

Question # 1

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum (.Museum.) any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's .The Pond.. After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, .Refund on 1st of Monay Pond series.

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, .That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it.

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting?
Discuss.

Remedies Model Answer Question # 1

Contracts/Remedies essay

Paula v Sally

U.C.C.

A contract involving a transaction in goods is governed by the U.C.C.

The transaction involved the sale of a painting, which are goods. Therefore, the transaction would be governed by the U.C.C.

Merchants

A merchant is a person who deals in the kind of goods involved in the transaction or otherwise holds herself out as having special knowledge and skill peculiar to the practices or goods involved in the transaction.

While Paula was earning her first commission as an acquisition agent, she was a recent art-school graduate and was holding herself out as one who finds artwork for collectors who are interested in buying particular artwork. Thus, she was holding herself out as having special knowledge and skill peculiar to the kind of goods involved in the transaction.

Sally is a private collector. Since she collects artwork she is holding herself out as having special knowledge and skill peculiar to the goods involved.

Therefore, Paula and Sally are merchants under the U.C.C.

Preliminary Negotiations

Preliminary negotiations are merely an invitation to deal.

Paula as an art acquisition agent tracked down Sally, a private collector, who owned three originals of Monay's "The Pond." They had some negotiations in which Sally expressed offhandedly how proud she was that she only sold to private collectors. As such, the discussions were an invitation to deal.

Thus, these were preliminary negotiations.

Offer

An offer is an outward manifestation of present contractual intent with definite and certain terms which was communicated to the offeree.

After some negotiations, Sally orally agreed to sell whichever of the three paintings Paula selected from "The Pond" collection. Based on Sally agreeing with Paula her action establishes an outward manifestation of present contractual intent to give Paula one of the three Monay's paintings that were in "The Pond" series.

The terms were described as one Pond painting, quantity; although no time was stated the court will look to a reasonable time, thus time period; Paula and Sally are the parties; the amount was \$200,000, price; and the first of the three of Monay's "The Pond" paintings is the subject matter. Since the terms are stated with sufficient particularity, the terms are definite and certain.

Sally orally agreed with Paula. Thus, Sally communicated the offer to Paula, the offeree.

Therefore, there was a valid offer.

Acceptance

An acceptance is an unequivocal assent to the terms of the offer.

Paula agreed showing an unequivocal assent to Sally's offer to purchase one of Monay's "The Pond" paintings.

Thus, a valid acceptance of Sally's offer occurred.

Consideration

Consideration is that which is bargained for and given in exchange for a return promise, requiring a legal benefit and a legal detriment to all parties.

Sally bargained for giving the first of the three of Monay's painting in "The Pond" series in exchange for a return promise from Paula to pay \$200,000. Paula bargained to receive the first of Monay's paintings in "The Pond" series from Sally in exchange for a return promise to pay \$200,000. Thus, Sally and Paula both received a legal benefit and incurred legal detriment arising from their agreement.

Therefore, there is valid consideration and contractual rights exist between Sally and Paula.

Statute of Frauds – Contract for the Sale of Goods for \$500 or More

Pursuant to the Statute of Frauds, a contract for the sale of goods for \$500 or more is unenforceable unless in writing.

The contract involved the sale of Monay's painting out of "The Pond series for \$200,000. The contract was made orally between Sally and Paula. Since the agreement deals with the sale of goods for over \$500, the contract is unenforceable under the Statute of Frauds.

Exception – Sufficient Memorandum

A writing that does contain all of the essential terms will satisfy the Statute of Frauds if there is some writing sufficient to indicate a contract of sale has been made, the quantity term is supplied, and the memorandum is signed by the party to be charged.

Paula will argue that Sally tendered a check which she had signed and had drawn from her bank account. The notation on the check stated "Refund on 1st Monay Pond series."

The check contained the definite and certain terms of the offer. The check with the notation, and drawn for Sally's account evidences an agreement for a 1st Monay Pond painting between Sally and Paula. The check, a writing, indicates a contract has been made, and is a sufficient memorandum to satisfy the Statute of Frauds to make the contract enforceable

Thus, the check is sufficient to satisfied the Statute of Frauds

Exception – Full or Part Performance

When a seller receives and accepts all or part of the money under the contract, the contract becomes enforceable.

Paula had caused \$200,000 to be wired into Sally's account in order to cover the purchase price of the painting. Since Sally accepted the money, the contract is enforceable as to the sale of one of Monay's paintings in "The Pond" series in which Paula is to choose.

Hence, this exception takes the agreement outside the Statute of Frauds.

Fraud

Fraud is a false representation of a material fact which induces reliance and one justifiably relies to their detriment.

Sally will argue she told Paula that she only sold to private collectors. Paula didn't tell Sally she was not a private collector, but an acquisition agent working for a third party, Museum. Thus, Paula was fully aware she was making the purchase for the Museum and never stated this fact to Sally. Thus, by Paula's omission to disclose that she was not a private collector she made a false representation.

However, Paula will contend that she made no representation of being a private collector. As an acquisition agent keeping the confidentiality of her client's identity is critical. Thus, she was bound to keep Museum's identity confidential. Moreover, Sally's statement of how proud she was to sell only to private collectors was made offhandedly and, thus, was never made a condition of Sally's sale of the painting to Paula. Therefore, Paula's failure to disclose that she was acting as an agent for Museum is not a false representation, nor was it a material fact to the transaction.

Thus, Paula did not defraud Sally.

Parol Evidence

Evidence of any oral or written prior or contemporaneous negotiations are inadmissible to modify, contradict, or vary the terms of the contract if the written contract is intended as a complete and final expression of the parties.

Sally will likely seek to introduce extrinsic evidence to explain that she only sells her paintings to private collectors and that she told Paula that fact before agreeing to sell the Monay to Paula.

The terms of the contract merely corresponded to the oral agreement that Sally and Paula had reached on the day of their negotiation for the sale of one of Monay's paintings in "The Pond" series. Moreover, the oral agreement did not include terms not stating that Sally was only going to sell to Paula as a private collector. The oral agreement between Sally and Paula was intended to be a complete and final expression of the agreement between the parties.

As such, Sally cannot present evidence to modify, contradict, or vary the terms of the contract because the parol evidence rule is inapplicable to the transaction. Thus, evidence that Sally only intended to sell the painting to a private collector in the present transaction is inadmissible.

Exception - Fraud

Extrinsic evidence is admissible to aid in preventing a fraud where a person makes a false representation and has no intention on fulfilling that representation.

As stated above, Sally will argue she told Paula that she only sold to private collectors. Paula did not tell Sally she was not a private collector. Based on their conversation by the facts Paula did not disclose that she was an acquisition agent and she representing herself as a private collector Paula's omission was a false representation.

However, as argued above, Paula's maintaining of the confidentiality of her client was critical in her role as Museum's agent. Further, that Paula was buying the painting as or for a private collector was never a condition of the sale since Sally only mentioned it in an offhanded remark. Therefore, no fraud occurred.

Thus, Sally will not be allowed to present evidence that she intended to sell only to a private collector.

Unilateral Mistake

A unilateral mistake exists where one of the parties under the contract is under a misconception based on the terms of the contract. The non-mistaking party can enforce the contract unless he knew or should have known of the mistake made by the other party.

Sally will argue that she was under a misconception that Paula was a private collector. Paula is an art acquisition agent for a non-private collector, Museum. This fact was never disclosed to Sally. Sally made her intention to sell only to a private collector known to Paula. Sally was mistaken that she entered into a contract for the sale of one of Monay's paintings to a private collector. As such, Sally was under a misconception. Paula should have been aware that Sally only sold to private collectors since Sally disclosed that in their negotiations. Thus, Paula knew or should have known of the mistake made by Sally.

On the other hand, Paula will likely argue that Sally never made her sale of the Monay to a private collector part of the terms of the contract.

While Sally was “proud” that she only sold to private collectors, she never made it a condition of the sale that the purchaser was a private collector. Thus, there was no “mistake” by Sally of which Paula knew or should have known.

Thus, unilateral mistake will not be a valid defense for Sally.

Conditions

Implied-In-Law – Constructive Condition Precedent

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Sally will argue that Paula must provide her with \$200,000 before Sally’s absolute duty to deliver the painting arises. Paula did have the \$200,000 transferred into Sally’s account. Since, Paula’s performance to provide the money must occur first before Sally’s duty to deliver the painting arose, Paula’s delivery of the \$200,000 was a constructive condition precedent.

Therefore, a constructive condition precedent exists.

Performance of a Condition

When one party performs under the contract the performance of the other party arises.

Paula and Sally agreed to the purchase price of \$200,000. Paula had \$200,000 transferred into Sally’s account. Thus, Paula’s performance was complete and Sally’s performance is now due.

Anticipatory Repudiation

Anticipatory repudiation is an unequivocal expression repudiating the intent to perform a contract.

When Paula went to tell Sally which painting she had chosen Sally declined to go through with the sale. Sally’s refusal constituted an unequivocal expression of repudiation of the parties’ contract.

Therefore, Sally anticipatorily repudiated the contract.

Breach

A breach is an unjustified failure to perform which goes to the essence of the bargain.

When Sally refused to comply with the contract, this was an unjustified failure to perform.

Therefore, Sally's failure to tender the painting is a major breach.

Specific Performance

Specific performance is an equitable remedy in which the court orders a breaching party to perform the terms of the contract. Specific performance will only be awarded if there is no adequate remedy at law.

Sally will likely contend that only Paula's \$15,000 commission should be paid as damages, which would make her whole and that she should not be forced to sell the painting. Thus, payment of the commission is an adequate remedy at law.

However, Paula will argue that the Monay painting she contracted to buy is the only one of its kind. Thus, the goods are unique. Further, Paula will argue if the court awarded only damages and did not force Sally to go through with the sale, her reputation would be irreparably harmed and her nascent career would be over. Thus, damages will not make Paula whole.

Question # 2

Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. (Bolton). Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Personal jurisdiction, subject matter jurisdiction, and venue were proper.

During a deposition, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods and, if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected to the questions on the ground that the information requested had nothing to do with whether Doctor was negligent as to Perry, and Doctor refused to answer. After the attorneys properly met and conferred concerning Doctor's refusal, Perry's attorney filed a motion to compel Doctor to answer the questions.

Shortly after the statute of limitations had run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging that it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the ground that the statute of limitations had already run.

Perry also learned that Doctor had lost a lawsuit brought by another patient with a back condition like his who had also alleged negligence by Doctor for inserting Bolton's rod into his spine. Perry filed a motion for summary judgment against Doctor on the basis of preclusion.

1. How should the court rule on Perry's motion to compel Doctor to answer? Discuss.
2. How should the court rule on Bolton's motion to dismiss Perry's claim on the ground that the statute of limitations had run? Discuss.
3. How should the court rule on Perry's motion for summary judgment? Discuss.

Civil Procedure Model Answer Question # 2

1. How should the court rule on Perry's motion to compel Doctor to answer? Discuss.

Performed other spine surgeries

Discovery may inquire into all non-privileged information that is relevant to the subject matter and which is reasonably calculated to lead to the discovery of admissible evidence even though such evidence may not be admissible at trial.

Perry sued Doctor for negligence related to the Doctor's performance of spine surgery. During a deposition Perry requested Doctor to answer the question whether she had performed any other spine surgeries using the Bolton's rods and, if so, whether any of those surgeries had resulted in complications. The information requested has nothing to do with whether Doctor is negligent to Perry. The question is relevant since Perry is suing Doctor for negligence. Doctor had performed surgery on Perry's spine and inserted a metal rod designed by Bolton. Shortly after the surgery, Perry developed severe back pain where the rod was inserted. If Doctor has performed similar surgeries with the same Bolton's rods in the past and those have also resulted in complications that would be relevant to the question of Doctor's duty and breach of her duty. Moreover, the answer to the question could lead to the discovery of evidence that the Bolton rod is defective. Further, the answer to the question could also reveal if Doctor was aware or should have been aware that there was a problem with the Bolton rod that she is using in her surgeries and she did nothing to correct it. Further it is relevant to establish a duty because it helps determine what standard of care Doctor should be held to which could lead to a finding of liability against Doctor, by showing she breached her duty.

In addition the answer to this question could reasonably lead Perry's attorney finding other patients with relevant information. Also Perry's attorney can discover the techniques used during those surgeries, in order to determine liability. Thus, the information is relevant and is reasonably calculated to lead to admissible evidence. Thus, this information is discoverable, and the Doctor must answer.

The court should grant Perry's motion to compel Doctor to answer.

Doctor would argue that she is prevented to answer the question based on doctor/patient privilege. However, Perry has sued for negligence and the answer in regard to prior spine surgeries that emulate Perry's surgery would tend to lead to relevant information related to the subject matter, i.e., Negligence by the Doctor. If Perry gets information that this has occurred before in the past he can find evidence that other patients have experienced severe back pain after the rod was placed in their spine, and he can use this information to show the Doctor breached her duty.

Therefore, the question is relevant and would be reasonably calculated to lead to further admissible evidence concerning Perry's belief that Doctor was negligent in performing the spine surgery.

Therefore, the Court should grant Perry's motion to compel the Doctor to answer the questions regarding other surgeries that resulted in complications.

2. How should the court rule on Bolton's motion to dismiss Perry's claim on the ground that the statute of limitations had run? Discuss.

Doctrine of Relation Back - Statute of Limitations

A plaintiff under F.R.C.P. 15(c) permits an amended pleading which allow the adding of a party, after the statute of limitations has run, to "relate back" to the filing date of the original pleading if the claim arises out of the same transaction and occurrence and the "new" defendant, within the period required by law Rule 4(j) for service of the summons and complaint (i.e., 120 days), received actual notice of the pendency of the action so that he will not be prejudiced in maintaining a defense and knew or should have known that, the defect being sued upon, ie, the of the defective rod manufactured by Bolton, the action would have been brought against him.

Perry originally sued Doctor in federal district court and now seeks to add Bolton to the lawsuit. Bolton will argue that Perry did not seek to change or substitute the proper defendant for the improper defendant, but rather, to add Bolton as a second defendant. Even if Perry were unable to join Bolton, he could still recover against Doctor, who could seek indemnity against Bolton if the rod is found to be defective.

Perry will argue that he sued Doctor for negligence related to the placing of the Bolton rod that was used in his surgery for his spine. He did not learn of the other lawsuits that were filed alleging the defective rod manufactured by Bolton until he read about the other lawsuits in the newspaper after the running of the statute of limitations. Perry did sue the Doctor, and his amendment would relate-back since the claim arose out of the same occurrence, i.e. the rod used in the spine surgery.

Perry will also have to establish that Bolton knew about his claim against Doctor within 120 days of its filing. There is no indication that Bolton received a copy of Perry's complaint against Doctor or had any notice that Perry brought a claim against Doctor as a result of his surgery. Thus, unless Perry can establish that Bolton knew about the lawsuit, he will not be able to establish this element.

Bolton's status as a manufacturer of the rod used in the Doctor's surgeries, and the lawsuits of several other patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery should have sufficiently placed Bolton on notice of the lawsuit. This notice would allow Bolton to mount any appropriate defense on the merits of the action thereby eliminating any prejudice to Bolton. It appears that Bolton knew or should have known that, but for the mistake in not suing or enjoining Bolton, an action would have been brought against them. The amendment to the complaint adding Bolton as a defendant may be deemed to relate back to the date Perry originally filed his complaint against Doctor in federal district court.

However, since Bolton had no actual notice of the lawsuit between Doctor and Perry, Perry's addition of Bolton, as a new defendant will not relate back to the original complaint and Perry will not be able to add his claim against Bolton. Thus, the court should grant Bolton's motion to dismiss Perry's claim on the ground that the Statute of limitations has run.

3. How should the court rule on Perry's motion for summary judgment? Discuss.

A summary judgment is a motion behind the pleadings to determine if there is a triable issue of material fact.

Perry learned that Doctor had lost a lawsuit brought by another patient with a back condition. He now moves for a summary judgment motion based on the fact that the Doctor was liable to another patient; therefore, he is liable to him. However, in order to determine if the motion should be granted or denied the court will need to look to Res judicata and Collateral Estoppel.

Res Judicata

Under the doctrine of res judicata once there is a valid final judgment on the merits that has been rendered on a particular cause of action, the plaintiff is barred from trying the same cause of action against the same party or privy in a subsequent lawsuit.

In the previous Plaintiff v. Doctor action where the court found the Doctor liable and since there are no facts that an appeal was filed, there was a valid final judgment on the merits which was conclusive that Doctor was negligent. However, Perry was not a party in the previous action nor was he in privity with either Plaintiff or Doctor. Therefore, the prior judgment is not conclusive as to whether Doctor was negligent to Perry.

Therefore, res judicata will be denied.

Collateral Estoppel - Issue Preclusion

Under the doctrine of collateral estoppel, judgment for the plaintiff or defendant is conclusive in a subsequent action on a different cause of action between them, if the issues are identical, the issue was actually litigated, was necessarily litigated and the party had a full and fair opportunity to litigate.

Perry wants to use the findings in the previous case, Plaintiff v Doctor, in order to impose liability onto the Doctor.

Issue actually litigated

Perry will argue that the issue of whether Doctor was negligent for inserting Bolton's rod into his spine was already decided in the first lawsuit since the court found for the plaintiff.

The facts state that "Doctor had lost a lawsuit brought by another patient... who also alleged negligence for inserting Bolton's rod into his spine." Therefore, it appears that the issue of negligence was actually litigated.

However, Doctor will correctly assert that although the court found for plaintiff on the issue of whether he was negligent in the operation, the issue of whether he was negligent in Perry operation was not actually litigated. The fact that Doctor was found negligent in the first suit does not automatically impute liability for any other operations. Doctor would argue that although the previous patient in the first case had a "back condition" like Perry's, most conditions, are almost never exactly the same and the issue of being negligent in Perry's surgery was not actually litigated.

Issue necessarily litigated

Perry will argue that the previous patient brought an action based on negligence and the issue of negligence was likely essential, and if the court had found Doctor not to be negligent, then the outcome of the case would have been different.

However, the Doctor will argue that the liability as to whether he was negligent to Perry was not necessarily litigated.

The issue of whether Doctor was negligent would not automatically impute his actions as negligent for any other operations. Doctor would argue that although the previous patient in the first case had a "back condition" like Perry's, back conditions, are never exactly the same. Each patient has different symptoms which would call for a different type of treatment. Thus, even if Perry and the previous patient had similar injuries, the causes, symptoms and other factors may require Doctor to use different techniques or procedures. Further, even if the same technique was used on both parties, each patient may react differently based on the patient's previous condition even without any negligence on the part of Doctor.

Thus, the issue of Doctor being negligent in Perry's surgery was not necessarily determined.

Full and fair opportunity to litigate

Perry is asserting issue preclusion against Doctor, who was the defendant in the first case because in the previous case, Doctor was sued by another patient. Doctor is a current defendant in Perry's case and was a defendant in the first case. Thus, Doctor is a party to both lawsuits.

However, Perry was not a party or in privity in the first lawsuit. Further, Doctor would argue that an act of negligence in one patient's operation does not mean he was negligent in the operation of Perry. Doctor's evidence could be much different than the previous case tried and show that he was not negligent. She has not had her full and fair opportunity to litigate the issue of liability to Perry.

Therefore, the collateral estoppel claim will be denied, and there is a trial issue to be determined.

Since it would not be fair to preclude Doctor from litigating the issue of negligence in Perry's case the court should deny Perry's motion for summary judgment.

Question # 3

Carol, a woman with young children, applied to rent an apartment owned and managed by Landlords, Inc. Landlords, Inc. rejected her application.

Believing that Landlords, Inc. had rejected her application because she had young children, Carol retained Abel to represent her to sue Landlords, Inc. for violation of state anti-discrimination laws, which prohibit refusal to rent to individuals with children.

Landlords, Inc. retained Barbara to represent it in the lawsuit. Barbara notified Abel that she represented Landlords, Inc.

Abel invited Ford, the former manager of rental properties for Landlords, Inc., to lunch. Ford had participated in the decision on Carol's application, but left his employment shortly afterwards. Abel questioned Ford about Landlords, Inc.'s rental practices and about certain conversations Ford had had with Barbara regarding the rental practices and Carol's application.

During a deposition by Barbara, Carol testified falsely about her sources of income. Abel, who attended the deposition, suspected that Carol was not being truthful, but did nothing.

After the deposition ended and Carol had left, Barbara told Abel that Landlords, Inc. would settle the dispute for \$5,000. Abel accepted the offer, signed the settlement papers that day, and told Carol about the settlement that night. Carol was unhappy with the amount of the settlement.

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

Answer according to California and ABA authorities.

Professional Responsibilities Model Answer Question # 3

What, if any, ethical violations has Abel committed? Discuss. Answer according to California and ABA authorities

Abel's Lunch with Ford

Duty of Fairness

An attorney owes a duty of care, loyalty and fairness to his client and his opponent. Based on his duty he has an obligation not to speak to any employees of a represented party without consent or in the absence of the opposing counsel.

Abel invited Ford, Landlords' former manager of rental properties, to lunch. Abel knew Barbara was Landlords' attorney since she had notified him of her representation. Nonetheless, Abel did not ask Barbara's permission before he invited Ford to lunch. Although, Ford had left his employment with Landlords shortly after Carol's application had been denied, making him no longer an employee of the opposing party, he was a participant in the decision of rejecting Carol's application.

Abel would argue he did not act unfairly or unethically since Ford was a former employee making it permissible to speak to him about Landlords Inc rental practices.

Barbara would counter that Ford had just recently been a high level employee and he was a participant who partook in the decision to reject Carol's rental application. Abel should have obtained her consent before speaking with Ford. However, a lawyer does owe his client a duty to diligently advocate the case and thoroughly investigate all facts and relevant evidence that will support the case. However, in diligently advocating for one's client, the lawyer must conduct himself with integrity, honesty, fairness and good faith in respect to the public, his adversary, and the legal profession. Abel likely did not commit an ethical violation because Ford was no longer an employee of Landlord, but when he asked specific questions about certain conversations Ford had with Barbara regarding the rental practices, he at that point violated his duty of fairness, by asking and knowing that he was asking for protected and confidential information.

Thus, Abel will not be subject to discipline for his act of asking Ford to lunch and speaking to him about Landlords Inc. practices. However, based on Abel's actions of asking Ford about conversations between Barbara and himself, he did violate his duty. Therefore, Abel is subject to discipline.

Duty of Competence

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

Abel, in order to prepare and gather information about his client's case, did ask a former employee of Landlords Inc. to lunch. As an attorney Abel does have a duty to exercise ordinary skill, diligence, and act zealously in representing Carol, his client. Abel's questioning of Ford about Landlords Inc. rental practices would be beneficial to the case and help in determining if Landlords Inc. did violate the anti-discrimination law. Thus, Abel acted with the requisite knowledge and skill and adequately preparing for his case on behalf of his client.

However, Abel went too far when he knowingly violated the attorney client privilege, as discussed *Infra*. A reasonable lawyer under the circumstances would have obtained the opposing attorney's consent to satisfy his duty of competence.

Thus, Abel is subject to discipline.

Attorney-Client Privilege

The attorney-client privilege prevents compelled disclosure of confidential communications. Conversations between high level employees and the corporation's attorney are privileged. The privilege is held by the client.

Landlords Inc. retained Barbara, a lawyer, to represent them in the anti-discrimination lawsuit. Barbara notified Abel that she represented Landlords Inc. thereby establishing the attorney-client relationship.

While performing his legal services for Carol, Abel contacted Ford, a former employee of Landlords Inc. Ford was no longer an employee of Landlords Inc. By the time Barbara was retained by Landlords, Ford had apparently already left his job at Landlords. Thus, his conversations with Barbara would not be protected by the privilege because he was no longer a high-level employee.

However, Abel acted unethically when he asked Ford about certain conversations Ford had with Barbara regarding the rental practices and Carol's application. Abel was aware that the information he was inquiring about was covered by Barbara's duty of confidentiality to Landlords, Inc. and would be privileged under the attorney-client privilege, if that privilege was invoked by Landlords Inc. Although Ford was not a current employee, at the time Ford had the conversations with Barbara, those conversations were made in confidence to the corporation's attorney. By asking these questions to Ford without advising him that such information was covered by the attorney-client privilege, Abel violated his duty of fairness and honesty to his adversary and his actions reflected negatively on his integrity and respect for the legal profession.

Therefore, Able will be subject to discipline.

Confidences and Secrets

An attorney must hold inviolate the confidences and secrets of his client. B&P 6068(e); MRPC 1.6; CPR DR 4-10; CPR EC 4-4. A confidence is an oral communication received by an attorney from his client during the course of representation. A confidence includes physical evidence discovered or observed as a direct result of a client's communication to the attorney.

All oral communications between Barbara and Ford, during the course of representation were confidential. However, when Abel asked Ford about certain conversations he had with Barbara, the attorney for Landlords Inc., knowing that the information was confidential and would be protected, he has violated his ethical duty.

Therefore, the duty of confidentiality prevented Abel from asking Ford about any conversations he had with Barbara in regard to Carol's rental application based on the attorney-client relationship between Landlords Inc. and Carol.

Carol's deposition

Improprieties

Under both the ABA Code of Professional Responsibility and California, a lawyer may not commit any fraud or act of dishonesty while representing a client. Under the ABA Code of Professional Responsibility 4-101, an attorney may reveal information to prevent a fraud.

It appears that Abel, while performing his legal services, during a deposition of Carol, suspected that Carol was not being truthful in her testimony to Barbara about her source of income. Abel, having suspected that her testimony was false, did not disclose or notify the tribunal of the false testimony. However, Abel only suspected and under the ABA and California ethical rules, he does not have an obligation to research and determine if his client did, in fact lie.

Therefore, as long as Abel had no absolute knowledge that Carol lied under oath during the deposition, Abel has not engaged in any impropriety by his suspicion of Carol lying and not taking any steps to determine if she did in fact lie under oath.

Therefore, Abel did not violate duty of impropriety.

False Testimony

Under ABA, a lawyer who knows his client has given false testimony must counsel the client, attempt to withdraw from the case, and disclose to the tribunal. In California, an attorney must allow his client to testify in a narrative fashion and may not disclose to the tribunal. Even though Carol's testimony was given during a deposition and not at trial, it was still given under oath and thus, Abel should have counseled Carol not to lie (and attempted to withdraw and if he could not prevent her from lying) and then have gone to the judge and disclose the fact that his client is giving false testimony, under the ABA rules.

However, Abel will argue he only suspected Carol was not being truthful, and that he did not actually know if she was lying under oath. While Abel probably should have done further investigation to determine if his client was being truthful, he has not acted unethically and will not be subject to discipline.

Duty of Confidentiality

An attorney must hold inviolate the confidences and secrets of her client. B&P 6068(e); MRPC 1.6; CPR DR 4-10; CPR EC 4-4. A confidence is a communication received by an attorney from her client during the course of representation. A confidence includes physical evidence discovered or observed as a direct result of a client's communication to the attorney.

California does not have such a rule, but the Attorney's Oath requires a lawyer to "maintain in confidence" the secrets of his client. Abel owes a duty of confidentiality to Carol. In response to any ethical questions about not revealing his suspicions that Carol testified falsely at the deposition, Abel would likely claim that he could not say anything without violating his duty of confidentiality.

Exception

Under the ABA rules a lawyer who reasonably believes disclosure is necessary to prevent any criminal acts may disclose the confidential information. Under California rules a lawyer must disclose confidences that the lawyer reasonably believes is necessary to prevent a client from committing a physically dangerous, future crime.

Carol's false testimony related only to her sources of income which does not implicate substantial bodily harm or death. Likewise, even if she was trying to recover more from Landlord by lying about her income this probably does not rise to the level of the serious financial loss exception recognized by the ABA. Further, these exceptions are permissive so they would not require Abel to disclose anything.

Duty of Competence

A lawyer has a duty to competently represent his client. A lawyer must use the knowledge, skill, thoroughness, and preparation required to do so. Included in the duty of competence is a duty to communicate with the client.

Abel owed a duty to evaluate the damages to his client and determine if the settlement offered was fair. His failure to act with knowledge and thoroughness in evaluating the settlement and taking it without communicating to his client, subjects him to discipline.

Communication

A lawyer has a duty to explain the case with the client and keep the client informed so the client may make informed decisions regarding the case.

Abel never discussed the settlement of the case with Carol. Abel had told Barbara, Landlords Inc, attorney, after Carol left the deposition that he would settle the dispute for \$5,000. Abel did nothing to explain the proposed settlement with Carol. Thus, Abel failed to provide Carol with information necessary to permit her to make an informed decision.

Abel violated the rules of professional responsibility by failing to communicate with his client.

Scope of Representation

A lawyer shall abide by a client's decision concerning settlement. While the attorney may make strategic decisions during the representation, whether to accept or reject a settlement offer is a substantive decision that must be made by the client.

Abel failed to communicate with Carol after the deposition of Landlords Inc. offer to settle for \$5,000. Abel then accepted the offered settlement with Barbara. The decision to settle is the client's decision.

Abel failed to act within the scope of his representation by settling the case without Carol's consent.