

**JULY 1997 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Professional Responsibility

QUESTION

Attorney Ann is a member of the State Bar of California and represents primarily low-income tenants.

Frank, a friend of Ann, told her about an apartment complex that appeared to be very run down and to have many elderly tenants. Ann visited the building and was shocked at its dilapidated and unsafe conditions.

Ann sent a letter to each of the tenants in the building, which stated:

It has come to my attention that there may be ILLEGAL and UNSAFE conditions at your apartment building!

I am an attorney experienced in this type of case, and I am willing to represent you in a lawsuit against your landlord regarding these conditions. CALL TODAY!

Tom, a tenant, called Ann in response to the letter and told her he wanted to hire her to sue Landlord. He said that another tenant named Barbara, who is 82 years old and speaks only Spanish, also wanted to hire Ann.

Ann met with Tom and Barbara. Since Ann speaks very little Spanish, and Tom is bilingual, he acted as a translator. It became clear that Tom's interest was in obtaining a money judgment and that Barbara's interest was in obtaining an injunction requiring the landlord to make repairs. Ann, Tom and Barbara signed a contingency fee agreement for Ann to represent Tom and Barbara in a lawsuit against Landlord. Under the agreement, Ann would receive 40% of any recovery in the case. Ann also separately agreed with Frank that she would pay him 10% of any fees she recovers in return for his having told her about the apartment complex.

Ann filed a lawsuit against Landlord. The suit had a sound legal basis, and she handled it in a professionally competent manner.

Ann and Tom worked together closely on the case, and before the case was resolved, he asked Ann to date him. He also gave her a free airline ticket to accompany him on a trip to Hawaii, which she accepted.

Eventually, Landlord made a written settlement offer to pay money damages only, which Ann conveyed to Tom. Tom, without consulting Barbara, told Ann that he and Barbara accepted the offer. Ann concluded the settlement.

What professional responsibility issues are raised by Ann's conduct? Discuss.

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ANSWER A

Applicable rules

As a member of the California State Bar, Ann (A) must abide by the California Rules of Professional Responsibility or she will be subject to discipline by the Bar.

A generally owes duties to her clients, the profession, other attorneys, the community at large, the judge and jury. The following analysis is arranged chronologically, by event.

Advertisement

Advertisements must be identified as advertisements, must contain the name of at least one attorney responsible for the ad, and cannot be false or misleading. Here, A's letter does not state that it is an ad and the text which we have does not contain A's name, although the letter itself presumably does either on the letterhead or in the signature.

A has not made any blatantly false or misleading statements in her ad, but the following statements might be at issue. A states that "there may be ILLEGAL and UNSAFE conditions", that A is an "experienced attorney" (assume that she has some basis to make this statement), and that she is "willing to represent you in a lawsuit against your landlord." Taken as a whole, these statements may give the potentially misleading impression that A has already investigated the situation, that the case is open and shut, and that A essentially is guaranteeing both representation and successful results. Both of these guarantees would violate rules on advertising.

Solicitation, targeted direct mail

Attorneys may only solicit relatives and former clients. Solicitation is the initiation of personal contact for the purpose of obtaining fee-paying work. Here, A is not soliciting since she is sending out a targeted direct mail advertisement. These are generally allowed.

Records Under California rules, A must keep copies of all her ads for two years, in case of disciplinary action by the Bar. It is unclear whether A intends to do this.

Taking Tom (T) and Barbara (B) as clients

An attorney cannot represent two parties on the same side of a lawsuit if they have diverging interests. An attorney may represent two parties if they have only a potential conflict (rather than an actual one), if she secures waivers from both parties.

Conflict

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Two parties are conflicted if one party's interests would prevent the full, loyal representation of the other party. Here, T was interested in obtaining a money judgment; B was interested in an injunction for repairs. T and B have different interests, and their interests are potentially conflicting, but it is possible that A could effectively represent both of them (at least it appears so in their initial meeting). However, to do so, A must secure waivers from both B and T.

Waiver

In a potential conflict situation, an attorney may represent both parties if a reasonable attorney would believe she could effectively represent both parties, if both parties are informed of the potential for conflict, and if both parties consent to the representation in writing. Here, assuming that A could reasonably believe she could effectively represent both B and T (see previous paragraph), she would still be subject to discipline because she did not discuss the potential conflicts with B and T, and did not obtain their consent.

T as translator

Attorneys owe a duty of loyalty and a duty to communicate to and with their clients. Here, B was A's client. A communicated with B via T. A probably breached a duty to B by using this arrangement since A does not really know what B and T are saying to each other and T has a motive to distort the communication between A and B, in order to achieve his own interests - damages rather than injunction. Hence, A should not allow T to translate for B.

Contingency fee agreement

In California, contingency fee agreements must be in writing, must disclose the fee percentage and how the fee is calculated, must disclose what expenses are excluded from the contingency fee and how they are to be charged, and must disclose that fee arrangement besides contingency is available. Here, A has done some of this (e.g., 40% fee rate), but it is unclear whether she has met all of the requirements. For example, since B is primarily interested in injunction, how is that to be handled? Does A get a percentage of the economic value of the repairs? If so, who decides the value? Is the injunction excluded from contingency but charged on an hourly basis? If so, which hours are charged to B's matter since much of what A does will be common to B and T?

Fee rate

In California, there are caps on medical malpractice contingency fees and fees generally cannot be unconscionably high. Here, a 40% rate probably is not unconscionable, since 1/3 and 1/4 generally seem to be popular rates.

A-F fee splitting agreement

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It is unclear whether Frank (F) is an attorney.

If he is, attorneys may split fees with attorneys in other firms, provided that the clients consent. There is no requirement that the fees be proportionate to work done or responsibility shouldered (unlike the ABA Rules). California allows straight referral fees. Here, however, A has not informed her clients B and T. If F is not an attorney, A may not split fees with him. F would be known, in the vernacular, as a runner or capper (although perhaps a casual rather than a professional one).

If F is an attorney in A's firm, then A and F may split fees however they like and without informing the clients.

A-T personal relationship

A's personal relationship raises a conflict of interest between A and T, and, more seriously, between A and B.

A and T

The issue is whether A can continue to effectively represent T while they are romantically involved. If not, A will have breached her duty of loyalty to A, by putting her personal romantic interests ahead of T's interests as a client. Even more problematic would be if the relationship soured.

A and B

The issue is the same for A and B, but the analysis is clearer – A's romantic interest and B's interest as a client are not aligned (as might be the case between A and T). In fact, the interests probably clash, particularly since T gave A a free airline ticket to Hawaii. At the very least, A has a duty to communicate what is going on as a potential conflict, to B. Probably, A should withdraw from representation of B (and possibly T also). Even if there is no actual conflict, the appearances are bad enough that conflict will likely be presumed.

T's role in the case.

The issue is whether A breached a duty to B by allowing T to take such an active role in the case, by allowing T to be the primary contact with B, and it appears by allowing T to make decisions for B. The last is clearly a breach since B's decisions can only be made by B; decisions regarding substantive rights can only be made by the client, not by the attorney, and certainly not by another party who may have conflicting interests. The other two issues follow a similar analysis as T's role as translator. A owes a duty to communicate with B; she probably breached this duty by allowing T to take such a large role in the case and in the go-between with B.

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Settlement.

An attorney has a duty to communicate with her clients, including settlement offers. Additionally, decisions regarding a client's substantive legal rights may only be made by the client.

Here, A breached both of these duties with respect to B. A did not communicate the offer to B. Instead, she told T. It is unclear whether A expected T to tell B. Perhaps this was the case since T then said that he and B both accepted the offer. A should be suspicious, however, since T's interest is not aligned with B's and it would be to T's advantage to not tell B and then accept the offer for both of them. A should have at least checked with B to make sure that B understood the offer, and voluntarily accepted it, before actually concluding the settlement.

ANSWER B

Duty of Competence:

An attorney owes their client a duty of competent representation and should not take on a case in which they have inadequate skill or knowledge to pursue it. Here, Ann primarily represents low income tenants. The problem and case involve the rights and duties of low income tenants and the landlord. She is, therefore, competent to take on this type of representation.

Solicitation of Clients:

Attorney advertising is protected by the first amendment, under the limited protections of commercial speech. A state may more severely regulate advertising when it poses a risk of misleading potential clients. Furthermore, the Supreme Court has held that untruthful or deceptive advertising has no 1st amendment protection and can be banned.

Specifically, the Supreme Court in Ohrlick held that a state may punish an attorney for engaging in in-person solicitation of clients for profit. In Primus, the court held an attorney could engage in in-person solicitation, however, if it was for free. Here, Ann is seeking paying work. However, her initial contact with the residents was in the form of a letter.

The Supreme Court held that targeted mailings - mail sent to persons whom the attorney knows are in need of representation - is protected conduct. However, the states may by regulation impose requirements on what must be in the advertisement. For example, the rules require that attorney advertising clearly indicate that it is advertising material. Here, there is no evidence that Ann placed such a label on her letter, either on the outside of the envelope or at the top of the letter, and she may be subject to discipline for this.

In addition, she knows these are elderly tenants and are more susceptible perhaps to claims or sales pitches. Her ad may be judged to be misleading because it says nothing about

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how much it will cost the residents to secure her assistance. She probably knows on average how much such cases cost, and she was not seeking to provide free legal assistance. As such, her ad may be misleading for failing to include any reference to the fact that Ann would want to be paid for her work.

The ad may also be inflammatory and misleading because it has in uppercase type “ILLEGAL and UNSAFE.” Sending this to elderly residents is likely to scare them and coerce them into seeking her help. As such, the ad letter is deceptive and misleading and perhaps improper, because it appears intended to have the effect of scaring the residents.

Joint Representation:

Ann was contacted by Tom, who told her that Barbara was also interested in hiring her. Barbara is 82, and speaks only Spanish. As such, Ann should have realized she may need assistance in order to represent Barbara. The Duty of Competence requires an attorney to seek outside assistance when it would not be reasonable for the attorney to perform their services under the circumstances. Here, since Ann owes Barbara a duty of care in providing her with representation, Ann should have taken better steps than relying on Tom to ensure that Ann understood the interests of Barbara in the Representation.

Duty of Loyalty:

An attorney owes the client a duty of loyalty, which includes not taking on conflicting interests. Here, Ann is assuming joint representation for Tom and Barbara. Since they are present clients, she must determine whether there is any conflict between what she is being asked to do for Tom and for Barbara. If a conflict exists, the attorney must not take the case if it would not be reasonable to believe the representation could be provided without the conflict affecting the case. Here, a potential conflict arose when Ann learned that Tom was primarily interested in securing a money judgment while Barbara wanted an order that the repairs to the apartment complex be made.

The attorney must not represent two clients at the same time when it requires the attorney to argue for inconsistent positions adverse to the other client. Here, Ann would be arguing for damages to go to Tom, and an injunction for Barbara: these are inconsistent because a prerequisite for an injunction is a finding that the legal remedies are inadequate. If damages are adequate to compensate the tenants, Barbara may not be able to get the order she wants to get the repairs made. As such, Ann should have clarified the representation purpose with Tom and Barbara. She would have to find that a reasonable person would determine the representation could be persuaded without actual conflict, but this seems unlikely here where damages for Tom may preclude relief for Barbara. At a minimum, she should have informed Barbara of the conflict and sought her written consent. She did not and may be subject to discipline.

Duty of Confidence:

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An Attorney owes the client a duty of confidence not to disclose any information or use to the client's disadvantage when learned as a result of the representation. Here, Ann held a joint meeting with Tom and Barbara. By permitting this, Ann permitted Barbara to waive her privilege in so far as Tom is concerned. There is no evidence that the consequences of the joint meeting and of joint representation were discussed with Barbara. Ann should have discussed this with Barbara, and another interpreter if required, before having the joint meeting. It would have been better to advise Barbara to seek other counsel.

Fee Agreement:

An attorney in California must in any fee agreement disclose in writing to the client the method of calculating the fee.

The fee must not be unreasonable. Furthermore, the fee agreement must include how costs are to be calculated. It must provide whether costs and expenses will be charged to the client, or whether they will be deducted out of the fee award, and whether they will be deducted before or after the contingency fee is calculated.

Ann is subject to discipline because her fee agreement with Tom and Barbara, while in writing and stating her percent of fee, did not mention how costs would be calculated or whether they would be taken out before or after Ann's fee was calculated. The size of the fee - 40% - appears to not be unconscionable. However, the factors to be included in the analysis are the expertise of the lawyer - Ann appears to specialize in this field - and the complexity of the case. This appears to be a simple landlord tenant dispute that could be worked out in settlement. 40% may seem a bit high when the case ended with settlement shortly after filing the suit. However, Ann could not be sure the Landlord would not force her to go to trial so the fee looks more reasonable on this basis.

Fee Splitting:

An attorney may not split fees with a nonattorney except under limited circumstances. The ABA model rules prohibit forwarding fees unless it is with an attorney and the attorney either assumes joint responsibility for the work or performs a proportionate share of the work. Here, we do not even know if Frank is an Attorney. A fee may not be split with him unless part of an employee compensation or retirement plan for a firm, for example. None of these exceptions appear to apply so Ann is subject to discipline for paying a fee to Frank. Furthermore, in California, Runners and Cappers are not permitted. If Ann has Frank out soliciting work for her, she is subject to discipline and guilty of a crime in California.

Ann and Tom's Relationship:

The ABA Model Rules and California rules strongly discourage attorneys from becoming romantically involved with their clients. An attorney may be subject to discipline if she has used

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her position as a fiduciary to coerce the client or otherwise improperly force a relationship on the client.

Here, it appears that Tom pursued Ann. It does not appear Ann used her relationship as Tom's attorney to coerce Tom in any way.

However, an attorney must continue to prevent any conflicts from arising which would prevent the attorney from following her duty to the client. Here, as noted earlier, Tom's interest appears adverse to Barbara's. By entering the relationship with Tom, Ann may be creating a potential conflict with Barbara if she permits her personal feelings to let her favor Tom in the disposition of the case rather than diligently protecting Barbara's interests. She may be subject to discipline.

Gifts from a Client:

The model rules prohibit certain gifts from a client to the attorney. For example, an attorney may not draft a will in which the client makes a gift to the attorney. However, Tom appears to have given Ann a personal gift of the Airline ticket and this alone does not appear to subject Ann to Discipline.

Duty to the Court:

An attorney owes a duty to the Court and to the profession to not interpose frivolous legal arguments or submit papers for an improper purpose, such as to harass. Here, Ann filed suit based on a sound legal basis and handled it in a professionally competent manner. She appears to have satisfied her duty to the Court and profession.

Settlement

Duty of Competence/Client

Scope of representation:

An attorney is permitted to make decisions regarding how the representation is to be carried out. For example, the attorney is permitted to determine what motions to file, what objections to interpose, etc. The client, however, is to make decisions regarding the goals and objectives of the representation. The client is also to make critical decisions - such as whether a criminal defendant will testify. In a civil matter, the client must be informed of and make the decision of whether or not to accept a settlement.

Ann received the settlement offer from the Landlord to only pay money damages. She informed Tom, satisfying this duty. However, Ann is subject to discipline for failing to personally inform Barbara.

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Ann was on notice that Barbara was not interested in money damages. She wanted an order. Ann should, therefore, have clearly known that she must discuss the matter with Barbara personally, rather than relying on Tom.

Furthermore, it was discussed above that Ann had a potential conflict between the interests of Tom and the interests of Barbara. Even if such a conflict was only potential at the initiation of representation here the conflict is actual - the landlord will not at this point offer anything other than money. Barbara said she wanted an order, not money damages. Ann should, in order to represent her interests, consider turning down the offer by the landlord and pursuing the order that Barbara desires. However, this is at odds with Tom's desires.

Rejecting the offer may imperil the landlord's interest in offering money damages, or at least lower the amount he is willing to offer. It would not be reasonable for Ann to believe she could continue this representation of both Tom and Barbara and faithfully adhere to her duty of loyalty to each. She should withdraw from the representation and facilitate Tom or Barbara in seeking other counsel. Arguably she should have never accepted the case and should have referred one of the clients to another attorney. But here, at the latest, she must withdraw. Since she did not, she is subject to discipline.

In addition, Ann may be subject to discipline for the relationship she entered with Tom. It appears at the end that she permitted the relationship with Tom to interfere with her duty of loyalty to Barbara. She accepted Tom's word that Barbara wanted the settlement. If so, she is subject to discipline.