

Question 3

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

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

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

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

Answer A to Question 3

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

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

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

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

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

Thus, here both provisions are triggered:

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

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

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

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

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

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

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

C. Duty as Advisor and General Duty of Competence

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

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

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

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

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

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

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

E. Fee

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

Summary of Options and What L Should Have Done

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

- ① Made full discl. to Dad of past relat. with Sis, & got written consent assuming L reasonably believed he would not be influenced by Sis.
- ② L should not have conducted the initial consultation in Sis's presence, and at the least needed to fully advise & disclose to Dad the implications re: the attorney-client privilege, & Sis's conflicting & potentially conflicting interests w/Dad.
- ③ L should have fully explained to Dad the options and acts needed to achieve his objectives, including the consequences of jtly titled accounts/property.
- ④ L should not have accepted Sue's check without full discussion & disclosure.
- ④a L should not have let his judgement (apparently) be influenced by Sis.

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

Answer B to Question 3

3)

I. Duty of Loyalty to Client

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

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

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

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

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

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

II. Duty of Confidentiality

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

III. Fiduciary Duty

Fee discussion upfront

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

Payment by Sis

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

IV. Competency

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

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

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