QUESTION 1

Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called "Top-Tile." During negotiations, Beverly asked if the roof was in good condition, and Austin replied, "I've never had a problem with it." In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks. The valid written contract to sell the warehouse specified that the property was being sold "as is, with no warranties as to the condition of the structure."

After Beverly bought the warehouse, the roof immediately started leaking. Beverly hired Lou, an experienced trial lawyer, and executed a valid retainer agreement. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

At trial, Lou offered the expert testimony of Dr. Crest, a chemical engineer who had testified in other litigation concerning Top-Tile roofs. Lou knew that Dr. Crest had previously testified that, "Top-Tile roofs always last at least five years." Lou also knew from the manufacturer's specifications that Top-Tile roofs seem to last indefinitely, but not in some climates. On cross-examination, Dr. Crest testified that, "Top-Tile roofs never last five years," and that, "Climate is not a factor; Top-Tile roofs fail within five years everywhere in the world." During closing argument, Lou repeated Dr. Crest's statements and also said that Lou's own inspection of the roof confirmed Dr. Crest's testimony.

1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non-disclosure? Discuss.

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

QUESTION 1: SELECTED ANSWER A

I. Contract dispute

The first issue is whether Beverly will be able to rescind the contract with Austin based upon misrepresentation.

A valid contract requires mutual assent (offer and acceptance) and consideration. Mutual assent means that there is a meeting of the minds as to the basis of the contract or bargain and the terms of the contract. Consideration requires a bargained-for exchange of legal detriment. Where the parties to a contract do not have a meeting of the minds, that is, there is no mutual assent, then the validity of the contract can be challenged. Put another way, if the parties do not have mutual assent then no contract was formed.

Rescission is a contract remedy available where one party seeks to void a contract. Lack of mutual assent is a basis for rescission of a contract where one party shows misrepresentation, mutual mistake or non-disclosure. The result is though the contract did not exist. A misrepresentation may make a contract unenforceable where one party makes a material misrepresentation, that was a basic assumption of the contract and the other party relies on that statement and was damaged. Non-disclosure arises where a party fails to disclose a material fact of the contract which forms the basis of the contract and the other party has no reason to know of the failure to disclose.

Generally, courts look to the terms contract in determining the terms of the contract. Moreover, parol evidence is generally not available to supplement or contradict the terms of a contract. However, the parol evidence rule against extrinsic evidence does not apply to evidence regarding the formation of a contract. Thus, oral

statements made at the time of entering into a contract may be admissible to show a condition on performance or misrepresentation.

Here, the facts state that Austin and Beverly entered into a valid written contract to sell the warehouse. Thus, there is a valid contract that can be the subject of a rescission claim. We are told that during negotiations, Beverly asked if the roof was in good condition and Austin responded that he had never had a problem with it, despite having been notified a year earlier by the manufacturer of the roof tiles, Top-Tile, that the roof would soon develop leaks. Thus, Austin made a misrepresentation of fact regarding the condition of the roof in response to Beverly's inquiry on that exact topic. Finally, the parties agreement included an "as is" clause which stated that Beverly was buying the warehouse in its current condition. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract, and that had the roof been in poor condition Beverly would not have purchased the warehouse. Beverly will argue that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain because the condition of a roof is quite important in the purchase of a warehouse, or any structure. It is likely that Beverly would succeed on this point that the misrepresentation was a basic assumption of the contract. Moreover, as Beverly is challenging the formation of the contract itself, parol evidence of Austin's oral statement to her is admissible.

If the court believes that Beverly should have inspected the roof independently of Austin's representations, then Beverly will be hard pressed to survive a claim by Austin that the contract stated the property was sold "as is". Where a contract states that property is purchased "as is" at common law, this was strictly construed. However, the modern trend is to relax the enforcement of "as is" clauses where one party misrepresented or committed fraud. That is the case here given that Austin was informed the prior year by the manufacturer that the roof would soon leak, though it does not appear from the facts that Beverly made her own independent inquiry into the

condition of the roof. Again, Austin will argue that the "as is" clause is controlling and that it would be prudent for a purchaser of property to have an inspection done to inform the buyer of any potential defects in the property, including those that even the seller was unaware of. Finally, had the roof been of such a concern to Beverly, she could have made the condition of the roof a term of the contract and not executed an "as is" provision. Yet, given his misrepresentation of fact, which he clearly knew to be false as we know from the facts, a court may find that the misrepresentation was significant enough to void any mutual assent despite the "as is" provision in the interests of justice. Finally, Beverly can show damages in that immediately after she bought the warehouse, the roof started leaking.

Thus, Beverly may be able to rescind the contract based upon misrepresentation.

With respect to the defense of non-disclosure, Beverly will be required to show that Austin did not disclose a material fact that formed the basic assumption of the agreement and that Beverly relied on his statement. Non-disclosure is different from misrepresentation in that with non-disclosure, the party makes no comment or disclosure with respect to a material fact that is known to be material to the other party. Moreover, Austin must not have any defenses.

Here, as stated above, Austin failed to disclose the actual condition of the roof in addition to misrepresenting the condition of the roof. Austin will make the same arguments as above that Beverly did not make it known - in words or actions - that the condition of the roof was a material fact of the contract that formed a basic assumption of the contract. Moreover, Austin will argue that the "as is" clause bars Beverly from recovery and that Beverly had a duty to do her own inspection of the property to discover the condition of the roof.

However, given the facts presented, and a court's ability to relax the strict construction of an "as is" clause where a party has misrepresented, or failed to disclose a material

fact, or committed fraud, a court may rescind the contract. Thus, Beverly may have a successful claim of rescission based upon misrepresentation.

II. The next issue is what, if any, ethical violations Lou committed.

Under both the ABA and California ethics code (CA rules), a lawyer, as an officer of the court, has a duty of candor. Under both the ABA and CA rules, a lawyer also has a duty to disclose law that is contrary to the client's position. However, a lawyer is not required to disclose facts that are not helpful to the client. Moreover, a lawyer must not offer evidence that he knows to be false or misleading and must seek to rectify any false evidence presented. If a lawyer reasonably believes that a witness will testify falsely, the lawyer must try to convince the witness or client not to testify falsely. If that fails, the lawyer must not allow the witness or client to testify. Under ABA and CA rules, a lawyer may then seek to withdraw. If a witness or client does testify falsely, in addition to seeking to rectify the false evidence, under the ABA rules the lawyer may notify the court or appropriate tribunal.

Here, Lou was an experienced trial lawyer who entered into a valid retainer agreement with Beverly. Lou hired an expert who he knew had previously testified regarding Top-Tile roofs. Lou apparently knew that the expert, Dr. Crest, had previously testified that the roofs last at least 5 years. Lou also knew, based upon review of Top-Tile's specifications, that Top-Tile stated that their tiles do not last indefinitely in some climates. However, at trial Dr. Crest testified differently, testifying on Beverly's behalf, that Top-Tile never lasted five years. If Lou knew that Dr. Crest was going to testify falsely, Lou must not have permitted him to testify. If Lou reasonably believed that Dr. Crest intended to testify falsely he should have tried to convince him to testify truthfully. Finally, if Lou knew that Dr. Crest had indeed testified falsely he must rectify the false testimony. This is particularly the case here, which is a civil case and one in which Lou retained Dr. Crest as an expert. Lou likely could have found an expert who would testify in support of Beverly's claim. Thus, under both ABA and CA rules, if Lou

knew that Dr. Crest was going to testify falsely and did nothing about it, then Lou is subject to discipline. Moreover, once Dr. Crest testified that Top-Tile roofs "never last five years", if Lou knew this to be false testimony, he had an obligation to neutralize the testimony.

This is also the case with respect to Dr. Crest's statement that "climate is not a factor." The fact that Lou was aware of Top-Tile's manufacturer's specifications that climate did affect the condition of the roofs does not mean under the ABA and CA rules that Lou was obligated to disclose that fact. This is a fact that is not in his client's favor, and under the ethical rules Lou was not obligated to disclose that. The obligation under ABA and CA rules is to disclose legal principles that are not in your client's favor. Thus, there is no ethical violation for failing to disclose that fact. However, if Lou knew that Dr. Crest's statement was false based upon the available data and his expert opinion, he had an ethical duty to clarify.

Thus, based on the facts presented, if Lou knew that Dr. Crest testified falsely, he has an ethical violation to clarify and rectify any false evidence, which he appears not to have done. Thus, he is subject to discipline.

Finally, with respect to Lou's closing argument. Lou would also be subject to discipline because he essentially ratified testimony which he likely knew was false. Thus, he did the opposite of what he is ethically obligated to do under ABA and CA rules. Moreover, Lou offered personal opinion and observation which was not the subject of evidence in the case. This was also unethical. Here, Lou inserted his own opinion and "evidence" that his inspection of the warehouse roof confirmed Dr. Crest's testimony. Lou was essentially giving testimony during his closing examination, based upon his own observations. A closing argument is not considered evidence and a lawyer is not permitted to raise issues, facts or evidence that were not presented at trial. Lou clearly violated this rule and is subject to discipline.

Finally, under both ABA and CA rules, when retaining an expert, a lawyer is required to get the client's informed consent (which must be in writing under the CA rules) which includes a clear statement of how the expert is going to be paid. The client is to be fully informed as to the terms of the retainer of an expert, before the expert is, in fact, retained. It does not appear from the facts that Lou did this. Thus, he is subject to discipline.

QUESTION 1: SELECTED ANSWER B

1.) Applicable Law

There are two general bodies of law which apply to cases involving a breach of contract: The Common law, and the Uniform Commercial Code (UCC). The UCC applies to all contracts with respect to the sale of goods, and the common law generally applies to all other contracts. "Goods" for the purpose of this determination are movable objects.

Here, Austin sold a warehouse to Beverly. A warehouse is real property, not a "movable good." Thus, the Common Law would apply to this transaction.

2.) Will Beverly be able to Rescind the Contract with Austin on the Basis of Misrepresentation and/or Non-Disclosure

As a result of the alleged misrepresentation, Beverly seeks to rescind her contract with Austin. Rescission is an equitable remedy which a court may grant under certain circumstances where a valid, enforceable contract has been created, but monetary damages would be inadequate, and equity requires a different remedy. If a court grants rescission as a form of relief, the contract is effectively cancelled, and parties are returned to the position they were prior to the formation of the contract (with possibly some form of incidental damages recovered).

<u>A.) Mutual Mistake</u>

The first ground on which Beverly may seek to rescind this contract is the grounds of mutual mistake. Generally, under the common law, a contract cannot be rescinded due to the mistakes of the forming parties. However, a court may grant the remedy if rescission if it can be shown that (1) there was a mistake as to a material fact, and (2) neither party bore the risk of that mistake.

Here, Austin told Beverly that he had "never had a problem" with Top Tile, indicating that the roof was in good condition. However, the roof ultimately leaked. Thus, there

was a mistake as to whether the roof would leak. Moreover, this is a material fact as it substantially affects the value of the property. Thus, a court would likely find a mistake of material fact.

However, Austin appears to have known about the issue. The Manufacturer of Top Tile had recently reached out to him and informed him that the warehouse roof would soon develop leaks. Thus, Austin knew about the problem, so this would not be considered a "mutual mistake."

B.) Unilateral Mistake

While there is no "mutual mistake" which could have formed a basis for rescinding the contract, there has been a "unilateral mistake." A court allows rescission based on a unilateral mistake as long as (1) the mistaken party did not bear the risk of that mistake, (2) the mistake was as to something material, and (3) the other party had reason to know of that mistake.

Here, Beverly was mistaken about the quality of the roof. She believed that it was in good condition and would not break soon. As discussed above, whether or not it would break is a material fact. Thus, she was mistaken as to a material fact.

Moreover, Beverly likely did not bear the risk of that mistake. A court generally will find a party to have born the risk of the mistake only if they have some superior knowledge. Here, it was in fact the seller, Austin, who had better knowledge because he owned the property and had spoken with the Top-Tile manufacturer. Thus, Austin would have been the party to bear the risk of the mistake here.

Moreover, Austin had reason to know of Beverly's mistake. Beverly specifically asked if the roof was in good condition, and Austin induced that mistake by informing her that he had "never had a problem with it" while being fully aware that the manufacturer had warned him that it would start leaking soon.

Thus, a court would likely find that Beverly may rescind the contract on the grounds of a mutual mistake because (1) she was mistaken as to the condition of the roof, (2) she did not bear the risk as to that mistake, and (3) Austin had reason to know of that mistake.

C.) Misrepresentation

Courts may also grant rescission when a contract was formed based on a material misrepresentation. Under this rule, a court will rescind a contract if they can show that one party (1) intentionally, (2) made a misrepresentation of material fact, (3) intending that the other party rely on that misstatement, (4) the other party did in fact rely on that misstatement, and (5) damages were suffered as a result.

i. *Intentional Misrepresentation*

Here, a court would likely find that there was an intentional misrepresentation. As discussed above, Beverly specifically asked whether the roof was in "good condition." Despite knowing that Top-Tile, the manufacturer of the roof tiles, believed that the roof would soon develop leaks, Austin responded that he "never had a problem with it." While this was not a direct misstatement of fact, it was an omission.

While a seller of property generally has no duty to disclose issue on the property due to the common law doctrine of Caveat Emptor, a seller may not omit a material fact upon inquiry of the buyer. Thus, while he technically did not lie, he committed an intentional misrepresentation for these purposes.

ii. Material Fact

This omission was also material. A fact is "material" if a reasonable person would consider that information when deciding whether or not to enter into a contract.

Here, the omitted fact related to the quality of the roof. Because repairing roofs is expensive, a reasonable person would want to know that information when deciding whether or not to enter into a contract. Thus, this term would be deemed material.

iii. Intending That the Other Party Rely

Austin likely made this statement knowing or intending that Beverly would rely on it. He wanted to sell the property (possibly because it would soon start leaking). Thus, he would likely have intended that Beverly rely on that statement.

iv. Other Party Did In Fact Rely

It also appears that Beverly did rely on that misstatement. She ultimately purchased

the property. The fact that she asked about the roof's condition prior to the purchase indicates that it was an important fact to her. Thus, she likely relied on that statement. Moreover, there is no evidence that she made an independent inspection, further lending credence to the idea that she relied on this misrepresentation.

v. Damages

Beverly was also damaged. She now has to pay for the repairs.

Because all of these elements are satisfied, a court would likely find that Beverly can rescind the contract on the grounds of a misrepresentation.

D.) Rescission Based on Non-Disclosure

A contract may also be rescinded on the grounds of non-disclosure if (1) there was a duty to disclose information, and (2) the seller failed to disclose.

As discussed above, there generally is no duty to disclose conditions on the premises due to the doctrine of caveat emptor. However, if a buyer makes an inquiry, a seller is not permitted to omit and fail to disclose a material fact related to that question.

Here, Austin would not have had a general duty to disclose the statement made by Top-Tile regarding the impending leak on the premises. However, Beverly asked if the roof was in good condition. This question created a duty for Austin to disclose known conditions in the roofing, which he failed to do when he deflected the question by stating "I’ve never had a problem with it."

Thus, Austin had a duty to disclose, and failed to do so. Thus, Beverly may properly seek rescission on the grounds of non-disclosure.

E.) The "As Is Warranty."

Generally, when property is sold, certain warranties are contained within the sale contract. These include warranties of habitability (in a residential property), covenants of quiet enjoyment, and warranties related to the condition of the property. However, parties are free to waive such provisions in the contract.

Here, Beverly purchased a warehouse from Austin. Thus, generally she would be granted certain warranties which would have protected against things such as a leaky roof. However, the parties waived those warranties. The written contract explicitly stated that the property was being sold "as is, with no warranties as to the condition of the structure." Thus, there appears to have been a valid waiver of warranties with regards to the condition of the structure. Such a waiver would be applicable even to express conditions.

Arguably, Austin gave an express warranty to Beverly when he implied that there were no conditions with the roof. Thus, generally, this would protect against Beverly's contemplated rescission claims. However, warranties cannot overcome explicit misstatements, omissions, and fraud used to induce into the contract.

As discussed above, Austin made a material omission. Thus, while the waiver generally would be considered valid, the waiver cannot be applied to the condition of the roof.

F.) Parol Evidence

Austin may argue that evidence of his Statements are inadmissible under the "parol evidence rule." This rule state that, when there is a written, "integrated" contract, statements not contained within the writing cannot be used to contradict terms in the writing.

Here, there is a written contract. Assuming there was a proper merger clause, the parol evidence rule would apply to this contract. Moreover, Beverly would be attempting to introduce Austin's statements regarding the roof. This would contradict the "no warranty" provision." Thus, it is being introduced to alter the terms of the writing.

However, this is being introduced not to change the terms, but to show that the contract is invalid. Thus, the parol evidence rule would not bar introduction of this evidence.

III.) What Ethical Violations has Lou Committed

Lou has committed multiple ethical violations related to this representation.

1.) Duty of Candor to the Court & Opposing Counsel

Under both the ABA and CA ethics rules, attorneys own a duty of candor and truthfulness to both the court and to opposing counsel. This means that, while an attorney is required to zealously advocate for the interests of their clients, they may not introduce testimony which they know to be false.

Here, Lou offered the expert testimony of Dr. Crest. Lou knew that Dr. Crest had previously testified that "Top-Tile roofs always last at least five years" and that the manufacturer's specifications indicated that Top-Tile roofs last indefinitely, except in certain climates. However, during cross examination, Dr. Crest testified that "Top-Tile Roofs never last five years" and that "climate is not a factor." Thus, Lou's witness introduced testimony which Lou knew to be false. Moreover, Lou chose to repeat those statements in his closing argument.

By doing this, Lou introduced facts known to be inaccurate to the court and to opposing counsel. This is impermissible. Thus, he violated his duties of candor under both the CA and ABA Rules.

Lou may argue, in his defense, that the testimony was elicited on cross-examination, not in the direct. This means that Lou did not directly induce the fraudulent testimony. However, his duties would require him to communicate this fact to the judge, and would prohibit him from referencing those facts in his closing arguments (which he did.) Thus, even though he did not personally elicit the fraudulent testimony, he will have been found to have violated this ethical obligation.

2.) Attorney as a Witness

Lou also violated his ethical duties when he effectively served as a witness in this case. Under the ABA rules, an attorney is not permitted to act as a witness in a case which they are litigating unless their testimony (1) relates to a non-disputed issue, or (2) the attorney is so critical to the case, that they cannot be removed as counsel, and their testimony is critical. Under the CA rules, an attorney may only testify if

Here, during his closing arguments, Lou testified that his "own inspection of the roof confirmed Dr. Crest's testimony." This is opinion testimony. Thus, while he was not

technically called as a witness, he did serve as one. Therefore, this testimony is only permissible if one of the exceptions apply.

It is unclear if this is a disputed issue. The central issue in the case was the nature of the representation about the leaky roof. However, it does not seem to be in dispute whether the roof was leaking, just whether there was a warranty. Lou's testimony only seems to state that he confirmed there were leaks. It is unlikely that he was testifying about the chemical makeup of the roof, or its propensity to leak. Thus, arguably he was not testifying regarding a disputed issue. However, because what he is talking about comes so dangerously close to the central issue in the case, it is likely impermissible. Thus, by stating that he did his own inspection and confirmed the results, he violated the rule prohibiting attorneys from acting as witnesses.

1. Duty of Competence

Lou also may have violated his duty of competence. Under the ABA rules, an attorney must carry out a representation in a competent manner. Under the CA rules, an attorney must not repeatedly carry out a representation in a negligent, reckless, or incompetent manner.

Here, Lou hired an attorney who had regularly testified about the opposite of the position he sought to assert. This information would almost certainly come out in a proper cross examination. Thus, his witness would have been thoroughly discredited. A competent attorney does not hire an expert witness who will easily be discredited and impeached. Thus, under the ABA rules, he violated his duty of competence.

Under the CA rules, he likely violated no duties. There is no evidence that this was a repeated pattern. Thus, under the CA rules, he likely would not be found to have violated his duty of competence.