

**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2012 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.

<u>Question Number</u>	<u>Contents</u>	<u>Page</u>
1	Civil Procedure	4
2	Community Property/Professional Responsibility	22
3	Evidence	40
4	Contracts	58
5	Wills and Succession	71
6	Criminal Law and Procedure	85

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 necessities 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 necessities 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 necessities, 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 necessities 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

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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.

<u>Question Number</u>	<u>Contents</u>
1	Criminal Law and Procedure
2	Professional Responsibility
3	Remedies
4	Torts
5	Civil Procedure
6	Business Associations

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.

<u>Question Number</u>	<u>Subject</u>
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) What ethical violations, if any, has Tom (T) committed?

Lawyer/Client relationship

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.

Duty of Competence

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.

Referring P's Case to Alan

Duty of Confidentiality

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, breaching 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) What ethical violations, if any, has Alan (A) committed?

Attorney-Client Relationship

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.

A and T's fee arrangement

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.

Referral fees

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.

Fee splitting

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 his 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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<u>Question Number</u>	<u>Subject</u>
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 themselves 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.

<u>Question Number</u>	<u>Subject</u>
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 believe 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 of 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 misappropriation. 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.

<u>Question Number</u>	<u>Subject</u>
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 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 (\$50,000) and the price paid (\$10,000). 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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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 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.

<u>Question Number</u>	<u>Subject</u>
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

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<u>Question Number</u>	<u>Subject</u>
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 provide 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 any 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 not 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 know that the law is good law, he just believes it is. Therefore, because he does not know 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.

Conclusion

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.

<u>Question Number</u>	<u>Subject</u>
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 fiancée 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 fiancée would not qualify as a family member. It is true that a current fiancée qualifies as a family member, but this rule is unlikely to apply to former fiancées from over two years ago. The rationale for the current fiancée rule is that they are engaged to be members of the family; a former fiancée 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 ramifications 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

This publication contains the five essay questions from the July 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. | 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

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<u>Question Number</u>	<u>Subject</u>
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.

<u>Question Number</u>	<u>Subject</u>
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 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.

<u>Question Number</u>	<u>Subject</u>
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 pursuing 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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<u>Question Number</u>	<u>Subject</u>
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

May Larry Ethically Follow Peter's instructions to file the motion

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.



**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 data 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 to 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 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.



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 his 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.



**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 **reasonable attorney** 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 **lawyer'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 is *[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.



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 be 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.



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.

<u>Question Number</u>	<u>Subject</u>
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.