

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name "ABC Legal Services LLP" ("ABC LLP"). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of \$1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at \$500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.
2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.
3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Answer A to Question 2

Limited Liability Partnerships:

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State. Here, the ABC paperwork was not filed and the LLP was never registered. Without the proper paperwork, this venture is likely to be treated as a general partnership.

General Partnerships:

General Partnerships (“GP”) are formed by two or more persons carrying on a business for profit. There are no filing requirements for forming a GP. GPs can be made up of general partners and limited partners. General partners have a duty to manage the business and can be held personally liable for partnership debts and/or obligations. Limited partners, however, are not liable for partnership debts and may lose their limited status if they engage in management. Absent any agreement each partner has an equal vote, profits are shared equally, and losses are shared as profits are.

A, B, and C are likely to be seen as general partners in a GP; thus they are entitled to an equal say in the management of the business and may be held personally liable for partnership debts.

Ethical Duties of Attorneys:

Attorneys owe a wide array of duties – to clients, the court, opposing counsel, and the public generally. The duties are established by ABA rules as well as state-specific rules. California’s rules on ethical conduct of attorneys largely follows the ABA rules, but there are variances which will be noted if applicable below.

Duties to clients:

Attorneys owe clients the duties of confidentiality, loyalty, financial responsibility, and competence. Duties owed to the court and opposing counsel include the duties of

candor, fairness, and decorum. Attorneys must also ensure that all members of their firm, including staff, act in accordance with the ethical standards imposed. To the extent that one attorney has a conflict, such conflicts are imputed to the firm and are shared by all other attorneys unless the conflict arises from prior governmental work or a personal relationship with the opposing party's counsel, for example.

1. The disclosure of client information:

One of the most important duties owed to clients is the duty of confidentiality. This duty requires the attorney to act so as to not reveal any confidential information of the client – without consent, either express or implied. The facts do not indicate that any consent was given to the disclosure of this information in this case.

Here, the client information was revealed due to the use of an unsecured wireless network which the firm used. Although the facts indicate that the attorneys were not aware of the use of the adjacent building's wireless network, we do know that they were surprised by the cost savings. If the attorneys were aware of unexpected savings, they should have spoken with Jack to determine why internet access was so much cheaper than expected. Because they did not so inquire, and consequently were unaware of the issue, Jack acted unethically by using another network for free. A, B, and C all had a duty to ensure that Jack's actions were proper and ethical.

Because ABC is likely to be deemed a GP, all general partners may be held liable for the debts of the firm. These debts can include the economic losses incurred from the disclosure of information and/or debts incurred if the client sues the firm for malpractice.

2. David's liability for malpractice:

Here the issue will be whether David is a partner of the firm or merely a lessee of an office. A, B, and C will argue that D was merely renting space from the firm, making him not a partner, and therefore not subjecting the firm to any liability for his actions. We do not have facts to indicate whether David ran his business under a separate name, kept his files in a separate room, used the same office staff, or contributed any money to the partnership. The first three factors would indicate a separate firm, while the final factor – buying into the partnership – would indicate that D had become a partner of ABC.

What we know is that David paid monthly rent. Absent other facts, paying rent indicates the D was likely a separate practitioner. If D was acting as a separate practitioner, the ABC firm partners would not be liable for this malpractice.

However, if there were facts to indicate the D was a partner of the firm, or that the malpractice occurred with regard to a firm client, the firm general partners may be liable for D's malpractice. In a LLP, as intended, partners are all liable only for their own malpractice, but in a GP, the general partners can be held liable for all partnership obligations. In a GP incoming partners are not liable for existing partnership debts, through the money they contribute can be used to pay off such debts. Outgoing partners of a partnership are liable for debts of the partnership until creditors have been given notice of their departure or 90 days have passed since their departure.

D's malpractice occurred shortly after he took up office space with ABC. If he were deemed to be a partner, and the malpractice occurred after joining the partnership, ABC general partners would be liable for partnership debts arising out of his malpractice.

3. Professional conduct:

The attorneys of ABC have violated a number of rules of professional conduct.

a. Management of Staff:

The attorneys have a duty to properly manage staff and ensure that all members of the firm are in compliance with the rules of conduct. Here, A gave partnership documents to an assistant for filing. While staff members of a firm frequently are in charge of filing court documents or making deliveries, it was likely imprudent to allow such an important document to be handled by an assistant. Because of the assistant's negligence the firm likely lost its privileges as an LLP. Attorneys cannot allow the unauthorized practice of law by non-attorneys. Here the documents likely did not need to be filed by an attorney, but the task was nonetheless important enough that it should have been done by a partner so as to ensure accuracy.

The attorneys were prudent in hiring Jack as a computer services manager as he was properly qualified with a degree in computer science. The use of non-attorneys does

not violate any ethical rules so long as fee sharing does not occur (payment of non-attorney salaries is not considered fee sharing.) The attorneys likely violated their ethical duties in their management of Jack, however. By not managing Jack properly and being unaware of Jack's use of an unsecured wireless network, A, B, and C breached not only their duties as managers, but also their duty of confidentiality to their client.

b. Duties to clients:

Attorneys owe their clients the duty of confidentiality – the duty to not reveal any confidential information without consent. Information may be revealed where necessary to defend oneself against a claim of malpractice or potentially if the attorney knows of conduct which will result in death or serious bodily harm which can be prevented through disclosure. The CA rules indicate that the conduct must be criminal; however the ABA makes no such distinction. Here, the requisite facts for proper revelation of client information do not appear. ABC breached its duty of confidentiality to its client by allowing the transmission of client information to a third party.

Attorneys also owe clients the duty of loyalty, which prevents attorneys from taking on representation or taking actions which are in conflict with current clients. Attorneys must always act in the best interests of their clients and with their interests at heart. It is unclear to whom the confidential information was revealed, but the ABC firm may have breached their duties of loyalty as well if the use of the network resulted in revelation of information to an adverse party.

Financial responsibility imposes on an attorney the duty to properly manage client funds and avoid commingling personal money. There are no facts indicting a breach of this duty by ABC.

The duty of competence requires that attorneys provide clients with professional, skilled, competent services. Here, by use of an unknown wireless server which allowed for the disclosure of confidential information, the attorneys of ABC have acted competently. A competent attorney would have ensured that information was not revealed, and would have properly managed all staff members.

Answer B to Question 2

Liability for Loss Due to disclosure of confidential information:

A partnership is an association of persons to carry on a business as coowners for profit. The partners are jointly and severally liable for the debts of the partnership, both in contract and in tort. A limited liability partnership is a partnership that registers as an LLP with the Secretary of State. As an LLP, the partners are liable for their own torts incurred in furtherance of the partnership but not for the torts of the other partners or the partnership.

Filing the documents to register the partnership as an LLP is a prerequisite to attaining limited liability status. By not doing so the partnership retains the status of a general partnership and, therefore the partners would be personally liable for all liabilities of the partnership to the extent the debt was not satisfied by the partnership.

They could argue they intended to be an LLP and treated themselves as such, so they should be deemed to be a “de facto LLP.” However, this argument is likely to fail because filing is such a simple act and the “de facto” argument has been applied in the corporation, not the partnership contract. Also, an LLP by estoppel argument would fail because there are no facts to indicate Abel’s client thought he was dealing with an LLP, and, even if he did believe that, this defense would not apply to a loss caused by a tort – i.e., negligence.

As partners A, B, and C are liable for failing to properly supervise Jack. Jack was their employee. His tapping into a wireless network directly caused the disclosure of client information. As his employee A, B, and C Legal Services is vicariously liable for the torts of their employee. Here Jack committed the intentional tort of conversion, the intentional taking of the personal property of another. He did this while working for the ABC LLP and with the intent of furthering their business. Therefore, even though the tort was intentional, ABC LLP is liable. Further they could be found liable for negligently hiring an inexperienced computer person and then failing to adequately supervise him. See the discussion of their failure to supervise and prevent breach of confidentiality

rules infra. Violating the rules does not show a personal liability but is evidence they breached their standard of care. Since ABC LLP is liable, the partners are jointly and severally liable for reasons discussed above.

David's Malpractice

A partnership is defined above. In order to prove the existence of a partnership, the primary element is whether the parties intend to share profits. Other indications are whether they share in losses and share in the management of the enterprise.

In this case David leased an office for a monthly rent that included 10% of his billings. While that relates to David's profits, it does not represent a sharing of profits because the amount is received as rent under a landlord-tenant relationship. Moreover, there is no indication of any sharing of losses or management responsibilities. There is no partnership between David and A, B, or C. Likewise, there is no indication that David otherwise held himself out as a partner of A, B, and C. One can be deemed to be a partner if he is deemed to have apparent authority by being held out as a partner. Since that is not the case here, ABC LLP is not liable for David's malpractice, and therefore ABC or its partners are not liable.

Breach of Rules of Professional Conduct

Lawyers have a duty to preserve the confidentiality of confidential client information. It may only be disclosed if expressly or impliedly authorized by client or permitted by the rules of professional conduct. None of the exceptions are relevant here, such as to present a crime involving death or serious bodily harm, serious economic loss (ABA rules only) or in response to a court order or order of the ethics committee.

Partners in a law firm have an obligation to put in place procedures to assure compliance with the rules of professional conduct.

They also have a responsibility to take any action to prevent or mitigate violation of the rules if they are able to do so.

Here ABC did not adequately supervise Jack or have any procedures in place to prevent violations of the confidentiality rule, resulting in a breach of the confidentiality rules. They breached the rules and may be disciplined accordingly.