Duty of Diligence

Under the MR, a lawyer is obligated to perform their duties in a diligent and timely manner such that the lawyer is a zealous advocate for the client. Under CA rules, a

lawyer is obligated to not knowingly, recklessly, or intentionally fail to act with diligence. Here, the facts indicate that L is increasingly distracted by her desire to spend time with P and files papers hurriedly and narrowly avoiding deadlines. Due to her inability to act as a zealous advocate for P, filing his papers in a concerted manner and giving his case the appropriate time needed to ensure he is adequately represented, L is breaching her duty of diligence under both the MR and CA rules.

2. Ethical violations of Tom

Duty Not to Threaten

In CA, lawyers are not permitted to threaten opposing parties or other clients with a claim that lacks merit to gain some kind of strategic advantage. Here, T, who is A's divorce lawyer, has called L and threatened to report her for having sex with her client, P. This is forbidden under the ethical rules as it is clearly based on T's statements that he is intending to use this information to induce L to convince her client that he should settle the case. As such, T is in violation of his ethical duty not to threaten with the prospect of influencing the result of a case.

T will likely argue that he is threatening L with a meritorious breach of duty, L's personal relationship with P that she has engaged in with her client. And while this may be true, it is an inappropriate use of the information as it is clearly being used to threaten L and P regarding the outcome of the case. As such, T has violated his ethical duties by threatening L.

Duty to Report

Under the MR, lawyers are under a duty to report misconduct of other lawyers when it pertains to matters of clear and weighty importance, like truthfulness or honesty, that would impact a lawyer's ability to practice law. Under the CA rules, there is no such duty to report misconduct of others. Rather, there is a duty to self-report conduct. Here, under a MR analysis, it must be determined whether L's relationship with T is a matter of clear and weighty importance that weighs on L's ability to practice law. While it is certainly a violation of ethical duties for L to engage in a sexual relationship with her client, as discussed above, she will likely argue that it does not in any way relate to her ability to practice law or her truthfulness or honesty. T will likely argue that any violation of the ethical rules is of clear and weighty importance and L's behaviors are report worthy. It is possible that under the MR, T violated his duty to report by not reporting L's misconduct to the state bar.

In CA, as discussed above, only lawyers have a duty to self -report their ethical misgivings. As such, under CA law, T is not under a duty to report L's relationship with P.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Professional Responsibility
3.	Torts
4.	Criminal Law and Procedure
5.	Wills and Succession / Community Property

QUESTION 2

Laura is a lawyer. She practices family law in a suite she shares with Alex, a tax attorney. Laura and Alex share a conference room, a printer, and a receptionist. Their receptionist is Laura's son, Sam. Laura and Alex each use separate letterhead, business cards, and telephone numbers.

Laura represented Wendy, who was divorcing her husband Henry. Laura filed a request for child support from Henry. In his financial statement, Henry claimed that he had no significant assets and that he lived alone. Wendy told Laura that she suspected Henry was not being truthful, that he had more income and assets than he claimed, and that he lived with and shared expenses with his girlfriend, Ginny.

One morning, while picking up papers from the office printer, Laura saw and read a document addressed to Alex left on the printer by Sam. The document was a property deed in the names of Henry and Ginny, and listed Ginny's address as the same as Henry's. Henry had not disclosed the property on his financial statement. Alex had received the document from Ginny, whom Alex represented on a matter unrelated to Henry's divorce.

Because Laura did not want to get her son into trouble, she never mentioned the property deed to Alex, Wendy, or the court. Wendy received a lower award of child support from the court than she should have, based on Henry's incorrect financial statement.

1. What ethical violations, if any, has Laura committed? Discuss.

2. What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

1.

Laura and Alex Office Arrangement

Laura and Alex are carrying on their respective practices in a shared family law suite. They must be sufficiently separate or else they risk being considered a partnership, and thus would be facing potential conflicts of interests with clients. While they share the same suite and the same receptionist, which could raise concerns about the adequacy of their separateness, they have been using separate telephone numbers, letter head and business cards. They are also each in different distinct specialties of family law and tax law, which could indicate to potential clients that they are separate practices.

With this arrangement they run the risk of not being sufficiently separate such that they could be considered a partnership. The facts do not indicate that they are clearly separated by demarcated offices, or how their respective individual practices are presented on the door of the suite. If they were deemed to be one firm, or a partnership, then they would face conflicts of interest.

A conflict of interest would exist between Laura representing Wendy, while another lawyer in the firm represents an opposing party in the same issue. If they were deemed to be one firm or partnership, then Sally would have to withdraw from representation of Wendy, or Alex would have to withdraw from representation of Henry and they would

have to shield the other partner from the case. Or they would be required to receive consent from both conflicted parties to representation, with informed written consent (CA) or informed consent in writing (ABA).

However, it is likely that Laura and Alex would be considered to be separate entities and must continue to keep their work separate and maintain clear boundaries between the two individual firms. They would need to create a new process for printing materials and keeping their practice clients' information confidential.

Document Addressed to Alex: Inadvertent Disclosure

When an attorney inadvertently receives confidential information or work product from an opposing party under ABA Rules. they are required to notify the sending party of the error and must not continue to read or use the document and return the offending document. In CA. the rule is that they must also refrain from reading the material and inform the sending attorney. but are not required to return the document.

Here, Laura should have stopped reading when she saw that the document was addressed to Alex. She should have also informed Alex of the inadvertent disclosure.

Duty of Competence

Laura owes a duty of competence to her client Wendy that she will competently represent Wendy in her case-meaning without negligence or recklessness. Here, Laura breached this duty because she had information about Henry's property and assets that were essential to her competently representing Wendy in Wendy's divorce. The property deed of Henry was essential to the determining of child support. And in declining to inform Wendy and apply it to the request, Laura was not acting competently

nor in the best interests of her client. The result was that Wendy received lower child support than she should have.

Communication

Additionally, Laura has a duty to communicate with her client and keep her client informed of key issues and steps in representation. Discovering that Henry had a property that he had not listed as a significant asset was important information for Wendy, as the client, to know. In failing to inform Wendy of this critical fact in her case, she violated professional ethics.

Duty of Loyalty

Laura has a duty of loyalty to her client. As discussed above, she must act competently and diligently in their representation; she must also be in communication with her client and keep them informed of the case. Here, she was concerned about her Son getting into trouble, and as a result, breached her duty of loyalty to her client by not informing Wendy of the property deed.

Duty of Candor

Laura owes a duty of candor to the tribunal. She is aware that Hugh said he lived alone, and that he had no significant assets; however now Laura is aware that there is a property deed in Hugh's name, and that Ginny resides at the same property, meaning that Hugh does not actually live alone.

Laura has a duty to inform the court of this discrepancy.

Duty to Supervise

Attorneys have a duty to ensure that their staff are behaving ethically. Here, Sam is a staff member of Laura as well as Alex. Laura has a duty to ensure that Sam is complying with ethical standards, which means keeping client information confidential. She has failed to supervise Sam, and additionally has failed to take steps to inform Sam of his duties after finding the property deed.

2.

Duty of Competence

Alex has a duty to act competently in the representation of his clients. He must not act with recklessness or negligence. Here, in leaving a property deed, a client's information, in a shared and potentially public space in the printer, is a breach of duty of competence.

Duty of Diligence

Along with competence, Alex has a duty of due diligence. This means he must timely manage and handle cases and documents. Here, Alex was not diligent in handling the property deed for Hugh and Ginny because he left it out on the office printer in a shared space.

Duty of Confidentiality

Alex has a duty of confidentiality to his client Hugh, and to possibly Ginny who is also his client, he cannot share information about representation of a client without consent

of the client or under various exceptions, such as he may reveal confidential information to prevent serious bodily harm or death. For a client to consent to attorney sharing revealing information about representation or privileged attorney client communication, the client must give informed written consent in CA or informed consent in writing (ABA). Here, the disclosure of the property deed was inadvertent, so it does not meet any exceptions like those that allow a client to reveal confidential information to prevent serious bodily harm or death (CA and ABA) or to prevent or rectify substantial financial harm where the client is using the lawyer's services in furtherance (ABA only).

Here, Alex negligently revealed confidential client information when the deed was left in the printer. He breached his duty of confidentiality to his client.

It is not clear if Alex was aware that the property deed was not disclosed in Henry's divorce case against Wendy. If Alex was aware, he could attempt to argue that this breach of confidentiality fell under the exception of revealing confidential information to rectify or prevent serious financial harm where the client is using the lawyer's services in furtherance (ABA only). However, the facts are not clear on the seriousness of the financial harm as a result of the lower child support payment, or that Henry was using Alex's services in furtherance. The information seems to have been inadvertently disclosed by Alex and Sam.

Duty to Supervise

Alex has a duty to supervise his staff, including Sam, who acts as a receptionist for Laura and Alex. Alex has a duty to supervise staff to ensure that they conform to ethical standards. Sam leaving out information on a printer in a shared office suite is behavior

that risks the confidentiality of clients.

Alex has failed to supervise staff diligently.

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QUESTION 2: SELECTED ANSWER B

Laura's Ethical Violations:

Duty of Loyalty: Self Interest

Laura (L) represented Wendy (W) and therefore, owed Wendy a duty of loyalty under both CA and ABA rules. The duty of loyalty requires a lawyer to act in the client's best interests. Under both rules, if a lawyer knows or has reason to know that there is a substantial risk of materially limiting their ability to represent their client competently or diligently because of a personal conflict, they must withdraw from representation unless (1) they reasonably believe they can provide competent and diligent representation, (2) representation would not be against the law, (3) they are not representing two clients on opposing ends of the same litigation, and (4) they obtain informed consent, confirmed in writing under the MR, or informed written consent under CA. CA differed in consent requirements because it requires that both the consent AND the disclosure be in writing, whereas the MR only require the former to be in writing.

Here, L had a personal conflict of interest because her receptionist, Laura's son, Sam (S), accidentally left a property deed on the printer. L will argue that at the start of representation, there was no conflict of interest and thus she did not have a duty to inform nor withdraw. However, after L found out that her son made a mistake, she acted on her own interests because she did not want to get her son in trouble. Since L was in a position to pick her son over her client, there was a conflict of interest here and thus, L breached it by not getting informed written consent or informed consent confirmed in

writing from W. Even if L did get the consent, it is unlikely that she could have believed that she would be able to provide competent nor diligent representation because she would have to pick her own client and put her son at risk of getting in trouble. Thus, this was a breach of her duty of loyalty under both ABA and CA rules.

Duty of Diligence

Under both CA and ABA rules, a lawyer must act with hard work and dedication, to diligently act in the best interest of their client. Under CA rules, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation. This rule does not require an attorney to breach ethical rules in order to zealously represent their client; however, they must do their best to advance their client's non-frivolous interests.

Here, Laura had a duty to use all the information that she got to W's best interest. However, she did not use the information about the deed because she did not want to get her son in trouble. L will argue that she did not use this information because she did not want to breach confidentiality between Alex and his client, Ginny. However, by prioritizing Ginny and her son's interests above her own client, L failed to do all that she could to advance the best interests of her client. Therefore, L breached her duty of diligent representation to W.

Duty to Withdraw

Under MR, a lawyer must withdraw from representation if representing the client would lead to a violation of the ethical rules, or any other law. Under CA rules, the lawyer must withdraw if continued representation would lead to a violation of the ethical rules. Here,

continuing to represent W led L to breach the ethical rules of diligence, conflict of interest, and more as discussed below. Therefore, by failing to withdraw, L was also in breach of this rule under both CA and ABA rules as well.

Duty of Candor

An attorney owes a duty of candor to opposing parties and the tribunal. Under both ABA and CA rules, a lawyer must not knowingly make a false statement to the court or fail to correct a false statement previously made.

Tribunal

Here, L breached the duty of candor to the tribunal because she knew that the financial statement that Henry submitted claiming he had no significant assets and lived alone was false. She knew that the court would rely on this statement when awarding Wendy's lower award of child support. However, instead of being truthful with the court and informing the falsity of this statement that she KNEW was false, she never mentioned it. Therefore, not only was this a CLEAR breach of diligence to her client as explained above, it was also a breach of candor to the court under both ABA and CA rules.

Alex

L also arguably breached the duty of candor to Alex because she failed to tell him about getting this information about his client. L will argue that she does not owe A any duties because he isn't even opposing counsel. However, as discussed below, she did owe him a duty to inform him of the inadvertent disclosure; by failing to do so she probably breached her duty of candor to him as well. (*See below, duty of fairness).*

Duty not to assist in perjured testimony

L may have also breached her duty not to assist in perjured testimony or false evidence. Here, H gave false evidence to the court that said he did not have significant assets and lived alone. However, L will likely be successful in arguing that H was not her client. She therefore did not have a duty to prevent him or try to dissuade him from offering false evidence like she would have if L were trying to offer that false document. Therefore, it is unlikely that L assisted H in providing false testimony. However, her failure to inform the court that she knew that this information was false due to her own self-interest will still likely be a breach of candor to the tribunal.

Duty of Communication

Under both ABA and CA rules, a lawyer has a duty to reasonably communicate with their clients. In CA, this includes updates of any significant developments in the case, which includes all written settlement offers or plea deals. Under ABA, this includes keeping the client reasonably performed of the status of the matter. Under both rules, the lawyer must keep the client reasonably informed of details necessary to make an informed decision.

Here, W told L that she believed H was not being truthful about having no significant assets and living alone. However, L found out that there was a deed in the names of both Henry and Ginny. This is likely something that is necessary to communicate to a client because it is about the status of the matter for child support, and it is a significant development under CA rules because it makes W's chance of receiving a higher award of child support more likely. However, L did not inform W of the fact that she discovered

evidence that will help W's claim. Instead, she hid it and never mentioned it to Alex, Wendy, not the court. Therefore, she breached her duty of communication to W.

Duty to Supervise

Under both CA and ABA rules, lawyers have a duty to adequately supervise the staff that they manage or exercise control over. Here, L practiced family law in a suit shared with Alex (A), a tax attorney. L and A both shared a conference room, a printer, and a receptionist, who was L's son, Sam. L will argue that since S was L and A's shared receptionist, she could not exercise control over him. However, a receptionist usually follows directions given by a lawyer that they are employed by, even if that means S was under the direction of both L and A. Moreover, S was L's son, which makes a stronger case that S was within L's control. Therefore, L breached a duty of supervising S and making sure that he did not leave confidential communications on the printer. L should have provided adequate training to ensure that things like this do not happen. By failing to provide such training and corrections, and denying that this whole incident didn't happen, L breached her duty to supervise under both MR and ABA rules.

Duty of Fairness: Inadvertent Disclosure

Lawyers owe a duty of fairness to opposing counsel. Under both ABA and CA rules, when a lawyer receives information that that they know or reasonably should know was sent by mistake, they must take certain steps to mitigate the harm to opposing counsel. Under the ABA rules, the lawyer must notify opposing counsel as soon as possible that they received this information. Under CA, the lawyer must notify opposing counsel and also only read as much as necessary to determine that the information was

inadvertently sent.

Here, L saw that deed in the names of Henry and Ginny and knew that H did not disclose the property on the financial statement. Under both ABA and CA rules, L was in breach because she timely failed to notify A who was in the other office next to her. She clearly did not notify him because she didn't want to get her son into trouble; however, her failure to do so was a breach of fairness to opposing counsel. Additionally, it is unclear whether L read more than necessary before she would have been required to disclose receipt of the information, but since she failed to disclose at all, she would be in breach of both rules regardless of how much of the deed she examined.

Contingency Fees

It is unclear what L and W's fee agreement was. In CA, the fee agreement may not be unconscionable and under ABA, the fees charged may not be unreasonable. Contingency fee agreements must be in writing under both authorities, and they are not allowed for criminal cases where payment is based upon a favorable judgment, or for family law cases where payment is based upon an award of spousal or child support.

We would need more facts about the fee agreement between L and W to determine whether this would have been a breach. Since L is representing W on a divorce matter and L is seeking child support, a contingency fee agreement would not be appropriate, and if L did execute one, this would be an ethical violation under both ABA and CA rules.

Duty of Competence

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a

lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly, fail to provide competent representation.

Here, it is unclear whether L acted competently because it seems she did not know of the property deed until after seeing it from the printer. Assuming that the deed was recorded, it is likely that a quick title search or further research would have revealed that H and G were living together to refute any claim that H did not own any property. Assuming a reasonable investigation would have revealed these facts, L breached her duty of competence by failing to find this out. Additionally, if she was able to find this out by a title search, she breached her duty because this makes a case even stronger that she breached her duty of diligence because this information could have been lawfully obtained even despite S's mistake. A lawyer would use this preparation necessary for competent representation; by failing to be thorough and adequately prepare, L breached her duty. Additionally, L breached her duty repeatedly by failing to search, failing to disclose, and failing to advocate for her client, therefore she also breached the duty of competence under the CA rules as well.

Alex's Ethical Violations:

Duty of Confidentiality

Lawyers owe a duty of confidentiality to their clients under both ABA and CA rules. Under ABA rules, the lawyer must not disclose information acquired through representation of the client, unless the client consents or it is impliedly authorized in the course of representation. Under CA rules, a lawyer must "maintain inviolate the

confidence and at every peril to himself to preserve the client's secrets." The duty of confidentiality lasts forever under the ABA rules, and ends when the client's estate is settled under the CA rules. Encompassed in both ABA and CA rules, a lawyer must take reasonable steps to avoid inadvertent disclosure of confidential communication.

Here, Alex (A) owed his client, Ginny (G), a duty of confidentiality. A received the property deed from G during his representation of her through a matter unrelated to Henry (H)'s divorce. He had a duty to exercise reasonable care to prevent inadvertent disclosure of documents received by her. A will argue that he did use reasonable care, and that it wasn't him who was careless, but L's son, S. However, assuming that S was subject to A's control, like he was subject to L's control discussed above, it is likely that A failed to use reasonable care to provide training to ensure that such careless mistakes would not happen. A should have also checked the printer from time to time to make sure that such communications would not inadvertently be shared with L. By failing to take any reasonable steps, it is likely that A breached confidentiality.

Not confidential?

A may also argue that the deed was confidential because it was readily available. Although the ABA rules make information that is readily discoverable not confidential, the CA rules differ in this regard. Therefore, the fact that the deed could have been discoverable by a quick title search (as discussed above), may make this not a breach of confidentiality under the ABA rules. However, under the CA rules, even if the deed was discoverable through some other means, this would not affect the analysis above.

Duty of Competence

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly fail to provide competent representation.

Here, A did not use the thoroughness necessary to provide competent representation because a receptionist, subject to his control, left a document that was found by L who represented a client whose interests were related to G's interest (since they were in a relationship). A will claim he did not breach the CA rules because he did not do this repeatedly and did not know that L even had the document. It is unclear whether A was aware of this risk which make it reckless, but it is likely that if no reasonable measures were taken to make sure that Sam wasn't doing this all the time, this would be gross negligence at least. Therefore, it is likely A breached his duty of competence.

Duty of Loyalty, Conflict of Interest: Laura and Alex

Certain measures must be taken under both ABA and CA rules when two lawyers are working in the same firm. It is unclear here whether A and L were working in the same firm. Although they shared a conference room, printer, and a receptionist, which suggest that they were sharing spaces, they also used separate letterheads, business cards, and telephone numbers, which suggests that they were just sharing an office space and not a practice. Moreover, since L practiced in family law and A was a tax attorney, they also practice in different areas, which still could make this analysis go either way.

Duty of Loyalty: Potential Conflict of Interest

Since L and A were sharing common areas, even if they aren't working in the same firms, the policy reasons for both MR and CA rules would likely apply to their situation. Lawyers may not represent a client if there is a substantial risk that representation will be materially limited by the lawyer's duties owed to a different client, whether that client is represented by the firm or by the lawyer individually. There will be a substantial risk when the lawyer receives harmful material information adverse to one of the clients. Under CA rules, the information need not harmful, but it must be material which means it is important to the subject matter of the case. The lawyer may only represent the client if they reasonably believe they can provide competent and diligent representation and they get informed written consent (CA) or consent confirmed in writing (MR).

Here, L and A were working in a common area and thus there was a substantial risk that their duties owed may be limited because harmful material information may have been shared among them with the use of a shared (arguably irresponsible?) receptionist. Therefore, they had a duty to inform both of their clients of the situation and get required consent under both rules. By failing to do so, both A and L breached their duties of loyalty. A will argue that there was no conflict of interest because he was representing W on a matter unrelated to H and W's divorce. A has a strong claim here because it is unclear whether there was a substantial risk of materially limiting representation with such different claims that are a bit removed. However, the fact that they shared so many common areas, and the fact that L's belief about H living with his girlfriend G was in direct dispute, this really could go either way.

Screening

Lawyers working in a same firm, assuming that a court does apply these rules because of the shared space between L and A, are allowed to participate in a matter if the lawyer entering a firm is "screened." Screening procedures require that the lawyer is not apportioned any part of the fee from a case and the prior client is given notice and details of the procedures taken to ensure compliance with the ethical rules. CA rules also require that the former client receive a certification by a partner in the firm and from the attorney that procedures followed were in compliance with the ethical rules. Here, no such notice was given to either W, on behalf of L, or G, on behalf of A. Even though it is likely that L and A were not operating in the same firm anyway, we can confirm that no screening measures were taken absent any additional facts.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

QUESTION 3

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for $100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for $100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for $50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return $10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

What ethical violations, if any, has Linda committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Formation of Client Relationship

Formation

A lawyer-client relationship is formed when the client reasonably believes that the relationship has been formed. Here, Clint (C) asked Linda (L) to represent him, and L agreed. At this point, C would reasonably believe that L was his lawyer so a lawyer-client relationship had been formed.

Duty of Competence

A lawyer should not accept representation of a client unless they are competent to perform the duties or can reasonably become competent through preparation. Here, there is no evidence that L has experience doing anything to do with personal injury law. If she did not have personal injury experience, then she either needed to ensure that she could adequately represent C through adequate preparation, or associate with a competent lawyer with C's permission, or decline the representation. Because there is not enough information to determine if L was competent to accept representation, there is no clear violation here.

Conflicts of interest

A lawyer also must ensure that they have no conflicts of interest that would prevent them from providing competent and diligent representation to the client before accepting or continuing representation. This could be due to personal conflicts or current, former, or prospective client conflicts. Here, there is no evidence of conflicts of interest, so there is no violation.

Working with an indigent client

A lawyer may waive fees for an indigent client and may advance reasonable expenses for litigation. If the client is in fact indigent, then the client does not need to pay the lawyer back. If the client is not indigent, then there must be arrangements for the client to repay the lawyer for the advanced costs. Here, it states that C cannot afford to pay L so there is some indication that he may be indigent. Therefore, L could ethically advance only the legal costs and is not obligated to force C to repay her for those if he is in fact indigent. Otherwise, C must repay her.

Contingency Fee Agreement

A lawyer is permitted to work for a contingency fee in most cases. The exceptions are when there is defense of a defendant in a criminal case or when the lawyer is working on a divorce or divorce settlement case and the contingency fee is based on obtaining a divorce or the amount of settlement. Here this is not the case, so L is able to agree to a contingency fee.

Writing Requirement

Under both the ABA and CA rules, all contingency fee agreement must be in writing.

For the ABA, the agreement must be: (1) signed by the client; (2) include the allocation of expenses; and (3) outline the scope of the representation. Under CA, the agreement must: (1) be signed by both the client *and the lawyer* and a copy must be given to the client; (2) include allocation of expenses; and (3) outline the scope of performance.

Here, L did not comply with the ABA or CA requirements. This is a contingency fee arrangement because it is based on a percentage of the outcome of the case. However,

it is not in writing, it is not signed by anyone, and C never got a copy. C and L merely agreed orally to the arrangement. L did state that it would be "less any costs," but this was not an exact definition of what costs C should be expected to pay and what costs L will pay as is required. It also did not dictate when this would be paid, nor did it state the scope of their relationship.

Therefore, L violated her ethical duties through making this oral agreement with C for a contingency agreement.

Fee must be reasonable / not unconscionable

Any time a lawyer represents a client, the fee must be reasonable (ABA) and not unconscionable (CA). Under the ABA, the reasonableness of the fee is determined by the complexity of the case, the preclusion of other employment, the expertise and reputation of the lawyer, the actual outcome achieved, structure of the fee (fixed v. contingent), and community standards for these kinds of cases.

Characteristics of the case

Here, this is a very easy case of a personal injury suit negotiating with an insurance company. L did not have to give up any other employment as she ended up doing no real work on the case. She also was likely not expecting to give up substantial work as this is a one-off personal injury case, so it was unlikely to lead to wide reaching conflicts of interest. While this case may have taken some work, it was not likely to dominate her entire practice and preclude her from taking on other jobs. This kind of case requires some expertise, but not extensive as it seems like it is a standard accident personal injury negligence case and there is also no information on L's reputation in the field.

L's Actual Work, Fee structure, and Community Standards

Her actual outcome was good for C as it was a fast and efficient resolution getting him a large settlement, but that was not actually due to anything that she did, but rather her just accepting a settlement so this does not deserve such a large fee. This is a contingent fee agreement, which does inherently come with more risk for the lawyer. Therefore, in general, it is reasonable for the fee on contingency to end up being higher than a fixed fee as the lawyer takes on more risk when structuring the agreement this way. However, it is not justifiable to have a fee that is grossly disproportionate to the amount of work done. Contingency fees also must still be reasonable on community standards. There is no information about the kind of fee normally charged, but, in general, contingency fees tend to be 20-30% of the settlement, not 50% plus fees. Here, L is getting $50,000 plus costs for doing no substantive work at all on the case other than accepting an unauthorized agreement for settlement. This fee is grossly disproportionate to the services that she rendered to the client and would imply an outrageous hourly rate of about $100,000, assuming she even did 30 minutes of work total on the case. Therefore, this fee seems unreasonable.

CA's Unconscionably also looks to the negotiation process

Under CA, most of the above elements are also considered. CA does not expressly look at the community standard for fees, but they do take into account the complexity, time/skill, reputation of lawyer, structure of the fee, and preclusion of other employment when considering the fee. In addition, they add several more requirements to these by looking at the time when the agreement was made. This includes elements such as if the lawyer committed fraud or misrepresentation in making the agreement, the relative

sophistication between lawyer and client and the existence of a preexisting relationship. Here, this fee was also likely unconscionable. L had a duty to memorialize this agreement in writing and get C to sign it, but she did not. Instead, she spoke it orally when C was likely desperate for a lawyer. Therefore, the instance of negotiating this fee was unethical on L's part. Additionally, there is likely a large discrepancy in the sophistication of the parties because C was a potentially indigent client who could not pay. He is seeking a lawyer because of a personal injury suit, not a business relationship, which indicates that he may have no prior experience with the law. Therefore, there is a substantial power imbalance here that makes the negotiation and agreement to the fee unconscionable as well as the rest of the factors described above.

Therefore, the fee is unconscionable as well and L violated both her duties under ABA and CA.

C has option to void, and L would get reasonable fee

Because the writing requirement for a contingency fee was not met, C would have the option to void the contingency fee contract. In this instance L would get a reasonable fee, which would be substantially less than $50,000.

Agreement to settle

Duty to communicate settlement offers

A lawyer has a duty under the ABA to communicate all settlement offers. Under CA, the lawyer in a civil case has a duty to communicate all written settlement offers and all oral significant settlement offers. Here, this is a written settlement offer being made by Acme (A) to settle the claim. This means that under both ABA and CA, L had a duty to

communicate this settlement offer to C. She failed to communicate this offer to him prior to accepting the deal. This was a violation of her ethical obligations under both ABA and CA.

Client's decision to accept settlement offers

The clients and lawyers have different spheres within the representation. The lawyer has control to make decisions regarding the strategy of the case, but the client has complete authority to make all decisions that are substantively related to the rights under the case, such as acceptance of settlement offers, plea deals, or demand for a jury trial. Here, it was only within C's power to accept the settlement offer. L was not permitted to accept the settlement offer without express authority from C. If C had given her express authority to accept any settlement above $90,000, then L's acceptance would have not been unethical, but here there was no such agreement beforehand. Therefore, L violated her ethical duties by accepting this agreement.

L may argue that C was happy with the settlement and was not harmed by this. However, a client need not be harmed for an ethical violation to occur. Therefore, L has still violated her ethical duties and should still be punished accordingly.

Duty of Competence

A lawyer has a duty of competence to their client, which means that the lawyer must act with the required knowledge, skill, thoroughness, and preparation of a reasonable lawyer to provide services to the client. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation to a client. The standard of competence for CA is similar, requiring knowledge and skill as well as the appropriate physical and emotional state to serve the

client.

Here, L likely breached her duty of competence to her client. She failed to take any investigation or preparation to uncover if the $100,000 settlement offer was in fact in the best interest of her client. She took no action to understand similar claims, what her client's claim may be worth if they went to trial, or what the chances of success on the merits would have been. By accepting the settlement offer without making any effort to properly investigate the claim or the potential alternatives that C would have if he did not accept it, L breached her duty of competence.

Duty of Diligence

A lawyer has a duty of diligence to their client, which means that the lawyer must act with the reasonable promptness to provide services, managing their workload to ensure that they can see the matter through to the end. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation to a client. Here, L could have also been said to have violated her duty of diligence by quickly accepting the settlement offer and cutting short the chance to fully explore all the options. However, she did respond quickly and take prompt action, which is also required under the duty of diligence. Therefore, this violation is less clear.

Duty of Loyalty

The lawyer also owes a duty of loyalty to act in the best interest of their client. A lawyer need not press for every possible advantage for the client, but they must reasonably act to serve the best interest of their client and not act in a self-serving manner that undermines the best interest of the client.

Here, L violated her duty of loyalty by accepting the settlement offer without making reasonable investigations into the true value of the claim. L was acting in her own best interest when she did this because she was going to make $50,000 for doing no work. However, she clearly did not adequately consider the client's best interest as she had completed no substantive work yet on the case. Therefore, it was not possible for her to reasonably know if accepting the settlement offer would be in C's best interest. As a result, it was a violation of the duty of loyalty to accept this settlement (regardless of the issues with lack of client consent) without proper investigation.

Receiving settlement check

Client Trust Account and Commingling Client Funds

When a lawyer receives client funds, they must keep that money in a separate client trust account. A lawyer is strictly prohibited from commingling the client funds with the lawyer's personal assets or firm's assets.

Here, L violated her duty to keep the client funds separate. She took the $100,000 check that was given to her from A as the settlement and deposited the check into her law firm's business account. This meant that she commingled C's settlement with the rest of the firm's assets. This is strictly prohibited and is a violation of both ABA and CA rules.

Disputed amount

L then sent C the amount that she believed that he was entitled to under their agreement by mailing him a check for $50,000 less fees. L was right to promptly deliver the client their funds from a settlement. A lawyer has a duty to hold client property and

promptly distribute all client settlements to the client once the settlement is complete. Therefore, this action itself was not a violation.

However, once there became a dispute with the funds L was obligated to continue to hold the rest of the fee, or any disputed amount if not all the amount is disputed, in the client trust account until the matter was resolved. Here, L never had a client trust account which was a violation, as explained above. Now that there is a dispute, it continues to be a violation as L is required to hold all disputed funds in the client trust account. Only funds that she has a clear legal and undisputed right to can be deposited into her own account. Here, she deposited the funds in her own account prematurely and this is a violation.

Settling claims of malpractice

A lawyer under CA rules is strictly prohibited from making agreements to prospectively limit their malpractice liability. Under the ABA, a lawyer is permitted to do this only if the client is represented by independent counsel when they make this release. Here, under both rules, L would have violated as C was not represented by counsel.

Here, L is negotiating after C has threatened her to sue for malpractice. Therefore, this should be analyzed as a settlement offer for malpractice rather than a prospective release.

Written Release and Representation by independent counsel

Here, when negotiating settlements of malpractice liability, the client should be advised and given an opportunity to seek external counsel. This makes the negotiation process substantially more fair and will allow the client the best chance to protect their own

interest. Here, L never told C that he should seek independent counsel, nor did she give him an opportunity to do so.

L and C only negotiated orally on the release after C threatened to sue. L offered to return him $10,000 of the settlement that she had withheld in exchange for him not suing. While under contract law, this likely would be an enforceable contract. This is also unethical because this was purely an oral conversation in which C had no counsel. Additionally, C did have a reasonable claim and could have voided the entire agreement. This was an option that C was not aware of because he was not advised of his rights. Therefore, L violated her duty of loyalty to C in this situation as well by failing to provide him with an adequate warning and opportunity to seek counsel.

QUESTION 3: SELECTED ANSWER B

Fee Agreements

Under the California rules (CA), a written fee agreement is required if fees will likely exceed $1,000. It must be signed by the client and attorney, and the client must get a copy. It must explain the basis of the fee. Under the ABA Model Rules (MR), a writing is not always required except for contingency fees. Under both rules, cases on a contingency fee basis always require a writing. In CA and the MR, fees must be reasonable. Under CA rules, they must not be unconscionable.

Even if this were not a contingency fee case, the fact that the agreement was oral, not written, would violate the California rules. Were it not contingent, the lack of a written agreement would be acceptable under the MR, though that is not the case here.

Reasonable Fee

Fees must be reasonable, and this is evaluated on factors including the skill of the attorney, the time the matter will take, the matter's complexity, the amount to which the work will preclude other employment, and the standard fees generally charged in related matters and circumstances. In California, the prohibition on unconscionable fees also looks to the relative sophistication of the parties in negotiation.

50% of a client's recovery in a case is very high for a personal injury contingency fee. Contingency fees are generally around 30%, so this is significantly higher and could be viewed as unreasonable.

Clint is likely not a sophisticated negotiator regarding personal injury representation. There's no indication he has prior experience seeking legal services, nor that he works

in a related field. This made him lack knowledge about negotiating the fee and could suggest procedural unconscionability. Clint also said he is unable to pay for a lawyer, so is in a disadvantageous financial position, giving him less power in negotiating a fee. Due to his inability to pay, he may think that he is unable to afford a lawyer at all, and this offer may seem generous to him, or at least, the only offer he is able to get.

The fact that C was surprised at how low his cut of the settlement amount was also indicates that he was not provided with information on how the fees and costs would be allocated--another ethical issue.

Contingency Fee Agreements

Under both the CA and MR, a contingency fee requires a written fee agreement. Under the MR, this requires a writing signed by the client indicating the basis of the fee and the extent to which the client will be responsible for costs at the end of the case. The CA rules are more stringent and require the agreement, again, to be signed by both the client and the attorney. They require noting the basis of calculation of the fee, the extent to which the client is responsible for costs in the outcomes of the case, and a statement that the fee is negotiable, if it is not a medical malpractice case.

When C told L he didn't have money for an attorney, L told C not to worry about payment and that instead she could provide legal services where she took 50% of the ultimate recovery. This is a contingency fee agreement and, under MR and CA rules, requires a writing signed by the client (MR and CA) and, in CA, also the attorney. There was no writing here, as C orally agreed to the terms.

There is no indication C knew the fee was negotiable, which would violate CA rules.

L told C she would take 50% as well as "any costs" she incurred. This is likely insufficient information to meet the requirements that the agreement specify his responsibility for costs. It doesn't indicate what types of costs that could include, and whether and to what extent he would be responsible for them in the case that he did not prevail. This would likely violate CA and MR rules.

CA also requires an explanation of how fees are calculated. L would say that noting the 50% split is sufficiently specific. However, this doesn't make any explanation of costs of litigation, which may be insufficient. She merely told him to "not worry about it," which is vague, providing no basis or explanation.

Advancing Costs of Litigation to Clients

An attorney may not give money to clients, however under CA and MR, an attorney may advance litigation costs so long as the client must repay those at the end of litigation.

L did not pay C but did front litigation costs as under their agreement she would pay for any costs and then recoup them from the ultimate recovery amount at the end of the case. This was permissible.

Scope of Employment

In an attorney-client relationship, the client has control over setting the goals of the case, while the attorney can make strategic decisions. The client controls aspects of the representation such as whether to waive a jury trial, testify in a criminal case, or accept settlement offers among others.

D's insurance company emailed L with a settlement offer for $100,000. L accepted it without D's consent. This violated her duty as that was D's choice, not L's.

L would argue that D was relieved when he heard of the settlement, so there was no issue, but that does not absolve her of her violation.

Communicating Settlement Offers

A lawyer has a duty to communicate with the client, keeping them reasonably apprised of the status of the case. In the model rules, the lawyer must communicate all settlement offers to a client. In CA, the lawyer must communicate all written offers as well as any oral offers that are a significant advancement in the case.

Dan's insurance company emailed Linda with a settlement offer. She did not communicate it to Dan before accepting it. This violated the CA and MR rules as it was both written and a significant advancement in the case.

L would argue that D didn't object to the settlement as he was "relieved" it settled so quickly. However, this doesn't cure her ethical violation. Dan did object later once he came to understand how little he would recover (again indicating the issue of fee reasonableness discussed above). Also, harm to the client is not required for an attorney to be in violation of ethical duties.

Duty of Competence

Under MR and CA rules, a lawyer has a duty of competence and must have the requisite skill, knowledge, training, and preparation to represent the client. In CA, an attorney may not repeatedly, recklessly, or grossly negligently fail to provide competent representation. If a lawyer is not competent in an area, they may accept representation if they are able to educate themselves on the matter enough to become competent in a timely manner, seek assistance from another attorney who is competent in the area, or

in an emergency.

Here, L didn't set an appropriate fee agreement, which arguably shows a lack of knowledge regarding how to proceed in a personal injury case on a contingency fee basis. She also accepted a settlement offer without asking for C's permission, also arguably demonstrating a lack of competence as a client advocate.

There is no indication whether L has experience in personal injury cases, or whether this was an area she was unfamiliar with. Her overall conduct indicates lack of competence which may suggest this wasn't her usual area of practice; if so, she should have not taken the case, done additional preparation, or retained co-counsel to assist. This situation was also not an emergency.

L didn't do any substantive work on the case before accepting a settlement offer, also indicating lack of preparation and skill in negotiating and advocating for a client. L likely violated her duty of competence.

Duty of Diligence

Per the MR and CA rules, a lawyer has a duty represent the client diligently, including keeping the client reasonably apprised of updates in the case, pursuing a matter to completion, meeting all filing deadlines, and managing workload.

L had not done any substantive work on the case when she received and accepted the settlement offer. This is clearly a lack of diligence as she did no work on the case. Had she done work on it, she would have had the knowledge about the extent of his injuries, applicable law, and comparable amounts of recovery at trial or by settlement in comparable cases. As it stands, she has seemingly no basis for determining whether

this was a reasonable settlement offer in the circumstances (this overlaps with the competence issue). It also violates this duty in that she did not keep her client updated on a serious development in the case.

As noted above, the duty of diligence also includes the duty to keep clients reasonably updated on their case. Here, L only informed him after she accepted the offer. Based on C's surprise at how little he received, it seems that her explanation of the situation to him did not in fact provide him with a reasonable amount of information, suggesting failure to adequately communicate regarding substantive information as well as timing.

Client Trust Account

An attorney may not mingle their assets and a client's assets under the CA and MR. A lawyer must keep all a client's money in a separate client trust account. An attorney may only move money out of the trust account into their account once they have earned the fees.

Here, A gave L a $100,000 check and she put it in her firm's business account. She did not put it in a client trust account. She mingled this with her assets. After depositing the money in her account, she then wrote a check to C for $50,000 minus costs.

She would argue that she paid C in a timely manner, but that is not sufficient to meet the requirements of either the MR or CA rules.

Disbursement of Disputed Fees

When there is a dispute about the fees owed to an attorney or payment due to a client, the attorney must immediately pay the client all money that is not disputed as theirs and maintain the rest in the trust account until the matter is settled.

D disputed that the amount L took as costs deducted from the check was not acceptable, complaining about it and threatening to sue her. At that point, L should have maintained the disputed amount of money in a trust account until the issue of fees was resolved. But she did not, as she had the money in her firm account and kept it there.

Settlement of Malpractice Claims

Under the CA and MR, an attorney may not settle a malpractice case with a client before advising the client to seek independent legal counsel and giving them an opportunity to do so.

C threatened to sue L for malpractice and report her to the State Bar. L offered him $10,000 to settle the malpractice allegation as well as all liability with the representation. L did not advise C to seek independent counsel, nor gave him the opportunity to do so. C accepted the money and executed the release without having the opportunity to seek counsel. L violated her ethical duties here.