

Question 2

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.
2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.

Answer A to Question 2

1. Ethical Violations Committed by June in Disclosing Acme's Memorandum.

Duty of Confidentiality

A lawyer owes their client a duty of confidentiality. This requires the lawyer not to disclose any of the client's information learned or discovered during their representation of the client. The confidentiality also extends to information gathered about the client in preparation of trial.

June, in violation of her duty of confidentiality, anonymously disclosed the Acme memorandum (from Acme president to company drivers) to No Lead and the media. She will be subject to discipline due to her disclosure because the material in the memorandum was confidential, meant for Acme employees only, and was only to be used by June in her preparation for trial.

Consent

A lawyer may disclose confidential materials if the client consents (in California ["CA"] the consent must be in writing). Here, there was no consent given by Acme because they didn't know of June's intention to disclose the memo and probably would not have consented anyway.

Prevention of a Crime/Fraud

A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, a financial crime as well as a crime of bodily injury may be disclosed to prevent it from being committed. In CA, however, only a crime that would result in serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Here, the crime that was committed was transporting paint containing lead over a road abutting a public reservoir, a misdemeanor. This would not invoke the status of a financial or injury crime so as to warrant disclosure to a court or public agency.

Therefore, June breached her duty of confidentiality to Acme by disclosing the memorandum.

Duty of Loyalty

A lawyer owes their client a duty of loyalty. She must act in the client's best interests and put the client before herself in making decisions that would affect the client.

When an event occurs that would make it difficult for a lawyer to represent the client, putting aside their feelings or position, this is called a conflict of interest. If the conflict is occurring then it is an actual conflict of interest. However, if there is a possibility of a conflict, then it is a potential conflict of interest. If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of all the potential negative effects of the conflict, and the client consents to the conflict. In the case of a potential conflict, the lawyer may continue if they feel they can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA, [regarding] the consent for representation to continue after all conflicts, the consent must be in writing.

Actual Conflict of Interest

There is an actual conflict of interest due to the fact that June disclosed the memorandum intended for Acme company drivers. This is a breach of duty of loyalty because June has put her interest ahead of Acme's and has taken a position adverse to their interests by giving up confidential information of the company. In order for her to continue her representation, June must disclose that she was the one who put forth the letter to the media, explain all the negative repercussions of her continued representation (her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint), and obtain the consent of Acme officials. Although it is stated that Acme objected to June's withdrawal, the facts do not show that they were informed of the actual conflict, and, therefore, their objection to her representation may change after being informed of her breach of the duty of loyalty.

June is likely subject to discipline for her breach of the duty of loyalty.

Potential Conflicts of Interest

Intertwined in the actual conflict of interest with Acme are several potential conflicts of interest that will hinder June's future representation of Acme: her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. These will be disclosed in trying to obtain Acme's consent to continue her representation. But, it should be noted that these may very easily result in actual conflicts, and possibly may already be actual conflicts that breach her duty of loyalty, without Acme's consent.

Participation in a Consumer Advocacy Group

A lawyer is permitted to affiliate with a local consumer advocacy group to express their views and be an active member of society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result, which they should be aware of.

2. Arguments for Withdrawal by June.

Mandatory Withdrawal – Crimes

A lawyer must withdraw if their continued representation of the client will facilitate a continued crime committed by the company. Here, June is not participating in the crime, misdemeanor for transporting lead-based paint, despite the fact that she knows about it. Therefore, this would not be enough for her withdrawal from her representation.

She may, however, be required to notify the court of the crime if it pertains to a lawsuit in existence and her participation would lead to suborn perjury or false statements to the court. Here, however, the lawsuit is about an accident, not the transportation of lead-based paint, so June would not be able to disclose the misdemeanor to the court.

Mandatory Withdrawal – Conflict of Interest

As stated above, Acme and June have a conflict of interest. If she could not effectively represent Acme and if Acme will not consent to her continued representation in spite of the conflict, then June must withdraw from representation of Acme. Here, Acme objected to June's withdrawal even after the media and No Lead knew about the memorandum. This may hint that Acme may not consent to the withdrawal due to the fact that June has done substantial work on the case, which is about to go to trial.

Permissive Withdrawal

June's Interests

The court will permit an attorney withdrawal if their representation of their client is repugnant/disgusting to the lawyer. However, in assessing permissive withdrawal the court will weigh such factors as the interests of the court and the client before deciding.

On these facts, June is outraged by the practices and is clearly disgusted by Acme's transportation of lead paint. She feels so strongly because of her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. The court will take these into account in balancing them with the interests of Acme and the Court.

Acme's Interests

Acme's interests stem from the fact that June has done substantial work on the case, which is about to go to trial. This is a huge factor because Acme would be severely disadvantaged if they had to get new counsel to replace June at such a late stage in the trial process.

Court's Interests

The Court's interests are those of efficiency of the trial process, undue delay and fairness. Permitting June to withdraw would add more time to the trial process, which was about to happen. Also, the court might have to delay the case in order for new counsel to prepare adequately. And, if the trial commenced as scheduled with Acme obtaining new counsel, there is very little likelihood that they would adequately be able to represent their interests.

Therefore, unless Acme consents to the withdrawal by June, it is unlikely that she will be able to withdraw from her representation.

Answer B to Question 2

- 1. An attorney owes duties of Confidentiality, Competence, Loyalty and Fiduciary duties to her clients.**

Duty of Confidentiality

Under the ABA Model Rules and the California Rules of Professional Conduct, the duty of confidentiality requires that an attorney preserve her client's confidences and not reveal any information regarding the client, regardless of its source. The duty of confidentiality attaches at the moment that an attorney-client relationship is formed; however, an attorney may also be prevented from revealing any confidences gained in consultation even if an attorney-client relationship does not result. Further, the duty of confidentiality endures after the attorney-client relationship ends. Finally, the client is the holder of the privilege.

In this case, June has breached her duty of confidentiality to Acme. June was reviewing Acme's records in preparation for trial and June found a memo that she subsequently and anonymously disclosed to a third party, No Lead. An attorney may reveal a client's confidential information where the client consents; however, there are no facts to suggest that Acme was aware of, or consented to, June revealing Acme's memo to No Lead. Under the ABA Model Rules, an attorney may reveal a client's confidential information if the revelation is necessary to prevent death or bodily injury. The California Rules permit disclosure only if the disclosure is necessary to prevent an imminent risk of death or serious bodily injury. Under both rules, the attorney must take steps before the disclosure is made. First, the attorney must notify her client that the behavior is illegal and/or dangerous. Here, Acme's letter, by its own terms, indicates that Acme was aware that the [behavior was] illegal. Second, the attorney must try to persuade the client from continuing to engage in or threaten the behavior. Here, June did not attempt to discuss Acme's policy with Acme before the disclosure. Finally, the attorney must tell the client that she intends to make the disclosure. Here, not only did June not tell Acme that she intended to make the disclosure, June made the disclosure anonymously in an attempt to hide the fact that she made the disclosure. Finally, California Rules permit disclosure only where there is an imminent risk of seriously bodily harm or death. In this case, the risk was not imminent because there was no increased likelihood that Acme's truck drivers would have the kind of accident feared in the next day, week, or month or even that the accident would ever happen. Because June disclosed a client's

information to a third party without the client's consent or a privilege to do so, June has violated her duty of confidentiality to Acme.

Duty of Loyalty

The duty of loyalty requires that an attorney be vigilant to potential and actual conflicts that will prevent or impede an attorney from fully representing her client's interests. An attorney may not represent clients with actual adverse interests because of the danger that the attorney will purposefully or inadvertently reveal or use confidential information gained from one client against the other client. Under California Rules, an attorney may represent clients with potential conflicts so long as the attorney believes that she can adequately and fairly represent the interests of both parties and both clients agree to the continued representation in writing.

Here, June represented Acme Paint Company stemming from an Acme truck accident with another car. The original cause of action was likely to be negligent driving and respondeat superior liability and June's representation was not likely to be very involved in investigating the dangers of lead paint. However, June was aware of Acme's business when she decided to get involved with No Lead. No Lead is a group which lobbies government agencies to adopt strict guidelines restricting the use of lead-based paint. June formed an attorney-client relationship with No Lead, undertaking legal research duties and advising No Lead on its tax status. While legal research and tax advice do not pose actual conflicts with June's representation of Acme at the outset of June's relationship with No Lead, nonetheless, there are potential conflicts because Acme makes paint that contains lead and No Lead is an activist group that targets the kind of business that Acme runs.

Because the interests of Acme were potentially adverse with the interests of No Lead, June was obligated to disclose the potential conflicts to both parties and obtain their written and informed consent to continue with the representation. In this case, June did not inform Acme of her affiliation with No Lead and she did not seek Acme's consent to continue the representation. The facts also do not state that June disclosed her relationship with Acme to No Lead. Because June continued to represent Acme and No Lead, whose interests were potentially adverse, without disclosure or seeking consent to the continued representation, June breached her duty of loyalty to Acme and No Lead.

Duty of Competence

An attorney owes a duty of competence to a client. A duty of competence means that the attorney will use her legal knowledge, training, and skill to diligently represent the client's interests. In this case, June was diligently preparing for trial when she discovered Acme's memo. Up to that point, June had not breached any duty of competence owed to Acme. However, once June discovered the memo, it is probable that June will no longer act in a diligent manner to pursue Acme's goals. Here, June was outraged by the content of the memorandum and

she subsequently breached her duty of confidentiality to Acme, acting on her outrage that was likely fueled by the injuries suffered by her niece. Since June was willing to engage in a breach of one of the most important duties that an attorney owes a client, confidentiality, as a result of the memo, it is doubtful that June will be able to set aside her feelings in any way that is sufficient to allow her to adequately and competently continue to represent Acme.

2. June's Argument for Withdrawal

An attorney may withdraw from representation where the withdrawal will not unfairly prejudice the client. An attorney must withdraw from representation where the attorney becomes aware of actual conflicts of interest or where the continued representation would foster the commission of a crime.

In this case, June will make several arguments for her permissive withdrawal. First, June will argue that the withdrawal is proper and should be granted because the goals of the client have become repugnant to her. June will argue that Acme paint contains lead and that Acme engages in transportation policies that are unsafe and present a risk of injury to the community. Further, June will disclose to the court that June has been personally touched by this issue where her three-year old niece suffered lead poisoning after coming into contact with lead paint. Because of the emotional reaction to her niece's injuries that stirred June to act by joining and providing legal services to a lead paint activist group, June can no longer separate herself from the issue in a way that would allow June to adequately represent Acme. The court will likely point out to June that Acme has asked her to represent them in an action that has nothing to do with lead paint content or safety issues where children are concerned. The court will also note to June that Acme is likely to be very prejudiced by her withdrawal from the case because the case is already at the stage of trial preparation. If Acme is forced to retain new counsel at this stage of litigation, Acme will be exposed to enormous costs relating to getting a new attorney familiar with the case sufficient to go into trial. Consequently, with only the argument that June now finds Acme to be engaged in activities that she finds repugnant, the court is not likely to allow her withdrawal and expose Acme to the costs of hiring a new attorney.

June may argue that she should be allowed to withdraw because Acme is engaged in an illegal activity. Here, Acme's memo states that Acme paints contain lead and that it is a misdemeanor to transport lead paint over roads abutting public reservoirs. The court is not likely to accept June's reason because, in this case, June's services are not being used to further a crime. The case that June is involved in may or may not involve an Acme truck on a road near a reservoir, but that fact would not change the underlying cause of action in the case from the most likely negligence claim. Thus, the court is likely to reject June's argument.

June will continue to argue that her withdrawal is now mandatory because she now represents two clients with adverse interests. Acme manufactures and delivers lead paint and No Lead is an activist group trying to influence legislation of Acme's activities. The court will point out that June is representing Acme in what is most likely a tort case where the elements of the cause of action that June is currently working with will likely have no reasonable relationship to the kind of paint that Acme makes or to the amount of lead contained in the paint. Further, June's activities for No Lead have consisted only of legal research and tax advice. It is unclear whether the legal research relates solely to the tax advice or covers questions relating to the amount of lead in paint; however, her research is most likely directed at influencing policies rather than researching tort claims relating to transportation of paint. As a result, the court is not likely to view the representation of Acme and No Lead as sufficiently adverse to allow June to withdraw at such a crucial time in the proceeding.

However, if June discloses to the court that June has become so emotionally involved in the issue that she can no longer adequately represent Acme as a company regardless of the cause of action, then the court will likely allow June to withdraw. The court will certainly allow June to withdraw if June discloses that she provided the confidential Acme memo to No Lead. However, if June discloses this information, Acme would also likely drop their objection to June's withdrawal. Even where the court allows June's withdrawal, June will be subject to ethical sanctions and she may even face malpractice liability for her work on Acme's case.