

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hearsay

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

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

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

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

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

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

Answer B to Question 4

4)

Question 4

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

Ann's interview of Carl raised several ethical concerns:

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

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

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

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

Moreover, 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.