February 1990

Question 3

Officer is the treasurer of Bank. Officer called the Bank's regular outside counsel, Lawyer, and asked that they meet immediately. Lawyer offered to come to Bank, but Officer insisted that they meet elsewhere for "confidentiality reasons."

When Officer arrived, he was visibly upset. He began by telling Lawyer that Bank was experiencing financial difficulties which, if not corrected, would lead "to more serious problems." The problem began several years ago when Officer's superior, Boss, the president of Bank, began making loans to fictitious corporations for Boss' benefit. The loans were initially for small amounts, but the amounts increased and now totaled over $1,000,000. Neither Boss nor any of the fictitious corporations is able currently to repay the loans, and interest on the loans has not been paid for some time.

Officer learned of the loans a year ago but agreed with Boss to keep quiet. In return, Boss arranged to have a$25,000 loan made to XYZ, a newly created corporation, for Officer's personal benefit. Officer reminded Lawyer that Lawyer's firm prepared the incorporating documents for XYZ Corporation.

Officer believes that all loans for both his and Boss' benefit could be repaid over time, but because Bank's auditors arc scheduled to review Bank's financial statements the following week, the problem loans are likely to be revealed.

Officer asked Lawyer to agree to advise him how to protect himself, Boss, and Bank from liability. Officer requested that the information he had disclosed and Lawyer's advice be kept confidential. Lawyer has not responded to Officer's requests.

Under the ABA Model Rules and ABA Code of Professional Responsibility:

1. Can Lawyer ethically agree to assist Officer, Bank, or Boss? Discuss.

2. Can Lawyer ethically disclose the information she has learned:

    a. To Boss? Discuss.

    b. To other officials of Bank? Discuss.

3. What individuals or entities will be able to waive Bank's attorney client privilege relating to Lawyer's discussion with Officer? Discuss.

4. What are Lawyer's ethical obligations to Bank given her law firm's preparation of the incorporating documents for XYZ Corporation? Discuss.

ANSWER A TO QUESTION 3

1. Can lawyer ethically agree to assist Officer (0), Bank (B) or Boss?

The basic rule is that a lawyer cannot represent clients with "differing interests" or "conflicts of interest." At present the Lawyer represents the Bank. His first duty is to that client. He may not represent any additional clients whose interests differ or conflict with the bank.

The question asks whether Lawyer may "assist" Bank, Officer, or Boss. I am uncertain what the term means.

Lawyer - may not represent either Boss or Officer--it is clear that their interests differ or conflict with the bank. The bank at the very least has a cause of action for breach of fiduciary duties against both Officer and Boss.

Waiver - in some instances clients can waive conflicts. Here, if the bank wanted to waive it would take a vote of the directors or stockholders. But that is unnecessary because a waiver would be ineffective in this case. The Code prohibits a lawyer from accepting employment when it's "obvious" his professional judgment would be impaired and he would not serve both clients. The Rules provide "a reasonable lawyer standard." Here, any reasonable lawyer would conclude that each party should be represented by independent counsel. The conflicts are rampant and obvious.

Lawyer is limited to telling Boss and Officer that he does not represent them, that they should be represented by independent counsel, and because they are an adverse party to the bank he should talk only to their attorney. The general rule is that Lawyer should not talk to any adverse party represented by counsel. Further, a lawyer should always advise adverse parties that they have a right to talk to counsel and advise them to.

The rationale is to avoid the appearance of overreaching or undue influence. Such impropriety could cause lawyer to become a witness (thus causing his disqualification at trial) or weaken the Bank's case by giving the appearance of impropriety.

Thus, except for this limited assistance, referring them to other counsel, Lawyer should not assist Boss or Officer in any manner.

Can Lawyer represent bank in this matter? Probably yes. If Officer refuses advice as a prelude to representation, then he can continue to represent bank. Some lawyers might withdraw as concerns this matter from representing anybody. I don't think that is required.

2. Disclosure

This issue involves both the attorney client privileges and confidential duties under the Code and Rules.

Lawyer is representing the Bank. The Bank as an "entity" is entitled to any information that comes to lawyer as a result of his representation. It is also the holder of any "attorney-client" privilege.

The information from Officer to Lawyer apparently came as a result of Lawyer's representation of the B. The request to meet away from the bank and for "confidentiality reasons" do not appear to be enough to create a separate attorney-client representation with officer. Nor do they appear to be statements made to determine whether he could or would represent Officer. Officer knew Lawyer represented Bank and as an officer should understand Lawyer fiduciary duties to Bank. However, Lawyer's past representation of Officer indicates that there has been an attorney-client relationship at least with lawyer's firm in the past. Further, Officer had a duty to report this fiduciary breaches to the corporation. All in all, I would hold that Officer and Lawyer did not have an attorney-client relationship and that client cannot claim his conversations with Lawyer were privileged or confidential as an attorney-client communication.

a) Can Lawyer reveal to Boss:

b) Can Lawyer reveal to other officers:

Lawyer's first duty is to the Bank. Lawyer's proper course of action to present this matter to a meeting of the Board of Directors, who have responsibility for running the corporation. Since the Boss is directly involved it would be imprudent to go directly to him. Ordinarily, Lawyer could report this matter to him as President of the Bank, since the President is ordinarily responsible for the day to day management.

3. Who could waive the privilege?

Ordinarily a corporation as an entity holds the attorney/client privilege. It can be waived by an officer with proper authority. Usually, only a President waives the privilege. However, others may be authorized. Ultimately, the board of directors would be responsible for waiving the privilege, particularly when the President is directly involved.

In the Upjohn case the U.S. Supreme Court discussed when the privilege can be invoked as determined by a three-part "control group test." [(1) Corp. requests conversation, (2) employee knows of request and consents, (3) the matter is within the scope of employee's duties.] However, this does not address the issue of who can waive.

In this case, waiver should be by the board acting without the participation of Officer or Boss.

4. Past Representatives

The Code did not directly address the issue of conflicts involving present clients and past representations. A series of cases developed this case law. The Rules have incorporated much of that case law.

The general rule is if the past representation involved matters presently in dispute, directly related to the facts, or lawyer's work product then the lawyer is disqualified from handling the present matter. The rationale is that there is a presumption (essentially unrebuttable) that there were confidential communications; also it avoids the appearance of impropriety.

If the past representation involved a discreet matter separate and unrelated to the present matter, the Lawyer may represent the present client. Unless there is a likelihood that there were confidences disclosed.

This case is a close call because XYZ Corporation is directly involved in the breach of

fiduciary duty. It is possible that in forming XYZ, Officer and Boss revealed confidential information to the attorneys. Others might argue that merely preparing corporate documents without further involvement or representation is not enough. I believe the letter rule is L's firm is disqualified.

Vicarious Disqualification - The rule under both the Code and the Rules is that if one member is disqualified, the whole firm is disqualified. (Some exceptions for former public employees not applicable here.) Here the fact Lawyer did not directly represent XYZ is irrelevant. He is disqualified because another member of his firm is disqualified.

Conclusion - Because of Lawyer's firm's involvement with XYZ, I would disqualify Lawyer and his firm. However, Lawyer still has obligation to report his conversation with Officer to the board and appear as a witness if necessary.

Miscellaneous - Because Lawyer could be a witness in future proceedings, it is not a bad idea to involve another firm in any event.

ANSWER B TO QUESTION 3

1. Can Lawyer Ethically Agree to Assist Officer, Bank, or Boss?

This question raises matters dealing with lawyer's (L) duties to her client or clients, particularly her duties of loyalty and zealous advocacy.

The first thing to determine is who L's client is. L is "the Bank's regular outside counsel"; thus, her first and sole duty is to the bank, a corporation, which is treated as an artificial person for these purposes. Thus, L's only loyalty is to the bank as an entity. Although L of necessity communicates with bank employees, she has no lawyerly duty to them. Indeed, if employees' and the bank's needs, goals or desires conflict, it is L's duty to take whatever actions necessary to preserve the interests of the bank.

Here, L must act for the bank alone. She cannot assist Officer (0) or Boss (B), and should advise them immediately to retain independent counsel, as it seems likely their interests conflict with those of Bank. Even her continued representation of Bank seems jeopardized by her "confidential" communication with officer, for she has now learned information that she would want to use against 0 in favor of bank. Yet her agreement to meet away from the bank for "confidentiality reasons" suggests she may already have violated her duty of loyalty to Bank, and suggests she may have allowed 0 to infer assurances of protection of 0 that L was not at liberty to give.

In sum, L might best avoid all conflict by not representing any of the three. It is possible she could represent bank, depending on the nature of her conduct during the conversation with O.

2. Can L Ethically Disclose the Information?

a) To Boss?

Assuming that L has not improperly promised 0 confidentiality, owes an all-encompassing duty of confidentiality to her client, Bank. Ordinarily, Boss would be considered a human instrumentality of L's client and it would be appropriate for L to discuss this matter with Boss in order to determine strategy. But since Boss is a likely opponent of Bank, L should not discuss this information with Boss.

b) To Other Bank Officials?

L has a duty to find bank officials who are not involved in the fictitious and fraudulent loans in order to discuss the matter with them as she would with a natural-person client. This should be those responsible for 0 and Boss, most likely, the board of directors. Her discussions with the board will themselves be confidential. They are thus ethically appropriate and indeed required.

3. Who Can Waive Bank's Attorney-Client Privilege?

Rule

The attorney-client privilege protects from disclosure in public forums (e.g. judicial proceedings and depositions) communications made in confidence between an attorney and her client, in furtherance of their professional relationship.

Application

Here L has received information, expressly described by 0 as confidential, in a meeting attended by no one but L and O. L is an ongoing attorney for O's employer, Bank, and the discussion explicitly pertained to legal liabilities of O. That 0 personally is not L's client does not affect the privilege (assuming no misconduct by L, as mentioned above), because 0 is speaking as a human voice of the artificial entity. Thus the attorney-client privilege pertains.

This privilege generally may be waived only by its holder, the corporation. Not only should lawyer advise corporation of the privilege, L is bound to assert it on the bank's behalf if L is called to testify. In this general case, then, no one who speaks on behalf of the corporation--certainly not 0--should be allowed to waive the privilege. Even after L talks with the board, it should be waived only with the corporation's "permission."

Exceptions

There are exceptions to this rule--a lawyer may disclose privileged information to settle a fee dispute, for instance. Specifically the crime-fraud exception excepts from the privilege any communications regarding future crimes or frauds--it is expected that a L will not violate her obligations as an officer of the court by taking part in such discussions, let alone shielding her client by invoking the privilege. The exception does not apply, however, to communications respecting past crimes or frauds; therefore, this exception does not permit L to divulge her discussion with 0, except if and to the extent, 0 asked for advice on how to defraud the auditors.

4. Lawyer's Ethical Obligations re: XYZ

As stated above, L may not disclose to a tribunal what she now knows about the incorporation of XYZ Corp. (assuming that the loan was fraudulent, at least as to O's personal profit). However, she does have some duties to the bank in this regard.

As stated above, it is entirely appropriate for L to consult with responsible members of the Bank regarding the predicament 0 has described. This will of course include disclosure of the XYZ loan, of L's role in it and of O's profit.

If it were determined that L, or any member of her firm, had any knowledge of the fraudulent nature of the loan, L's firm should of course withdraw its representation of bank, and may be liable, as a co-defendant with 0 and Boss, for any loss bank suffered. Similarly, L's firm may be liable for malpractice if Bank can show that L's firm negligently breached a duty to advise bank regarding the nature of the XYZ Corporation and thus caused damage to the bank. It is also possible that L's firm breached a duty of loyalty to the bank, if its relationship with the XYZ Corporation conflicted in any way (that L knew or should have known of) with its representation of the bank. Ordinarily, however, its representation of an investor in a corporation should not preclude representation of the corporation.

Nonetheless, even if these relationships were proper until this point, it is very likely that they will cause conflicts of interest in litigation flowing from this incident. Once the bank learns of the improper loan, it well may want to sue 0 and B for various breaches of their fiduciary duties,

specifically for disgorgement of the unjust profit earned by O. L may at the least be called upon to testify as a witness in this matter. Even if L's testimony would not be adverse to the bank, she should not represent the bank since she knows at the outset that she may testify and the matter may involve a disputed fact issue.

Moreover, her natural desire to justify any role she played in incorporating XYZ--e.g. discussing its financing, preparing investment agreements--may conflict with the bank's desire to rectify the matter, creating a conflict of interest that is best avoided by withdrawing from representation of the bank.

July 1990

Question 5

Doctor is a nationally recognized surgeon. He operated on Patient who, after the surgery, developed an infection and died. Exec, the personal representative of Patient's estate, commenced a malpractice action against Doctor who referred the claim to Medins, Doctor's malpractice insurance carrier.

Doctor's policy provided that Medins would retain an attorney to defend any claim against Doctor, and would pay up to $1,000,000 in satisfaction of any claim or judgment against Doctor. The policy also provided that Medins would "investigate and settle any claim as it deemed appropriate."

Medins retained Lawyer to defend against Exec's claim. After reviewing the record, conducting some discovery and obtaining an opinion from a medical expert, Lawyer reasonably concluded that, while Doctor's liability was uncertain, Exec had a good chance of prevailing. In light of the possibility of substantial damages, Lawyer recommended that Medins settle the case. Medins authorized a settlement. Lawyer then negotiated with Exec's attorney and reached a tentative agreement to settle the case for $500,000.

Lawyer's secretary notified Doctor of the proposed settlement. Doctor expressed anger with the proposed settlement, stating unequivocally that he was not responsible for Patient's death. Doctor stated that settling would adversely affect his reputation, could increase his insurance premiums, and could result in disciplinary action against him. Accordingly, Doctor told the secretary that he would not authorize the settlement. There were no further communications between Lawyer and Doctor.

Lawyer contacted Medins informing it of Doctor's objections and seeking further direction. Medins directed Lawyer to complete the settlement in accordance with the tentative agreement.

1. Who does Lawyer represent in this case? Discuss.

2. Has Lawyer violated rules of ethical behavior in her handling of the case prior to taking action on Medins' direction? Discuss.

3. May Lawyer settle the dispute as directed by Medins without breaching rules of professional responsibility? Discuss.

4. What rights does Doctor have, if any, against Lawyer? Discuss.

ANSWER A TO QUESTION 5

1. LAWYER REPRESENTING BOTH THE INSURED AND INSURANCE COMPANY:

As is often the case in malpractice suits, Doctor is covered by malpractice insurance and correctly refers the suit against him to his insurance company. Under the contractual terms of the policy, Medins must provide an attorney to defend the claim against Doctor. Medins has retained Lawyer to defend against Exec's claim. Thus, it appears Lawyer is representing both Doctor and Medins at this point.

We presume that since Lawyer has conducted some discovery, she has filed an answer on behalf of Doctor. So, as far as notice to the court, since Medins is not a party, Lawyer represents Doctor, the defendant in the suit. Of course, she is being paid and has been retained by Medins. Thus, she represents both clients.

2. ETHICAL BEHAVIOR IN DUAL REPRESENTATION:

It does not appear that Lawyer has properly handled this case from inception. Since Lawyer was hired by Medins to represent Medins and Doctor, Lawyer had an immediate obligation to both parties to:

a) Assess the circumstances of the dual representation to see if she could adequately represent both clients.

b) Discuss potential conflicts in dual representation with both clients. Lawyer should have made a full disclosure that conflicts might arise if:

- Medins wanted to settle and Doctor did not;

there was a possibility the limits of insurance coverage would not be sufficient to cover potential damages;

there were any other considerations where Doctor's views and desires may conflict with Medins', i.e., calling potential witnesses, etc.

c) Get clients' consent to represent both. This should have been done initially so that Doctor understood it might be to his benefit to obtain independent counsel.

d) Withdraw if necessary if a conflict does arise between the clients.

If Lawyer has not proceeded in the above manner, she has violated rules of ethical behavior.

Duty to communicate: Lawyer has the duty to act competently and to communicate regularly with her clients (both Medins and Doctor) to keep them fully informed in order for them to make reasonable decisions regarding the case.

Although Lawyer appears to have handled the matter diligently (reviewing record, conducting discovery, etc.) and may have come to a reasonable conclusion regarding settlement, it is up to the client to decide if settlement is appropriate. Medins' reasons for settlement are in

conflict with Doctor's reasons. Doctor wants to save his reputation and professional future. Medins wants to decrease the monetary risk. Therefore, it was essential that Lawyer discuss her assessments of liability and recommendations to settle with both Medins and Doctor before reaching a tentative agreement with Exec's attorney.

At that point, when Doctor's objections became evident, Doctor should have been given the opportunity to obtain independent counsel -- perhaps at the expense of Medins. Whether Lawyer could continue representing Medins relates to the original contractual basis of the dual representation between the three. Generally, when this occurs, Lawyer does continue representing Medins, and Doctor's attorney joins as counsel of record for Doctor. Ethically, if Lawyer had received any confidential information from Doctor that could be harmful to Doctor if used by Lawyer in her representation of Medins, Lawyer may have to withdraw. This is why it is essential to work out these matters initially.

Lawyer's secretary's communication to Doctor of the proposed settlement may be ethical, but appears to be sloppy, demeaning behavior on Lawyer's part. There should have been notice to Doctor by Lawyer -- prior to negotiating settlement.

3. Since Lawyer's secretary is her agent, she has vicarious knowledge that Doctor would not authorize settlement. As attorney for both Medins and Doctor, Lawyer cannot proceed to settle the dispute as directed by Medins. She must withdraw.

In the alternative, if the initial retainer agreement contractually bound Lawyer to be Medins' attorney, there is a question of whether Doctor has waived his right to object to the settlement.

However, it would be a breach of the rules of professional responsibility, in view of the facts presented to us, for Lawyer to settle the dispute. Doctor is the defendant - - not Medins. Doctor must be given the final authority in authorizing settlement.

If the insurance policy states otherwise, Doctor would still have a right to defend, and then Medins could proceed against Doctor in a later suit if Medins felt Doctor breached his contractual duty to settle if reasonable. If judgment was greater than the desired $500,000 settlement, perhaps Medins could limit their liability to that amount.

But the bottom line is that Doctor is the one who decides -- basing his decision on his rational perception of the damage to him by not defending.

4. If Lawyer proceeds to settle this suit without Doctor's approval, Doctor could proceed against Lawyer in a civil malpractice action for: 1) breach of implied or express contractual duty, 2) breach of fiduciary duty of loyalty, 3) misrepresentation theory, or 4) negligence.

Of course, Doctor could file a complaint with Lawyer's bar to seek disciplinary measures.

If Doctor pursues a breach of fiduciary duty based on contract, Doctor would prove his actual, causal, certain and definite foreseeable and unavoidable damages resulting from the breach. The foreseeability of the damages would be as of the time of formation of contract (Hadley v. Baxendale) unless specifically told to Lawyer.

Doctor would have to prove the adverse effect on his reputation by settlement and disciplinary action -- loss of clients, income based on comparison with prior years. Loss of

reputation might be speculative. Increase in insurance premiums would be easily shown.

If Doctor proceeded on negligence theory, he would have to show:

1) Duty of Lawyer to client -- standard of care -- reasonable practitioner under circumstances.

2) Breach of that duty (violating ethical rules is not, per se, conclusive but admissible).

3) Causation: But for attorney's actions, he would not have suffered. (He would have to show Exec would have lost the original case.)

4) Damages -- actual, causal, definite and foreseeable -- to make him whole.

ANSWER B TO QUESTION 5

1. Who is the client

A. The insurance policy - under Doctor's (D) contract with Medins (M), M has agreed to retain an attorney "to defend any claim against D." This would appear that M is merely hiring an attorney for D. However, the contract goes on to say that M can "settle any claims it deemed appropriate." This indicates that the litigation will be controlled by M and that D has authorized M to determine settlement. So as between M and D it would appear that M will have the last word. However, Lawyer (L) is also subject to the rules of professional conduct.

B. Under the rules of professional conduct - L is responsible to her client. Where a third party is paying for the service, L cannot let that third party interfere with her professional judgment or do anything to disadvantage her client. In D's opinion, settling this case would severely disadvantage him. He doesn't want a settlement, it would adversely affect his reputation, increase his insurance premiums, and result in disciplinary action. It would appear that settlement is not in D's interest, at least as he perceives that interest to be.

Also very important here is that the interests of M and D are in conflict at this point. M has potential liability up to $1,000,000. The proposed settlement is $500,000 (half of the potential). M's interest is in settling as quickly as possible for as little as possible. D's interest is in protecting his reputation.

The court would probably find that D is L's real client, since L is defending D's interests in the suit. As such, L must work for his (D's) interest.

2. Violations of ethical behavior

A. Identifying the client - there are three possibilities here. Either L is M's lawyer, L is D's lawyer, or L is representing both and is M and D's mutual lawyer. Either way, this should have been clearly established at the outset and all parties advised. Since M retained L to "defend Exec's claim," it would appear that L is D's lawyer. If so, L will have duties to D.

B. Communicating with the client - the facts do not indicate that L once contacted D to see what he wanted from the claim. It is for the client to set the goals and for the lawyer to set the tactics. In addition, the client should decide if an action is going to be compromised with settlement. At the least, D was either a mutual or the sole client and should have been consulted.

C. Conflict of interests - if M and D are mutual clients, L may have failed in her duty by not advising the clients of potential conflicts. D is concerned with his reputation and professional standing. On the other hand, M is concerned with the amount it will have to pay. There is a potential for conflict between these interests, and at the least L should have advised M and D of this.

It is possible that the best course would have been not to represent both interests since the potential for conflicts is high. L should have considered whether her obligations to M would have impaired her ability to exercise her independent professional judgment for D. If so, she should not have accepted the representation. If not, she should still have received consent after full disclosure to both M and D.

D. Competence - aside from the potential conflicts, it would appear that L has been competent in her representation. She has conducted discovery and gotten an expert opinion. She has evaluated the merits of the plaintiff's case and the doctor's defenses and considered them in light of the potential damages. Her decision was "reasonably concluded." Therefore, it would appear that she behaved competently.

3. May L settle per M's direction - this will depend upon whose attorney L is.

A. M's attorney - in the unlikely event it is found that L is M's attorney, then it would seem that L could settle as M directed. There is support for this in the way the contract was drafted. In addition, L has not contacted D, so it may be that the parties anticipated that L would be M's attorney. However, this is probably not the best answer.

B. D's attorney - if L is D's attorney, then L absolutely cannot settle the case against D's desires. As indicated above, D is in charge of the goals of the litigation, and L cannot settle over D's objection.

C. M and D's attorney - if L is representing the parties mutually, then she is attorney for both. If so, she probably cannot settle the case against D's wishes. In addition, she may even have to withdraw at this point. This is controlled by the rules governing conflicts of interests. Where the lawyer can no longer exercise his independent professional judgment and the interests of mutual clients becomes actually adverse, L must withdraw and thereafter cannot represent either of the clients in that litigation. Because D's interests are in vindicating himself and M's in settling the case so that they are not exposed to the additional policy limits, the parties are now in adverse positions. In addition, because M has a contract that may injure D (i.e., the right to settle the action without D's consent), there is an additional conflict which L should withdraw from.

4. Doctor v. Lawyer - to recover from L, D must sue for negligence. A negligence action requires duty, breach, cause in fact, proximate cause and damages.

A. L's duty to D - a lawyer has a duty to his clients. The question here is whether D was L's client since L was retained by M and never talked with D except to have her secretary advise D of the settlement offer. However, as discussed above, the better conclusion was that L was at least the attorney for both M and D, if not for D exclusively.

B. Breach - assuming L had a duty to D, did she breach the duty? This would be a professional standard, and D would be held to the standard of a member in good standing in the bar of a same or similar community. If a reasonable attorney in *L's* position would not have acted as *L* did, then D will have an action if that breach caused damages.

1. Conflict of interest - would need to be established by expert testimony that a reasonable lawyer would not have accepted M as a client or would have consulted D about the representation.

It does seem fairly obvious that a reasonable attorney would have taken some steps to contact his client about the representation. If any damages flow from this omission and expert testimony establishes it breaches the standard of care, then D will be able to recover.

2. Settling the case - if *L* settles the case as M has directed, then this might be negligence. Again, it will be determined by expert testimony. Any damages flowing from it will be recoverable.

C. Causation - In order to be actionable, the breaches of duty must be the cause of damage to D. At this point (i.e., the case has not been settled), it does not appear that any of *L's* actions have caused any damage. Therefore, this discussion will consider that *L* settles as requested by M. If so, D will need to prove what damages are attributable to settling the case.

1. The malpractice action - most of the damages will depend upon the merits of the malpractice action by Exec. It is unsure right now, however, that the facts say that liability is uncertain. D must show that he would have received a defense verdict. If so, then he will be able to recover for the damages proximately caused by settling a losing case. Since this is a representation in a medical malpractice action, *L* can foresee that damage could result to his reputation and professional standing. In addition, since D has communicated his anger, etc., he should be able to recover for his pain *and suffering resulting from this action. In short, D's likely damages will be foreseeable to L.

D. Damages - as mentioned, D's damages include his damages to his reputation, the increase in his insurance premiums and any consequences of the disciplinary action which might result. However, also as mentioned, recovery depends upon whether he can prove that Exec's action was without merit. If not, then L's settlement did not cause D any damage.

July 1997
Question 3

Attorney Ann is a member of the State Bar of California and represents primarily low-income tenants.

Frank, a friend of Ann, told her about an apartment complex that appeared to be very run down and to have many elderly tenants. Ann visited the building and was shocked at its dilapidated and unsafe conditions.

Ann sent a letter to each of the tenants in the building, which stated:

> It has come to my attention that there may be ILLEGAL and UNSAFE conditions at your apartment building!
>
> I am an attorney experienced in this type of case, and I am willing to represent you in a lawsuit against your landlord regarding these conditions, CALL TODAY!

Tom, a tenant, called Ann in response to the letter and told her he wanted to hire her to sue Landlord. He said that another tenant named Barbara, who is 82 years old and speaks only Spanish, also wanted to hire Ann.

Ann met with Tom and Barbara. Since Ann speaks very little Spanish, and Tom is bilingual, he acted as a translator. It became clear that Tom's interest was in obtaining a money judgment and that Barbara's interest was in obtaining an injunction requiring the landlord to make repairs. Ann, Tom and Barbara signed a contingency fee agreement for Ann to represent Tom and Barbara in a lawsuit against Landlord. Under the agreement, Ann would receive 40% of any recovery in the case. Ann also separately agreed with Frank that she would pay him 10% of any fees she recovers in return for his having told her about the apartment complex.

Ann filed a lawsuit against Landlord. The suit had a sound legal basis, and she handled it in a professionally competent manner.

Ann and Tom worked together closely on the case, and before the case was resolved, he asked Ann to date him. He also gave her a free airline ticket to accompany him on a trip to Hawaii, which she accepted.

Eventually, Landlord made a written settlement offer to pay money damages only, which Ann conveyed to Tom. Tom, without consulting Barbara, told Ann that he and Barbara accepted the offer. Ann concluded the settlement.

What professional responsibility issues are raised by Ann's conduct? Discuss.

February 1994
Question 1

Knowles was retained to represent Baker on a federal bank robbery charge. The indictment charged that Baker robbed Freedom Bank on Third Street. The prosecutor's case depends on, among other things, photographic evidence from hidden cameras in the bank. None of the photographs clearly depicts the robber's face.

At their first meeting, Baker told Knowles that at the time of the robbery he was watching television at the home of his friend Peterson.

Knowles noticed that one of the bank photographs shows the robber wearing a ring on the fourth finger of his right hand. At one of the trial preparation sessions, Knowles saw that Baker had a ring on the same finger. Knowles mentioned this to Baker, and the following conversation occurred:

Baker: "So what? There must be lots of rings that look like this one." Knowles:

"Yours has a 'B' on it."

Baker: "You can't see the one in the bank photo clearly enough to see if there's a`B'." Knowles:

"You might if they blow it up."

Thereafter, Baker removed the ring and Knowles never saw it again. Knowles later suggested that Baker get a new ring to cover a mark left by the old ring.

During the trial, but before Baker testified, he asked Knowles what might happen if the prosecutor asked him if he had a ring with a "B" on it.

"Because you insist on testifying, you have to tell the truth," Knowles said.

On the evening before the day of closing arguments, Baker gave Knowles the balance of his legal fee in $100 bills. Knowles noticed that the serial numbers on fourteen of the $100 bills were the same as the serial numbers on some of the stolen bills, which numbers had been revealed during the course of the trial.

Knowles returned the fourteen r$100 bills to Baker and told him to bring an equivalent sum in other denominations. The following morning, Baker came to court with twentyeight $50 bills, which Knowles accepted.

In his closing argument, Knowles argued that the prosecutor was going after the wrong man and urged the jury to believe Peterson's alibi testimony.

What standards of professional responsibility, if any, has Knowles violated by his conduct in representing Baker? Discuss.

ANSWER A TO QUESTION 1

1. Duty of Diligence and Competence to Client

A lawyer owes the duty of diligence to his client to represent his interest with zeal and competence.

Baker's Ring

The state's case here depends upon the photos in the bank. Therefore the photographic evidence must be dealt with by the defense. As a competent lawyer, Knowles is concerned about any connections this evidence may have to Baker. He is concerned there may be a link to Baker regarding his ring, therefore he suggests that he wear a different ring.

The question here is whether it is improper for Knowles, the attorney, to suggest he not wear the "B" ring. Under the ABA and California ethics rules, an attorney cannot assist a client in fraud or in a crime. Additionally, an attorney cannot assist a client in the suppression of evidence.

Furtherance of Fraud

Knowles does not know if the film will show the ring clearly. Further, he does not even know if the ring in the film has a "B" on it. By suggesting to Baker that he not wear a ring, he is not assisting in a fraudulent act or crime. It is common for defense counsel or counsel in a civil case to suggest that their client dress or behave in a certain way that is less incriminating.

Lawyer Knowles, by suggesting that Baker not wear the ring, was fulfilling his duty to his client to representation as a competent and zealous advocate.

Suppression of Evidence

An attorney also has a duty to the courts not to suppress evidence. (Additionally, an attorney may be charged with suppression of evidence). To do so can be the basis of disciplinary action.

The question then is whether asking Baker not to wear the "B" ring is suppression of evidence.

As stated above, it has not even been established or suggested that the person of the film was wearing a ring with a "B" on it. Thus, the ring is not evidence and the likelihood it is, is too remote. Therefore Knowles's conduct in suggesting to his client not to wear the ring is not suppression of evidence.

If an attorney is given an instrument of a crime or the fruits of a crime, he does have a duty to turn it over to the authorities. (See discussion below.)

2. Attorney's Duty Regarding, a Client's Perjury

An attorney cannot assist his client in fraud or a crime. Accordingly, if an attorney is questioned about whether a fact should be hidden or lied about, he must tell his client to tell the truth.

If an attorney becomes aware that his client is going to commit perjury, he must advise his client not to commit perjury. If it appears the client is going forward, the attorney must seek leave to withdraw. Under the ABA rules, he must advise the court of the perjury. Under California rules, he does not inform the court, but cannot advance the perjury. In other words, he does not question his client nor does he argue this.

Knowles properly advised his client to tell the truth about the "B" ring. This was appropriate.

It should be noted that Knowles's statement, "Because you insist on testifying, you have to tell the truth" may appear to be communicating to Baker that he should not testify. Although a defendant has the absolute right to testify, it is proper for an attorney to give his opinion as to whether a client/defendant should take the stand.

3. Knowles Conduct Regarding the $100 Bills

Suppression of Evidence

As stated above, an attorney cannot suppress evidence from the court. If evidence of the crime such as the instruments of the crime or the fruits of the crime get into the attorney's hand, he must turn them over to the proper authorities. The attorney can first retrieve any evidence he needs, but he must then turn them over.

Confidentiality

An attorney also owes his client the duty of confidentiality. This is a broader concept than the attorney client privilege in that it includes more than communications. The ethical confidentiality privilege or duty covers all communications or facts learned during representing a client that may be harmful or embarrassing to the client.

In this case, there is a conflict between Knowles's duty of confidentiality to Baker and Knowles's duty to the court to turn over evidence.

The facts state that the serial numbers of the stolen money were presented in the trial. Baker attempted, to give Knowles 100 bills with the serial numbers. Accordingly, the $100 bills presented to Knowles were evidence in the crime, they were the actual fruits of the crime in his client's hands.

Obviously, this evidence, money, would be damaging to Baker if the fact that he was in possession of the stolen money became known. Knowles told Baker to take the $100 bills back and did nothing as far as reporting the money to the court.

Although this is a close call, the proper conduct would have been for Knowles to advise Baker of his actions and to turn the $100 bills over to the court. He could not tell the court where he received the bills from because that would breach his duty of confidentiality. By doing so he would not be a partner in the suppression of evidence nor would he be breaching his duty of confidentiality.

Knowles could not argue that he received this information too late. The trial was not over and instead of giving closing argument, he should have approached the court. Knowles could still argue Baker's alibi, he did not have to argue or mention the newly discovered evidence.

ANSWER B TO OUESTION 1

Knowles (K) has been retained to represent Baker (B) in a criminal case. K has a duty to maintain the confidential communications with his client and a duty to diligently represent his client. At the same time, K also has a duty of candor to the tribunal. He cannot knowingly participate in the presentation of false testimony at trial.

Duty to Client to Maintain Confidential Information

The attorney's duty to maintain confidential information is based on policy of encouraging communication between the accused and the attorney. Because of the candid exchange between the attorney and the client, the lawyer's ability to adequately represent the client will be enhanced.

In the present case, the identity of the robber is a key element of the prosecutor's case. It is the prosecutor's responsibility to prove beyond a reasonable doubt that B is the perpetrator of the crime. The prosecutor's best evidence are photos taken at the bank.

The defendant has told his lawyer he was not the robber and given an alibi. However, the ring that B wears may assist the prosecutor in proving his case. It is persuasive circumstantial evidence that B was indeed at the bank and committed the robbery.

Advice to Remove the Ring

K noticed that the ring in the photographs was worn on the same hand that B wore his ring. K also noticed that B's ring has a distinctive emblem that could provide circumstantial proof to

support the prosecutor's case. At the time K asked B to remove the ring, K did not know whether the prosecutor had an interest in the ring. The facts as given to us state that the ring was noticed by K following his investigation into the evidence. K also was preparing the case with the alibi of B as part of his case. Therefore, if the ring were to be noticed by the prosecution, it might trigger further investigation, which could result in evidence that refutes any alibi. While it is possible or even probable that the bank photo might be enhanced enough to show the "B" on it, this has not been done by the prosecutor. It is the prosecutor's obligation to prove his case. The defendant's attorney has an obligation to bring forth known evidence that he has in his possession. At this point in the case, the attorney doesn't know that the ring is evidence. He does not have a duty to disclose his observations to the prosecutor or to the court. He may advise his client to remove the ring and to wear a different band.

K's Advice to Tell the Truth when Testifying

The client asked K what might happen if the prosecutor asked about a ring with a B on it. Knowles's advice is that the client must tell the truth. The advice is consistent with the lawyer's duty of candor to the tribunal. He cannot encourage, condone or participate in the presentation of false testimony at trial. K knows that B has a ring with the emblem on it. If the prosecution seeks information about the ring during cross-examination, then K must advise his client to answer truthfully.

Refusal to Accept $100 Bills

The lawyer presumably has a contract with this client which entitles him to be paid for his services. However, when B pays K, K notices that the bills are the same serial numbers as the stolen bills and this has been revealed during the course of the trial.

The bills are evidence, and K knows that this is evidence. K also has possession of the bills, sufficient to inspect them and ascertain their value as evidence. Generally when an attorney comes into possession of evidence of a crime, he has a duty of candor to turn that evidence over to the prosecution. Here K received the money, inspected it, and once he realized its relation to the crime, returned the bills to the client. The client was not told to go hide or suppress the evidence. Nor was the client told why the $100 bills were not acceptable. However, the request for payment in other denominations was probably a clear clue to the client about why the bills were unacceptable. K may have returned the money to B because of his duty to maintain confidentiality with the client. However, in similar cases where the attorney takes possession of evidence, the attorney has a duty to turn it in. The attorney may maintain the client's confidence by not providing any comment to the prosecution at the time the evidence is turned in.

Testimony of Client

As stated above, the attorney may not participate in the presentation of false evidence or testimony at trial. In the present case, K allows B to testify about his alibi. If, at the time the client gives testimony, the attorney knows of the falsity of the testimony, then the attorney must admonish the client to be truthful, and, if client insists on giving false testimony, the attorney must approach the judge and request to withdraw. When asked about the ring, K advised B to be

truthful in his testimony. Presumably, he said the same thing to the client about the alibi.

Closing Argument

According to the facts, by the time K needs to make his closing argument, he has seen and returned the $100 bills stolen from the bank. Prior to this, however, his client testified and gave an alibi. K knows the alibi is false. His duty of candor to the tribunal should stop him from using the false alibi of his client in closing argument. He does not have to refer to the client's testimony but can focus on the prosecution's failure to prove the identity of the perpetrator.

February 1995
Question 4

May has represented the International Bakers Union (IBU) as its attorney for several years. Last year, while IBU was on strike against Bakery, a car belonging to the owner of Bakery was firebombed outside his home. Walter, the vice president of IBU, and Frank, an apprentice member of the union, were charged with arson to property, a felony carrying a penalty of up to three years in prison.

IBU retained May to represent Walter and Frank in the criminal case. Shortly after entering her appearance, May was approached by Pete, the prosecutor, who told her that an unidentified member of IBU's Executive Board would testify that Walter and other members of IBU leadership planned the firebombing and got Frank to go along only after they threatened to revoke his apprentice union card. Pete said that if Frank would testify for the prosecution against Walter, Pete would allow Frank to plead guilty to a misdemeanor and would recommend that he be placed on probation. May immediately refused, telling Pete that she knows he is just a "union buster," and that IBU's interests would suffer if she agreed to his proposal.

The case proceeded to trial, and the Secretary of IBU testified for the prosecution as Pete had indicated. Both Walter and Frank were convicted. The judge denied May's pleas that her clients be placed on probation and sentenced each defendant to three years in prison.

What standards of professional responsibility, if any, has May violated? Discuss.

ANSWER A TO QUESTION 4

I. CONFLICT OF INTEREST

May's agreement to represent Walter and Frank in the criminal case may have created two (2) separate conflicts of interests: (1) between her 3rd party former client IBU and the two defendants, and (2) between the two defendants Walter and Frank.

A. IBU - PAYMENT OF FEES

When a 3rd party pays the fees of a client a conflict of interest is created. May, although paid by IBU, represents the interests of Walter and Frank, not IBU. Nevertheless, she may still represent them if, (1) the clients consent; (2) there is no interference with the attorney's independence of professional judgment and the attorney-client privilege; and (3) confidentiality is maintained.

The facts do not indicate that May informed Walter and Frank of the possibility of the conflict. Here, as members of IBU, IBU more than likely expects them to represent their interests. But, as defendants they have their own interests to protect. Further, IBU may later want to distance itself from Walter and Frank if it appears that they were to be found guilty (which they inevitably were). In addition, IBU may seek to know information about the case that would be privileged because they are paying. Frank and Walter have a right to know all of this before accepting representation.

In addition, as touched on above, IBU's own interest may interfere with May's independent professional judgment, if they suggested ways in which May could defend Walter and Frank.

Therefore, because of the possibility of conflict, Frank and Walter had a right to determine, based on the above information, whether they wanted May to represent them.

B. IBU - AS FORMER CLIENT

An additional conflict may have been created by the fact that IBU, the union, was May's former client, and now she is representing individual members in a criminal action. May should have declined representation if: (1) there was a possibility that their representation would be materially limited due to her interest with IBU; or (2) if they would be adversely affected; or, (3) if actual confidences are received.

There is a clear conflict between the interests of the union, and those of its individual members. Although they are being charged as individuals, their crimes may be imputed to the union. As May has represented the union in the past and is currently being paid to represent the defendants, she may have a tendency to want to protect her relationship with the union, thereby materially limiting and adversely affecting her representation of the defendants. The only way she should have continued with her representation is if Walter and Frank consented after disclosure and consultation.

As indicated above, the facts do not show that May received their consent or even sought

it. As such, she may be subject to discipline.

C. CONFLICT BETWEEN FRANK AND WALTER

The code and the rules discourage (strongly) representation of two clients in a criminal case, as the possible conflicts of interest are tremendous. There are several conflicts in this case. As stated above, May should have sought the consent of the clients when the conflict presented itself. She did not.

When May was approached by Pete, the prosecutor, and told that a member of IBU's executive board would testify that Walter planned the firebombing and Frank was coerced into going along, a clear conflict was presented. If May continued to represent both clients, their defenses would be adverse. She could not say Frank was coerced into the act as a valid defense, without jeopardizing Walter's defense. When a conflict is so clear, the attorney has a duty to withdraw from both representations, as actual confidences were received. She should not seek consent after disclosure if a reasonable prudent attorney would not seek consent under the circumstances.

As indicated above, as their interests are directly adverse, May should have withdrawn from representation of both Walter and Frank.

II. BREACH OF DUTY TO KEEP CLIENT INFORMED

May has a duty to keep both Walter and Frank informed of all information in their case. The information received by the prosecution was critical, and both Walter and Frank should have been informed, particularly Frank. Failure to inform is a breach, and May may be subject to discipline.

III. FAILURE TO PRESENT OFFER TO FRANK

While the attorney is responsible for the tactics and ways to obtain an objective, the defendant has the right to choose those goals and objectives. Therefore, May is subject to liability for not presenting Frank with the deal offered by the prosecution. It is not May's right to make decisions, such as accepting or declining a plea without first notifying the client.

Here, there is no doubt that Frank would have seriously considered taking them up on their offer. Even if May thought it was not in the best interests of IBU, IBU is not her client. Also, such an offer is even more of a reason for May to withdraw from representation.

INEFFECTIVE ASSISTANCE OF COUNSEL

Failure to notify Frank of the prosecution's offer may be ineffective assistance of counsel justifying reversal of the indictment against Frank if: (1) May's actions were unreasonable for your average prudent attorney under like circumstances, and (2) he would not have been indicted but for May's actions.

Here, it is unreasonable for an attorney not to present a settlement or plea offer to a defendant, especially since the charge carried a penalty of up to three years. Also, Pete said they would allow Frank to plead guilty only to a misdemeanor, and would recommend he be put on probation. Therefore, he would not have been indicted, but for May's actions.

Therefore, May's breach is tantamount to ineffective assistance of counsel, and a

reversal is appropriate.

ANSWER B TO QUESTION 4

May has violated, or at least potentially violated, a number of standards of professional responsibility, as set forth by the American Bar Association's Model Rules of Professional Conduct, and similar standards set by the California bar.

The first potential violation was in possibly breaching her duty of competence. Every attorney has a duty to only accept cases in areas in which she is reasonably competent, unless they are able to take the time to become competent in that area of law, or unless (with the client's consent), she consults with an attorney who is competent in that area. May as a representative of the union, probably specializes in labor law and might have no experience or skills as a criminal defense attorney -- her performance certainly leads one to that conclusion. If May indeed did not have any reasonable amount of competence in criminal defense work, she should not have accepted the case.

The second violation -- and this was a definite violation, not merely a potential one -was in accepting a fee from IBU for her representation of Walter and Frank. An attorney may not receive payment for her services from a party who is not her client unless: (1) the client consents, (2) no confidential information arising out of the representation is divulged to the paying party, and (3) the paying party does not interfere with the attorney's representation of her client's best interests. In this case, the third criterion was obviously not followed -throughout the litigation, it was clear that May was representing IBU, and not Walter and Frank. Her decisions during the course of her representation are an excellent example of why this rule exists. Since May was representing IBU's interests, she rejected a plea bargain that would have substantially benefitted one of her clients. Thus, it is clear-that by accepting IBU's money and subsequently allowing IBU's interests to prevail over her clients', May violated this standard.

It should also be noted that when a rule of professional conduct requires client consent, California's rules of professional responsibility will frequently impose a "reasonable attorney" standard on that consent. In other words, if a reasonable attorney would advise a client not to give consent to a potential conflict of interest, then any consent given by the client cannot validate the questionable action that the attorney undertakes. In this case, there is no information given as to whether or not Walter and Frank did consent to IBU's payment of their fees, but even if they did, the reasonable attorney standard might have rendered their consent ineffective. Of course, even if they did give valid consent, the control that IBU obviously exerted over the case, as discussed in the preceding example, would have still rendered this
fee arrangement unethical.

Even if IBU had not paid May's fees, there might have been a violation of professional standards when May took Walter and Frank's case, due to the confidential information that she undoubtedly possesses regarding IBU. May has a continuing duty of confidentiality to any client or former client, and so even if she had stopped representing IBU and represented Walter and Frank pro bono, she would be violating her duty of confidentiality to IBU if she used any confidential information regarding IBU (information she acquired during her professional relationship with them that they would expect to be kept confidential) in defending Walter and Frank. Given the nature of the case, it is likely that some confidential information regarding IBU may have been relevant and helpful to the defendants' case. For example, if IBU made a practice of threatening

apprentices with loss of membership if they didn't comply with the leadership, such a fact would be helpful in Frank's case, but May would not be able to properly divulge it if she learned about it during the course of her representation of IBU.

Yet another ethical violation occurred when May represented both Walter and Frank. A criminal attorney may represent two clients in the same matter if there is no potential conflict between them, and if they give consent. If there is no conflict at the outset of the relationship, but one develops during the case, the attorney must withdraw immediately, from both cases if necessary to protect confidential information from being divulged.

May probably should have seen the potential for conflict at the outset, and thus not taken the case, but even if she could not have anticipated the conflict, she should have withdrawn immediately when the prosecutor approached her with the plea agreement. At that moment it became clear that the interests of Walter and Frank conflicted and that she could not represent them both. She has a duty as an advocate to take actions and give advice based on the best interests of her client, and obviously the best interests of Walter and Frank were in conflict. May should have immediately withdrawn from the case, with the court's permission (since this was in a litigation context).

Finally, May failed in her duty to communicate all settlement offers to her client. If any offer of settlement is made by the opposing side, the attorney must communicate it to the client and allow the client to decide whether or not to accept the offer (after giving proper advice and recommendations to the client). In this case, May did neither--she immediately rejected the offer without allowing her client to make the decision, and without even informing him of its existence.

Her failure to inform Walter of this offer clearly prejudiced him in the trial, since it is likely he would only have received probation if he had accepted. Although prejudice to the client is not required to conclude that May breached her ethical duty, it will be required for Walter to succeed in any action against her (or on appeal) for ineffective assistance of counsel. Whether or not Walter undertakes any personal case against May, she still could face disciplinary proceedings, which might lead to being disbarred, for her multiple violations of the standards of professional responsibility.

February 1997

Question 5

David has been arrested for and charged with murder and robbery. David made a telephone call to Attorney, a member of the California Bar. Attorney came to see David in the small rural jail in which David is being held and agreed to represent him.

In an interview in the jail, David told Attorney that he killed the victim and stole the victim's shirt, shoes, and ring, and was wearing them when he was arrested. David also told attorney that he had hidden the shirt and shoes as best he could in his cell, and that he had thrown the ring out of the cell window into a trash can behind the jail. David is now bare-chested, bare-fingered, and bare-footed.

Attorney told David to do nothing else to hide or destroy evidence and David reluctantly agreed. Attorney then left, went behind the jail and looked into the trash can. The trash can was empty except for a ring. At this point, Attorney heard a noise, looked up, and saw David throw a pair of shoes out of the cell window. The noise also attracted a police officer, who discovered the shoes and ring. The police officer asked Attorney what he knew about the ring and shoes. Attorney refused to tell the police officer anything about them.

Attorney returned to the jail and spoke to David again. David told him that he had torn the shirt into strips, which he plans to burn. Attorney told David not to burn the strips, but David insisted that he will bum them.

Attorney is called before the Grand jury investigating the murder and robbery. Consistent with his ethical obligations:

1. Should Attorney have told the police officer anything about the shoes or the ring? Discuss.

2. Should Attorney tell the Grand jury that David is threatening to bum the scraps of the shirt? Discuss.

3. May Attorney tell the Grand jury anything about any of the other events described above? Discuss.

4. Should Attorney continue to represent David? Discuss.

ANSWER A TO QUESTION 5

Relationship between Attorney and David

David called attorney from jail and attorney visited him in the jail. Attorney agreed to represent him so an attorney-client relationship has been established.

1. attorney's Duty to Reveal Source of Ring/Shoes to Police Officer

a. Attorney Duty of Confidentiality

An attorney owes his client a duty to keep confidential all information which he learns from his client and all information which he learns in the scope of the representation from whatever source. Thus, the duty of confidentiality is broader than the attorney-client privilege because it applies to much more than confidential communications between the attorney and client or their respective agents. In addition, the duty of confidentiality applies to many more settings than court-ordered compulsion. Under the Model Rules and California ethical duties, Attorney cannot use any confidential information gained in the representation to harm David.

Here, David told attorney about the ring he had thrown into the trash can outside his cell window. The location of the ring and how it got there is confidential information. The ring itself is not covered either by the attorney client privilege or the duty of confidentiality because it is fruits of a crime.

Under the authority of Meredith v. California where an attorney learns during the representation of a client about the location of the fruit of a crime, he is under no duty to retrieve it. If he does retrieve it, it is not privileged and he must turn it over to the authorities. He may keep it for a reasonable time to obtain information needed for the representation and then must turn it over. He may not however reveal the source of the item (i.e., how it got there). The rationale is that if the attorney has moved it from its location, he has destroyed that evidence. The jury will be told where the item was found but not that it came from attorney or how it got there.

An attorney may go to the scene and view the item to determine the veracity of the client's statement and to assist in client's defense. As long as he does not retrieve it there is no duty to turn it over. Here, attorney went to view the ring. While there, shoes came out of the cell window. Attorney likely knew the source of the shoes. However, this information is also privileged and confidential because Attorney learned their source in talking with David.

Therefore, the duty of confidentiality prevents attorney from telling officer anything about the source of ring or shoes.

b. Attornev-Client Privilege

The attorney-client privilege prevents compelled disclosure of confidential communications. It would not apply to the out of court conversation with officer. However, the statement about the ring and the shoes is privileged and it would be

another reason attorney could not disclose his knowledge about them to officer.

c. Attorney Duty Not to Conceal Evidence/Commit Fraud

The attorney was under an obligation to tell David not to do anything else to hide or destroy evidence. Here, Attorney did that. Attorney cannot counsel or in any way assist David in his attempt to conceal evidence.

d. Duty of Loyalty

Attorney owes David a duty of loyalty. Neither Attorney's interest (to avoid arrest or a problem with the officer) nor his duty to a 3rd-party (general civic responsibility in dealing with officer) can compromise his duty of loyalty to his client. Thus, even if officer threatens Attorney with arrest, Attorney cannot reveal the source.

2. Attorney's Responsibility to Testify Before the Grand Jury Regarding David's Attempt to Burn the Shirt,

a. Duty Not to Conceal Evidence/Perpetrate a Fraud

Attorney went back to the jail and told David not to destroy evidence again. David informed attorney that he intended to burn the shirt taken from the victim. At this point, attorney has a duty to insure he does not assist in the fraudulent conduct and may have to withdraw (see discussion below). In any event, he should strongly discourage such activity.

b. Compelled Testimony Before the Grand Jury -- Attorney/Client Privilege

If Attorney is called before the grand jury, the attorney client privilege would apply to David's statements about the shirt. To reveal that David intends to burn the shirt would be revealing a confidential communication between the Attorney and David during the course of the representation. The attorney-client privilege applies before the grand jury as it is compelled testimony.

Exceptions to Attorney-Client Privilege

There is an exception to the attorney-client privilege where the attorney learns of a client's future crime or fraud. Such statements are not covered. In California, the crime must be a serious crime (threatening death or serious bodily injury).

David's actions would be fraudulent and criminal. However, it would not be of the serious crime nature necessary to violate the attorney-client privilege. In addition, Attorney may believe David will heed his advice not to burn them. Here, it says David is insisting he will burn them. Nonetheless, Attorney would not reveal that information to the grand jury.

3. Attorney's Duty to tell the Grand Jury about the Ring and Shoes

a. Attorney-Client Privilege

As discussed above, the attorney client privilege applies to compelled disclosure of information. It would prevent Attorney from disclosing any confidential communications of David. Here attorney learned of the ring and shoes from David. Attorney knew of the location of the ring (and could infer the source of the shoes) from David's statements. He cannot be compelled to disclose that information.

The same exclusion for fraud/crime discussed does not apply. Here, however, it is a past crime. Attorney does not have to reveal past crimes he learns in his communications with David.

The district attorney may argue that Attorney is obligated to testify to what he saw outside the jail. While this has initial merit because it is not protected as a confidential communication, such testimony would reveal indirectly why Attorney had gone to the trash can (David's statement about the ring). Attorney should not be compelled to testify.

b. Duty of Confidentiality

The duty of confidentiality applies to non-compelled testimony. Here Attorney is being asked to testify before the grand jury.

c. Exclusionary Rule

The exclusionary rule does not apply to grand juries. Thus evidence illegally obtained is admissible. However, the attorney-client privilege does apply.

4. Continued Representation of David

a. Duty not to Participate in Fraud

Where an attorney is asked advice about fraudulent conduct he must (1) dissuade the client (2) withdraw if the client insists. When the attorney learns the client has used his advice to commit a fraud he must withdraw. Here, Attorney learned that David was going to burn his shirt despite Attorney's instructions to the contrary. Attorney must withdraw.

b. Attorney as a Witness

Where an attorney believes he may be called as a witness he cannot act as trial counsel. If he learns afterward, he must withdraw. Here Attorney was a witness to the shoes from the cell window. He may have to withdraw on these grounds.

c. Duty to Represent Client Zealously

Attorney, with knowledge of David's fraud, has a duty to the court to not use it. He could not argue based on any testimony that he knows is perjured. Under the Model Rules, the attorney has a duty to reveal the perjury. In California, the attorney must seek to withdraw or ignore the perjured evidence.

Attorney knows information he cannot use in his representation of David. He must withdraw.

d. Attorney's Withdrawal Must Not Prejudice Client

As this is a criminal case and early on, there would be no prejudice.

ANSWER B TO QUESTION 5

1. Should Attorney have told the police officer anything about the shoes or the ring?

An attorney owes a client a duty to keep confidential anything learned in the course of his representation of a client. That duty begins as soon as the client consults the attorney and seeks representation, whether or not the attorney ultimately does represent the client. In California, the attorney has a duty not to reveal a client's confidences and secrets. Confidences are those communications which are covered by the attorney-client privilege. Secrets constitute anything else learned by the attorney from whatever source in connection with the representation.

The attorney-client privilege relates to the ability of a tribunal to force an attorney to reveal confidences. The duty of confidentiality concerns whether an attorney may voluntarily reveal information obtained in the course of the representation.

Here, the shoes and the ring pose different problems. David told the attorney that he had stolen the ring and that he had thrown it out of the cell into a trash can below. Clearly, the attorney's sole knowledge of the ring stems from a confidential communication covered by the attorney-client privilege.

If a client gives an attorney the instrumentalities of a crime or told where to locate them, it is permissible for the attorney to inspect them and obtain whatever information he needs from them. After doing so, however, he must turn them in to the proper authorities without revealing his source of information, i.e., the client. In this case, attorney was proper in not telling the police officer anything about the ring because to do so would have violated the attorney-client privilege as well as a client secret.

However, the shoes pose a more difficult problem. Here, David admitted to the attorney that he had stolen the victim's shoes and that the-shoes were hidden in the cell. Attorney properly advised David not to hide or destroy any of the evidence. But in this case, the attorney was a witness to a criminal act by David - the attempted destruction of evidence of a crime by throwing the shoes out the window. The attorney will argue successfully that any information about the shoes imparted to him in confidence by David is strictly privileged and may not be revealed.

The attorney may also argue that because he learned of the shoes being thrown out the window by virtue of his representation of David, that that information should be protected as well. However, an attorney has a duty to not actively participate in a crime, nor to further the commission of a crime by a client. Inasmuch as the attorney was a witness to the commission of a crime, he must reveal that he saw David throw the shoes out the window, or else he might be

guilty of obstruction of justice. However, the police officer is not a tribunal. Thus, the police officer cannot require the attorney to divulge what he saw David do. Accordingly, the attorney should not have told the police officer anything about the shoes or the ring that he learned from his representation of David.

2. Should Attorney tell the Grand Jury that David is threatening to burn the scraps of the shirt?

The attorney-client privilege is held by the client, and if the client is not available, the attorney must claim the privilege on behalf of the client. A disclosure by a client of an intent to commit a crime in the future is not protected by the attorney-client privilege. In this case, the proposed crime is the destruction of evidence of a crime. Because there is no protection by the attorney-client privilege, the attorney must reveal it to the grand jury. With respect to permissive disclosure of an intent to commit a crime, California holds that an attorney may disclose a client's intention to commit a crime if it involves death or serious bodily injury.

3. May attorney tell the grand jury anything about any of the other events described above?

The attorney may not disclose to the grand jury any of the confidences imparted to him by David. Since David is not present, the attorney must claim the privilege for him. The admissions by David that he killed the victim and stole the victim's shirt, shoes and ring, and that he was wearing them at the time he was arrested are all privileged communications that are protected by the attorney-client privilege. Also protected by the privilege is David's admission that he hid the shirt and shoes and that he threw the ring out of the cell window into the trash can behind the jail. The attorney may, however, be required to tell the grand jury that he saw David throw the shoes out the window. What the attorney saw is not a communication protected by the attorney-client privilege, rather, it is a criminal act - the destruction or attempted destruction of evidence of a crime. Inasmuch as it is not protected, Attorney must reveal what he saw to the grand jury.

4. Should attorney continue to represent David?

If an attorney knows in advance that he will be called as a witness in a case, he has a duty not to accept representation. If an attorney learns during the representation that he will be called as a witness, he should withdraw provided that his withdrawal will not prejudice the client. In this case, after the attorney had begun his representation, he witnessed David throw the shoes out of the window. As a witness to the event, he will likely be called to testify at David's trial. Since it is early on in the proceedings, and there is no evidence that the attorney's withdrawal would prejudice David, the attorney should withdraw.

In addition, the attorney may withdraw if a client fails to comply with the attorney's advice. In this case, David ignored attorney's advice not to do anything else to hide or destroy evidence. Based on this, the attorney has grounds for permissive withdrawal. However, if the attorney has already initiated representation, he will need the court's permission to withdraw.

July 1997

Question 3

Attorney Ann is a member of the State Bar of California and represents primarily low-income tenants.

Frank, a friend of Ann, told her about an apartment complex that appeared to be very run down and to have many elderly tenants. Ann visited the building and was shocked at its dilapidated and unsafe conditions.

Ann sent a letter to each of the tenants in the building, which stated:

> It has come to my attention that there may be ILLEGAL and UNSAFE conditions at your apartment building!
>
> I am an attorney experienced in this type of case, and I am willing to represent you in a lawsuit against your landlord regarding these conditions. CALL TODAY!

Tom, a tenant, called Ann in response to the letter and told her he wanted to hire her to sue Landlord. He said that another tenant named Barbara, who is 82 years old and speaks only Spanish, also wanted to hire Ann.

Ann met with Tom and Barbara. Since Ann speaks very little Spanish, and Tom is bilingual, he acted as a translator. It became clear that Tom's interest was in obtaining a money judgment and that Barbara's interest was in obtaining an injunction requiring the landlord to make repairs. Ann, Tom and Barbara signed a contingency fee agreement for Ann to represent Tom and Barbara in a lawsuit against Landlord. Under the agreement, Ann would receive 40% of any recovery in the case. Ann also separately agreed with Frank that she would pay him 10% of any fees she recovers in return for his having told her about the apartment complex.

Ann filed a lawsuit against Landlord. The suit had a sound legal basis, and she handled it in a professionally competent manner.

Ann and Tom worked together closely on the case, and before the case was resolved, he asked Ann to date him. He also gave her a free airline ticket to accompany him on a trip to Hawaii, which she accepted.

Eventually, Landlord made a written settlement offer to pay money damages only, which Ann conveyed to Tom. Tom, without consulting Barbara, told Ann that he and Barbara accepted the offer. Ann concluded the settlement.

What professional responsibility issues are raised by Ann's conduct? Discuss.

ANSWER A TO QUESTION 3

Applicable rules

As a member of the California State Bar, Ann (A) must abide by the California Rules of Professional Responsibility or she will be subject to discipline by the Bar.

A generally owes duties to her clients, the profession, other attorneys, the community at large, the judge and jury. The following analysis is arranged chronologically, by event.

Advertisement

Advertisements must be identified as advertisements, must contain the name of at least one attorney responsible for the ad, and cannot be false or misleading. Here, A's letter does not state that it is an ad and the text which we have does not contain A's name, although the letter itself presumably does either on the letterhead or in the signature.

A has not made any blatantly false or misleading statements in her ad, but the following statements might be at issue. A states that "there may be ILLEGAL and UNSAFE conditions", that A is an "experienced attorney" (assume that she has some basis to make this statement), and that she is "willing to represent you in a lawsuit against your landlord." Taken as a whole, these statements may give the potentially misleading impression that A has already investigated the situation, that the case is open and shut, and that A essentially is guaranteeing both representation and successful results. Both of these guarantees would violate rules on advertising.

Solicitation. targeted direct mail

Attorneys may only solicit relatives and former clients. Solicitation is the initiation of personal contact for the purpose of obtaining fee-paying work. Here, A is not soliciting since she is sending out a targeted direct mail advertisement. These are generally allowed.

Records Under California rules, A must keep copies of all her ads for two years, in case of disciplinary action by the Bar. It is unclear whether A intends to do this.

Taking Tom (T) and Barbara (B) as clients

An attorney cannot represent two parties on the same side of a lawsuit if they have diverging interests. An attorney may represent two parties if they have only a potential conflict (rather than an actual one), if she secures waivers from both parties.

Conflict

Two parties are conflicted if one party's interests would prevent the full, loyal representation of the other party. Here, T was interested in obtaining a money judgment; B was interested in an injunction for repairs. T and B have different interests, and their interests are potentially conflicting, but it is possible that A could effectively represent both of them (at least it appears so in their initial meeting). However, to do so, A must secure waivers from both B and T.

Waiver

In a potential conflict situation, an attorney may represent both parties if a reasonable

attorney would believe she could effectively represent both parties, if both parties are informed of the potential for conflict, and if both parties consent to the representation in writing. Here, assuming that A could reasonably believe she could effectively represent both B and T (see previous paragraph), she would still be subject to discipline because she did not discuss the potential conflicts with B and T, and did not obtain their consent.

T as translator

Attorneys owe a duty of loyalty and a duty to communicate to and with their clients. Here, B was A's client. A communicated with B via T. A probably breached a duty to B by using this arrangement since A does not really know what B and T are saying to each other and T has a motive to distort the communication between A and B, in order to achieve his own interests - damages rather than injunction. Hence, A should not allow T to translate for B.

Contingency fee agreement

In California, contingency fee agreements must be in writing, must disclose the fee percentage and how the fee is calculated, must disclose what expenses are excluded from the contingency fee and how they are to be charged, and must disclose that fee arrangement besides contingency is available. Here, A has done some of this (e.g., 40% fee rate), but it is unclear whether she has met all of the requirements. For example, since B is primarily interested in injunction, how is that to be handled? Does A get a percentage of the economic value of the repairs? If so, who decides the value? Is the injunction excluded from contingency but charged on an hourly basis? If so, which hours are charged to B's matter since much of what A does will be common to B and T?

Fee rate

In California, there are caps on medical malpractice contingency fees and fees generally cannot be unconscionably high. Here, a 40% rate probably is not unconscionable, since 1/3 and 1/4 generally seem to be popular rates.

A-F fee splitting agreement

It is unclear whether Frank (F) is an attorney.

If he is, attorneys may split fees with attorneys in other firms, provided that the clients consent. There is no requirement that the fees be proportionate to work done or responsibility shouldered (unlike the ABA Rules). California allows straight referral fees. Here, however, A has not informed her clients B and T. If F is not an attorney, A may not split fees with him. F would be known, in the vernacular, as a runner or capper (although perhaps a casual rather than a professional one).

If F is an attorney in A's firm, then A and F may split fees however they like and without informing the clients.

A-T personal relationship

A's personal relationship raises a conflict of interest between A and T, and, more seriously, between A and B.

A and T

The issue is whether A can continue to effectively represent T while they are romantically involved. If not, A will have breached her duty of loyalty to A, by putting her personal romantic interests ahead of T's interests as a client. Even more problematic would be if the relationship soured.

A and B

The issue is the same for A and B, but the analysis is clearer - A's romantic interest and B's interest as a client are not aligned (as might be the case between A and T). In fact, the interests probably clash, particularly since T gave A a free airline ticket to Hawaii. At the very least, A has a duty to communicate what is going on as a potential conflict, to B. Probably, A should withdraw from representation of B (and possibly T also). Even if there is no actual conflict, the appearances are bad enough that conflict will likely be presumed.

T's role in the case.

The issue is whether A breached a duty to B by allowing T to take such an active role in the case, by allowing T to be the primary contact with B, and it appears by allowing T to make decisions for B. The last is clearly a breach since B's decisions can only be made by B; decisions regarding substantive rights can only be made by the client, not by the attorney, and certainly not by another party who may have conflicting interests. The other two issues follow a similar analysis as T's role as translator. A owes a duty to communicate with B; she probably breached this duty by allowing T to take such a large role in the case and in the go-between with B.

Settlement.

An attorney has a duty to communicate with her clients, including settlement offers. Additionally, decisions regarding a client's substantive legal rights may only be made by the client.

Here, A breached both of these duties with respect to B. A did not communicate the offer to B. Instead, she told T. It is unclear whether A expected T to tell B. Perhaps this was the case since T then said that he and B both accepted the offer. A should be suspicious, however, since T's interest is not aligned with B's and it would be to T's advantage to not tell B and then accept the offer for both of them. A should have at least checked with B to make sure that B understood the offer, and voluntarily accepted it, before actually concluding the settlement.

ANSWER B TO QUESTION 3

Duty of Competence:

An attorney owes their client a duty of competent representation and should not take on a case in which they have inadequate skill or knowledge to pursue it. Here, Ann primarily represents low income tenants. The problem and case involve the rights and duties of low income tenants and the landlord. She is, therefore, competent to take on this type of representation.

Solicitation of Clients:

Attorney advertising is protected by the first amendment, under the limited protections of commercial speech. A state may more severely regulate advertising when it poses a risk of misleading potential clients. Furthermore, the Supreme Court has held that untruthful or deceptive advertising has no 1st amendment protection and can be banned.

Specifically, the Supreme Court in Ohralick held that a state may punish an attorney for engaging in in-person solicitation of clients for profit. In Primus, the court held an attorney could engage in in-person solicitation, however, if it was for free. Here, Ann is seeking paying work. However, her initial contact with the residents was in the form of a letter.

The Supreme Court held that targeted mailings -- mail sent to persons whom the attorney knows are in need of representation -- is protected conduct. However, the states may by regulation impose requirements on what must be in the advertisement. For example, the rules require that attorney advertising clearly indicate that it is advertising material. Here, there is no evidence that Ann placed such a label on her letter, either on the outside of the envelope or at the top of the letter, and she may be subject to discipline for this.

In addition, she knows these are elderly tenants and are more susceptible perhaps to claims or sales pitches. Her ad may be judged to be misleading because it says nothing about how much it will cost the residents to secure her assistance. She probably knows on average how much such cases cost, and she was not seeking to provide free legal assistance. As such, her ad may be misleading for failing to include any reference to the fact that Ann would want to be paid for her work.

The ad may also be inflammatory and misleading because it has in uppercase type "ILLEGAL and UNSAFE." Sending this to elderly residents is likely to scare them and coerce them into seeking her help. As such, the ad letter is deceptive and misleading and perhaps improper, because it appears intended to have the effect of scaring the residents.

Joint Representation:

Ann was contacted by Tom, who told her that Barbara was also interested in hiring her. Barbara is 82, and speaks only Spanish. As such, Ann should have realized she may need assistance in order to represent Barbara. The Duty of Competence requires an attorney to seek outside assistance when it would not be reasonable for the attorney to perform their services under the circumstances. Here, since Ann owes Barbara a duty of

care in providing her with representation, Ann should have taken better steps then relying on Tom to ensure that Ann understood the interests of Barbara in the Representation.

Duty of Loyalty:

An attorney owes the client a duty of loyalty, which includes not taking on conflicting interests. Here, Ann is assuming joint representation for Tom and Barbara. Since they are present clients, she must determine whether there is any conflict between what she is being asked to do for Tom and for Barbara. If a conflict exists, the attorney must not take the case if it would not be reasonable to believe the representation could be provided without the conflict affecting the case. Here, a potential conflict arose when Ann learned that Tom was primarily interested in securing a money judgment while Barbara wanted an order that the repairs to the apartment complex be made.

The attorney must not represent two clients at the same time when it requires the attorney to argue for inconsistent positions adverse to the other client. Here, Ann would be arguing for damages to go to Tom, and an injunction for Barbara: these are inconsistent because a prerequisite for an injunction is a finding that the legal remedies are inadequate. If damages are adequate to compensate the tenants, Barbara may not be able to get the order she wants to get the repairs made. As such, Ann should have clarified the representation purpose with Tom and Barbara. She would have to find that a reasonable person would determine the representation could be persuaded without actual conflict, but this seems unlikely here where damages for Tom may preclude relief for Barbara. At a minimum, she should have informed Barbara of the conflict and sought her written consent. She did not and may be subject to discipline.

Duty of Confidence:

An Attorney owes the client a duty of confidence not to disclose any information or use to the client's disadvantage when learned as a result of the representation. Here, Ann held a joint meeting with Tom and Barbara. By permitting this, Ann permitted Barbara to waive her privilege in so far as Tom is concerned. There is no evidence that the consequences of the joint meeting and of joint representation were discussed with Barbara. Ann should have discussed this with Barbara, and another interpreter if required, before having the joint meeting. It would have been better to advise Barbara to seek other counsel.

Fee Agreement:

An attorney in California must in any fee agreement disclose in writing to the client the method of calculating the fee.

The fee must not be unreasonable. Furthermore, the fee agreement must include how costs are to be calculated. It must provide whether costs and expenses will be charged to the client, or whether they will be deducted out of the fee award, and whether they will be deducted before or after the contingency fee is calculated.

Ann is subject to discipline because her fee agreement with Tom and Barbara, while in writing and stating her percent of fee, did not mention how costs would be calculated or whether they would be taken out before or after Ann's fee was calculated. The size of the fee -- 40% -- appears to not be unconscionable. However, the factors to be included in the

analysis are the expertise of the lawyer -- Ann appears to specialize in this field -- and the complexity of the case. This appears to be a simple landlord tenant dispute that could be worked out in settlement. 40% may seem a bit high when the case ended with settlement shortly after filing the suit. However, Ann could not be sure the Landlord would not force her to go to trial so the fee looks more reasonable on this basis.

Fee Splitting:

An attorney may not split fees with a nonattorney except under limited circumstances. The ABA model rules prohibit forwarding fees unless it is with an attorney and the attorney either assumes joint responsibility for the work or performs a proportionate share of the work. Here, we do not even know if Frank is an Attorney. A fee may not be split with him unless part of an employee compensation or retirement plan for a firm, for example. None of these exceptions

appear to apply so Ann is subject to discipline for paying a fee to Frank. Furthermore, in California, Runners and Cappers are not permitted. If Ann has Frank out soliciting work for her, she is subject to discipline and guilty of a crime in California.

Ann and Tom's Relationship:

The ABA Model Rules and California rules strongly discourage attorneys from becoming romantically involved with their clients. An attorney may be subject to discipline if she has used her position as a fiduciary to coerce the client or otherwise improperly force a relationship on the client.

Here, it appears that Tom pursued Ann. It does not appear Ann used her relationship as Tom's attorney to coerce Tom in any way.

However, an attorney must continue to prevent any conflicts from arising which would prevent the attorney from following her duty to the client. Here, as noted earlier, Tom's interest appears adverse to Barbara's. By entering the relationship with Tom, Ann may be creating a potential conflict with Barbara if she permits her personal feelings to let her favor Tom in the disposition of the case rather than diligently protecting Barbara's interests. She may be subject to discipline.

Gifts from a Client:

The model rules prohibit certain gifts from a client to the attorney. For example, an attorney may not draft a will in which the client makes a gift to the attorney. However, Tom appears to have given Ann a personal gift of the Airline ticket and this alone does not appear to subject Ann to Discipline.

Duty to the Court:

An attorney owes a duty to the Court and to the profession to not interpose frivolous legal arguments or submit papers for an improper purpose, such as to harass. Here, Ann filed suit based on a sound legal basis and handled it in a professionally competent manner. She appears to have satisfied her duty to the Court and profession.

Settlement
Duty of Competence/Client
Scope of representation:

An attorney is permitted to make decisions regarding how the representation is to be carried out. For example, the attorney is permitted to determine what motions to file, what objections to interpose, etc. The client, however, is to make decisions regarding the goals and objectives of the representation. The client is also to make critical decisions -- such as whether a criminal defendant will testify. In a civil matter, the client must be informed of and make the decision of whether or not to accept a settlement.

Ann received the settlement offer from the Landlord to only pay money damages. She informed Tom, satisfying this duty. However, Ann is subject to discipline for failing to personally inform Barbara.

Ann was on notice that Barbara was not interested in money damages. She wanted an

order. Ann should, therefore, have clearly known that she must discuss the matter with Barbara personally, rather than relying on Tom.

Furthermore, it was discussed above that Ann had a potential conflict between the interests of Tom and the interests of Barbara. Even if such a conflict was only potential at the initiation of representation here the conflict is actual -- the landlord will not at this point offer anything other than money. Barbara said she wanted an order, not money damages. Ann should, in order to represent her interests, consider turning down the offer by the landlord and pursuing the order that Barbara desires. However, this is at odds with Tom's desires.

Rejecting the offer may imperil the landlord's interest in offering money damages, or at least lower the amount he is willing to offer. It would not be reasonable for Ann to believe she could continue this representation of both Tom and Barbara and faithfully adhere to her duty of loyalty to each. She should withdraw from the representation and facilitate Tom or Barbara in seeking other counsel. Arguably she should have never accepted the case and should have referred one of the clients to another attorney. But here, at the latest, she must withdraw. Since she did not, she is subject to discipline.

In addition, Ann may be subject to discipline for the relationship she entered with Tom. It appears at the end that she permitted the relationship with Tom to interfere with her duty of loyalty to Barbara. She accepted Tom's word that Barbara wanted the settlement. If so, she is subject to discipline.

February 2001

QUESTION 5

Jones & Smith is a law firm concentrating on plaintiffs' personal injury litigation. The firm has decided to take several steps to increase its business volume.

First, the firm plans to run television advertisements stating that the firm offers to handle cases for discount contingency fees. The advertisements will state that, while most firms normally charge a 33% contingency fee for handling a personal injury case, Jones & Smith will undertake representation for a fee of 25%. In addition, the advertisements will state that the firm offers interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value of the case.

Second, the firm plans to acquire from the police department lists of individuals who have been involved in automobile accidents, and to mail letters to those persons informing them that the firm is available for consultation about their legal rights arising out of the accident. Individuals who have been hospitalized as a result of an accident will receive a flower arrangement, delivered "compliments of Jones & Smith, Attorneys at Law."

Finally, the firm plans to make use of nonlawyers in order to reduce costs. The firm will employ several paralegals and investigators who will be responsible for working up personal injury cases. Their activities will include fact investigation, witness interviews, negotiation with insurance adjusters, meetings with clients to discuss proposed settlements, and settlement conferences with clients to explain releases and to execute other documents necessary to conclude a case.

Do the proposed actions violate any rules of professional conduct? Discuss.

ANSWER A TO QUESTION 5

The ABA Model Rules generally provide the majority ethical rule standards governing the conduct of attorneys. California has some rules which are more strict, less strict or different than the ABA rules on various issues. As to advertising, in particular, California has detailed requirements requiring that ads be labelled and that any staged recreations or simulations be labelled, and also designating a number of practices as presumptively deceptive or misleading. That includes any guarantees or warranties of results, as one example.

1. The Television Ads

Lawyer advertising is commercial speech, which is subject to regulation that balances the First Amendment free expression rights with limitations such as that there is no constitutional right to make false statements.

Thus, while lawyer advertising is permitted, it must be truthful and not misleading.

A law firm is entitled to advertise its rates. The Jones & Smith (J & S) ad's statement that while most firms normally charge a 33% contingency fee, they will charge 25% is potentially misleading in that it may not be true that most firms charge a 33% contingent fee. If that statement can be supported (and may well be true), the next problem is that the ad does not disclose that costs for advanced items will be recovered as well.

California requires contingent fee contracts to be in writing and to specify not only the contingency percentage but also whether costs are recovered before or after the contingency percentage is applied. The absence of that information (i.e., whether costs are recovered before or after the 25% contingency is calculated) may render the ad misleading.

The Interest-Free Advances

The offer of interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value is clearly an ethical violation, in several respects.

First, a lawyer is not permitted to acquire a personal financial interest in a case, apart from the permitted contingent fee. Lawyers may not pay to get a case. Lawyers also are generally not permitted to loan clients money. They may advance litigation expenses or sometimes necessary medical expenses necessary for litigation. California does permit loans, but only after the representation is established and only if the client signs an IOU in writing.

The ad contemplates advances on loans even before the potential client has become an actual client.

Additionally, the parts of the ad that deal with "cares of clear liability" and "50% of the firm's estimated value of the case," are suggestive of guarantees or assurances of case outcome which, as noted above, are presumptively misleading and impermissible in California.

2. The Mailings to Accident Victims

The Supreme Court has upheld targeted mail solicitations such as letters to accident victims. However, the ABA Model Rules and California impose various restrictions and requirements on such letters. Both the letters themselves and the outside envelope must note that it is a commercial solicitation. The information about the firm and its availability also must be truthful and not misleading. So the plan to mail letters is not ipso facto any ethical violation assuming that the accident information is obtained lawfully. Informing that the firm is available for consultation is permissible.

The plan to send flower arrangements to hospitalized victims that say, "compliments of Jones & Smith," is not ethically permissible.

As noted above, any advertising has to be labelled as such. This would be considered advertising and would have to be labelled.

Second, there is a problem of direct solicitation. The law firm is not sending out a general mailing advising of its availability, but instead soliciting business from an individual.

Just as it is not ethically proper for a lawyer to fling his business card to an accident victim as he goes by (without any direct discussion) it would likewise be impermissible to solicit business by a card on a floral display.

Additionally, a lawyer may not offer payments or gifts to obtain business. A floral display sent to a friend or colleague with the compliments card would be permissible. A floral arrangement sent to a potential client to encourage him/her to hire the firm is not ethically permissible. It violates duties of fairness to other lawyers and of decorum to the public.

Use of Non-lawyers

Non-lawyers may be used by lawyers to assist with legal tasks, subject to several restrictions. Lawyers may not share legal fees with a non-lawyer. The non-lawyers must be supervised by the lawyer(s) and the lawyers are responsible for any ethical breaches committed by their supervisee. Additionally, it is ethically impermissible for lawyers to assist non-lawyers in the unauthorized practice of law.

Some of the activities contemplated here are proper for non-lawyers, such as fact investigating and witness interviews, as long as the paralegals and investigators observe client confidentiality and other strictures.

Some of the activities contemplated involve the practice of law, and the law firm is in ethical violation if it assists in that.

Meetings with clients to discuss settlements and settlement conferences to discuss releases and to execute other documents involve legal functions - judgments about the legal strength of claims and the evaluation of legal documents and their consequences. The paralegals and investigators should not be performing those functions.

Likewise, negotiations with insurance adjusters is not an investigatory function or a paralegal one. It involves legal evaluations and a number of legal judgments and legal strategies. That should be done by a lawyer. Paralegal or investigator involvement would involve the unauthorized practice of law. The law firm would be in ethical violation by assisting or allowing that to occur.

Supervising lawyers are liable for any ethical violations which they direct or know about and fail to correct.

ANSWER B TO QUESTION 5

Jones & Smith (J & S) as a law firm has proposed several actions that raise potential conflicts with, and violations of, both the ABA Rules of Professional Conduct and those specific to California. Where appropriate, the split between the ABA and California Rules is mentioned below.

I. TELEVISION ADS

There is nothing inherently wrong with a firm running ads seeking to inform the public that it wishes to offer its legal services. While some may find ads seeking representation on T.V. to encroach upon the duty of dignity and decorum to the profession and public, commercial speech under the First Amendment is protected speech so long as it is not deceptive, false or misleading.

J & S must make clear in their T.V. ads that the spots are ads seeking to gain clients and must not make any unverified claims or comparisons. If actors are used in the spots, the ads should clearly state the ad is a "dramatization" and contain an attorney name and contact number for the ad.

California's statutory code provides a series of presumptions concerning improper lawyer advertising. Among these is that a firm should not make any unsubstantiated guarantees, warranties or representations.

Here, J & S plan to state that most firms handle contingency fees for a personal injury case for 33% of the eventual recovery. J & S will need to verify this claim before giving such an ad and also make clear how the costs are calculated. Since it is inherently difficult to offer an industry-wide practice, particularly where the geographic scope is not mentioned, regarding costs, J & S may be engaged in deceptive or misleading advertising.

J & S then plans to compare its 25% fee to that of "most" firms at 33%. The ad is deceptive, or potentially misleading, in that "most" is very imprecise (51 % or 99%?) and does not state what is involved. Then J & S attempts to state that it will "undertake" representation for a 25% fee. What does undertake mean? Does it mean that all personal injury cases are for a 25% fee, or does it mean that this is a floor for negotiation or for most cases?

More importantly, a contingency fee arrangement is a contractual relationship between the client(s) and firm in which all relevant factors must be made clear to the parties. The fee arrangement should detail, inter alia, (i) what costs are included or excluded, (ii) whether the percentage includes or excludes such costs, and (iii) what costs are involved in the event counsel

is dismissed or withdraws before settlement.

The ABA provides that contingency fees must not be unreasonable while California requires that fees not be unconscionable. Additionally, personal injury cases often involve medical malpractice claims and such claims in California can be capped at a set percentage.

Loans

The ads also plan to mention that J & S will offer interest-free advances against prospective judgments in "cases of clear liability" of up to 50% of the firm's "estimated value" of the case. Both standards appear to be very subjective and offer the consumer no true idea how or whether a loan will be granted.

More importantly, loans are improper under both the ABA and California Rules. The ABA provides that loans may only be advanced to indigent clients for necessary litigation expenses, while California provides that loans are per se improper unless accompanied by a signed promissory note.

Additionally, the loans serve to provide J & S with an improper interest in the subject of litigation. However, this is not fatal since contingency fee arrangements inherently involve interest in the client's litigation.

II. IN-MAIL SOLICITATION

It is proper for J & S to acquire the names of potential clients from the police because this is public information made available to the public.

While it would be improper for lawyers to use such lists for in-person solicitation of clients, sending letters is different. Lawyers are prohibited by the rules of professional conduct from in-person solicitation of prospective clients for personal pecuniary gain in the absence of a preexisting legal or familial relationship. The rationale is that potential clients may feel coerced to assent to

representation under the duress of face-to-face confrontation.

This concern is lessened with solicitation for profit through the mail. There is less pressure and the client is better able to weigh his options. The rules pertaining to such letters are similar to those for T. V. acts above - there should be a prominent disclaimer that this is an ad for legal services and provide an attorney contact and number. Attorneys are required in California to keep a copy of all such ads for 2 years and make them available for inspection to the state bar.

The letters should not make any unverified claims, comparisons, or contacts or influence with local agencies and officials. Additionally, while the firm may state that it concentrates in the area of personal injury, it should not claim any specialization unless certified by the state bar or an approved independent organization.

Flowers

Attorneys are forbidden to either personally, or through the use of runners and agents, solicit representation in person at the scene of an accident or in the hospital. Such scenarios increase the likelihood of pressure and duress in gaining solicitation, and is a breach of the public's **trust in the profession.**

The flowers may or may not be improper. However, no matter the variety, something smells bad when a law firm sends flowers or gifts to prospective clients. As such, the flowers may constitute solicitation and would be improper. Even if they do not, J & S should refrain from sending flowers.

III. USE OF NON-LAWYERS

Non-lawyers may not direct nor supervise the work of lawyers. Additionally, lawyers may not share fees with non-lawyers for conducting legal work (with exceptions for death benefits and pensions).

Here, J & S seeks to have non-lawyers conduct the following activities:

i) Fact investigation

This is proper, and many firms employ paralegals and even private investigators to do such work.

ii) Witness interviews

This may be appropriate, but attorneys owe their clients a duty of competence to fully prepare and handle their cases. Witness interviews should only be conducted with sufficient firm oversight so that important factual matters giving rise to legal claims do not go unnoticed.

iii) Negotiations

This is prohibited. Non-lawyers may not engage in the providing of legal services. Since insurance adjusters often determine the size of the claim, attorneys should oversee such negotiations.

iv) Proposed Settlement Meetings

This is also prohibited. Lawyers have a duty to communicate with their clients and relay all proposed settlement offers. A client is owed a duty of loyalty and confidentiality, and this entails that all such communications are to be between the client(s) and attorney(s).

Additionally, clients oversee substantive decisions (whether to settle) while attorneys oversee procedural/tactical decisions. Thus, non-lawyers should not conduct settlement conferences since it violates the above rules and duties.

v) Execute other documents

Lastly, non-lawyers are not to execute any documents with legal significance that require legal analysis and professional judgment. To allow otherwise breaches duties to the client, profession, public and the courts.

February 2002

QUESTION 3

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

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

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

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

Has Alice violated any rules of professional responsibility? Discuss.

ANSWER A TO ESSAY QUESTION 3

Alice's Professional Responsibilities

Who does Alice represent?

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

Duty of Loyalty

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

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

Betty's Involvement

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

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

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

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

Actual Conflict of Interest

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

Todd's Guilty Plea

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

Duty of Competence

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

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

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

Duty to Maintain the Proper Scope of the Relationship

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

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

Duty to Render Competent Advice and to Pursue Matter Diligently

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

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

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

Duty of Confidentiality

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

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

Todd, and not Betty, is her client.

Fiduciary Duties

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

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

Duty to Communicate with the Client

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

Duties Owed to the Court and Third Parties

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

ANSWER B TO ESSAY QUESTION 3

Question 3

Duty of Confidentiality

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

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

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

Duty of Loyalty: Potential Conflict

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

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

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

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

(in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent - written or otherwise - from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

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

Duty of Loyalty: Actual Conflict

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

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

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

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

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

Alice rather than Todd's wishes.

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

Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

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

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

Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

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

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

Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less on[e] that involved a serious drug felony. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent

to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

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

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

Diligence

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

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

Duty to Communicate

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

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

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

February 2003

QUESTION 4

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

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

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

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

Answer A to Question 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An objective uninterested lawyer may agree dual representation is proper, depending on D and A's final goals. It is likely that a third party lawyer would disagree.

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

4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS

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

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

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

5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

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

the third party paying the fee.

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

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

Answer B to Question 4

Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W

& Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

A. Lawyer for the Government Now in Private Practice

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

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

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

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

Duties of W & Z if there is a Conflict

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

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

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

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

Conflict Between Developer & Association

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

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

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts to both Developer and Association and obtains their consent, she should be able to represent both clients under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

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

Payment of Fees By a Third Party

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

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

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

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

July 2003
Question 5

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

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

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

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

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

Answer A to Question 5

Duty of Loyalty

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

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

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

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

Representation of Corp.

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

Withdrawal

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

or fraud. In such a case, the lawyer might have to make a "noisy withdrawal" by disclaiming work he prepared that furthered the crime or fraud.

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

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

After Smith Completed his Statement

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

2. Duty of Confidentiality

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

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

Exceptions

A lawyer may only violate the duty of confidentiality if the client consents, if he's ordered to disclose information by law, if he does so to defend himself in a malpractice action or a suit to recover legal fees, or (under ABA Rules) prevent a crime involving imminent death or serious bodily harm. The last exception is the only one that is arguably applicable here. It must be noted that the California Supreme Court has not found such an exception under its state law. While the CA evidence code has such an exception, the vitality of this exception is unclear in CA. Even if it did apply, it probably wouldn't apply here. Although the dumping creates a severe risk of serious bodily harm or even death, the risk is not of an imminent nature. While others would argue that the harm from the toxic chemicals is an ongoing one, this exception is designed to deal with a case where an individual's safety is in danger from more obvious, and less latent, danger. Therefore, the duty of confidentiality prevents Lawyer from disclosing this information to the government.

Attorney-Client Privileges

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

would require him to disclose them if ordered to do so, since a crime is ongoing.

Answer B to Question 5

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

A lawyer owes a duty of uncompromised loyalty to his client which forbids him from taking actions which might create competing obligations except in specifically enumerated situations. An attorney representing a corporation is in a particularly precarious position because his duty of

loyalty runs to the corporation, and not to any individual employees.

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

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

Duty of Confidentiality to S

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

Here, L became ethically obligated to keep confidential the conversation he had with S by allowing S to meet with him on a "confidential basis" and confide in him regarding crimes that he had committed. S informed L that S himself had violated company policies and govt. regulations by failing to disclose the substance of his investigation in his inspection report, and may therefore have subjected himself to criminal or civil liability, and workplace censure for his failure to do so. Since S likely would not have confided in L unless he believed L was, for the purposes of the conversation, his attorney, L has incurred a duty of confidentiality to S by failing to properly inform him of his (L's) loyalties.

Duty of Loyalty to C

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

compromise his duty of loyalty to C or S.

Duty of Competence to C

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

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

Duty of Confidentiality to C

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

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

2 May L Independently Disclose Information About Dumping?

Duty of Candor

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

Duty of Confidentiality

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

Under the ABA Model Rules, an attorney is permitted to disclose otherwise confidential information in order to prevent immediate death or substantial bodily harm. Here, it is unclear whether S's revelation suggests any immediate danger, since S only opined that there were

"possible health threats" because the dump site was located near private residences and potable drinking water. However, L could make the case that such dumping does pose an imminent threat because contamination will almost certainly lead to death or serious bodily injury, and is ongoing. Thus, in an ABA MR jurisdiction, L may be permitted to disclose the dumping.

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

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

February 2004

Question 3

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

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

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

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

Answer A to Question 3

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

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

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

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

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

Thus, here both provisions are triggered:

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

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

Duty of Confidentiality & Preservation of Attny-Client Privilege

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

The facts suggest that there was some ambiguity concerning Sis's role. If Dad in fact desired to have Sis present during the discussions, to assist him, that would be permissible (assuming L disclosed ramifications) and there may have been a way to allow that without effecting a waiver. On the other hand, it appears Dad was competent, so there arguably was no need to have Sis present. Regardless, L needed to raise these issues with Dad at the outset, including a discussion

of who was the client (Dad) and of the attorney-client privilege, and the possible impact of allowing Sis to "sit in" on the consultation on waiving any privilege. L also would have needed to discuss the fact that because Sis was an interested person in his estate distribution, the potential conflict of interest between Dad & Sis weighed in favor of excluding Sis from the consultation.

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

C. Duty as Advisor and General Duty of Competence

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

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

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

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

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

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

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

E. Fee

A lawyer's fee must be reasonable in light of the services performed. Here, lawyer charged a flat fee of $750. Assuming this amount was reasonably related to the services performed, including

their complexity, the lawyers' experience, & fees charged by others in the community for similar work, it would be proper even though in the nature of a "flat" rather than hourly based fee. California does not require fee agreements to be in writing unless amt is greater than $1000.

Summary of Options and What L Should Have Done

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

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

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

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

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

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

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

Answer B to Question 3

3)

I. Duty of Loyalty to Client

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

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

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

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

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

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

II. Duty of Confidentiality

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

III. Fiduciary Duty

<u>Fee discussion upfront</u>

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

Payment by Sis

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

IV. Competency

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

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

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

July 2004
Question 5

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

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

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

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

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

Answer A to Question 5

5)

Duty of loyalty: special concerns for prior government lawyers

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

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

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

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

Duty to profession: getting clients from hospitals

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

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

Duty to profession: Sharing fees with non-lawyers

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

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

Duty of Competence

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

Duty of Loyalty: trip to Dinoworld

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

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

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

Duty to Opposing Parties: duty to avoid deception

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

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

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

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

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

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

Answer B to Question 5 1. Duty

of dignity to legal profession

- Solicitation -

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

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

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's

wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

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

- Referrals -

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

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

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

Advertising -

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

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

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

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

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

2. Duty of Candor/Fairness

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

- Represented Person -

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

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

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

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

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

July 2005
Question 6

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

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

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

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

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

Answer A to Question 6

6)

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

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

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

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

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

percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally's assets as this is most likely far to[o] unreasonable and unconscionable.

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

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

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

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

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

Answer B to Question 6

6)

Applicable Law

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

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this ca[s]e once Lou and Sally meet for their appointment a lawyer-client

relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

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

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

In Person Solicitation

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

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

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

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

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

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

Fee
Breach of Fiduciary Duty to Client for an Improper Fee

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

Fees *Generally*

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money

but her and her husband had $1,000,000 worth of art. This would mean that Lou's fee was at least $250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of $250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

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

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

Contingency Fee

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

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

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

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

Breach of Duty of Loyalty to the Client

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

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases.

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

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

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

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

Rules

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

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

California RPCs

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

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

California RPCs.

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

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

Failure to Communicate the Settlement Offer and Rejection Thereof

Breach of Duty of Care Owed to the Client

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

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

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

Scope of Representation

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

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

therefore violated the Model Rules and the California RPCs.

February 2005
Question 4

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

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

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

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

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

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

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

Answer A to Question 4

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

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

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

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

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

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

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

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

to either Bob or the Court immediately.

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

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

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

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

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

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

Hearsay

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

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

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

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

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

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

Answer B to Question 4

4)

Question 4

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

interview of Carl raised several ethical concerns:

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

In the instant circumstance, C is an employee of an organization, the Department, which is

represented by attorney Bob (B). The issue is whether it is permissible under the rules of professional conduct for A to interview C without notice t[o] B or representation by counsel.

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

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

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

Duty of Fairness to Third Persons

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

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

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

Attorney-Client Privilege

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

Work Product Privilege

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

Duty to Return Material Mistakenly Delivered

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

Duty of Zealous Representation and Diligence

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

3. ___ Objections to Admissibility of Memo

a. ___ Objection based on attorney-client privilege

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

Waiver?

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

b. ___ Hearsay

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

Admission

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

objection on this basis.

Offered Not for the Truth But for The State of Mind

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

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

No Business Record Exception

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

No Official Record Exception

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

Conclusion

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