

JULY 2002 PROFESSIONAL RESPONSIBILITY QUESTION

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved “as quickly and quietly as possible.” Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her “associate.” Todd denied possessing, selling, or even using drugs. Todd said he was “set up” by undercover officers. After Todd left the office, Zelda told Alice that if Todd’s story was true, the prosecution’s case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could “take it from here” and gave her a check marked “Consultation Fee, Betty’s Case.”

Alice entered an appearance on Todd’s behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: “Look, I’m innocent. Don’t I have any other choice?” Alice, cognizant of Betty’s wish to get the matter resolved, told Todd she thought it was Todd’s best chance. Based on Alice’s advice, Todd accepted the prosecution’s offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility?
Discuss.

ANSWER A TO ESSAY QUESTION 3

Alice's Professional Responsibilities

Who does Alice represent?

Despite the fact that Betty, Alice's friend, requested that Alice represent her son in a "possession of cocaine with intent to distribute" matter, it should be noted that Alice's client in this situation is Todd. Todd is legally an adult, and it is Todd whom Alice has a professional relationship with – not Betty. Therefore, this could create potential conflicts for Alice.

Duty of Loyalty

An attorney owes his client a duty of loyalty. This duty arises in situations where the interests of a third party, the client or the attorney, might materially limit, or adversely affect the attorney's ability to effectively represent his client. When there is a possibility that this may occur at some point during the course of the representation, it is called a potential conflict of interest. When the conflict does in fact exist, it is called an actual conflict of interest.

In situation where this arises, under the ABA, an attorney should not undertake (or continue) representation unless (1) he reasonably believes the [sic] he can effectively represent his client despite the potential conflict of interest, or that an actual conflict of interest will not adversely affect his representation; (2) disclose the conflict to his client; (3) obtain the client's consent; and (4) the consent must be reasonable (in the opinion of an independent outside attorney). California has stricter requirements, requiring that the attorney obtain the client's consent in writing.

Betty's Involvement

Under the facts of this case, a potential conflict of interest exists. For starters, Betty is a friend of Alice's. This could affect Alice's judgment. However, if she reasonably believes that it would not, and meets the other requirements, this should be acceptable.

Second, Betty informed Alice that she "wanted to get the matter resolved "as quickly and quietly as possible'." This definitely creates a potential conflict of interest, since Alice does not know at this point what it is that Todd wants to do. She should have consulted with Todd, and informed him that his mother wanted to have the matter resolved quickly. Furthermore, she should have obtained his consent to continue with the representation.

Third, she is asking Alice to recommend to Todd to go to a drug rehabilitation center. As mentioned above, this also creates the potential for a conflict of interest, since she is unaware of what Todd wants at this point. Again, she should have disclosed this to him during their meeting, and obtained his written consent.

Lastly, Betty is paying Alice for her representation of Todd. This creates a potential conflict of interest, since a third party is paying for a client's legal fees. Alice should have informed Todd of this and obtained his consent. Furthermore, Alice must keep in mind that despite the fact that Betty is paying for Todd's legal fees, it is Todd who is her client. Alice should have also pointed this out to Betty at the time, so that all parties understand their relationship to another.

Actual Conflict of Interest

The duty to disclose to a client a conflict of interest and to obtain that client's consent is a continuing duty, and the duty of loyalty requirements must be met each time a conflict arises, before the attorney should continue representation. After consulting with Todd, Alice should have realized that an actual conflict on [sic] interest existed. Betty desired to have the matter resolved quickly. Todd, Alice's client, on the other hand insisted that he was "set up" and was innocent. The two interests are incompatible, since pleading innocent to such a charge would prolong the process of resolving the matter. Alice should have again disclosed her conflict of interest to Todd. Furthermore, Alice should have withdrawn from representation if she did not believe she could effectively

represent Todd or if she had failed to disclose the conflict and obtain his consent.

Todd's Guilty Plea

Alice's violation of her duty of loyalty to her client culminated in her advice that Todd accept the guilty plea. Clearly, Todd did not want to accept the plea, as he maintained his innocence. However, Alice, in attempting to comply with Betty's wishes, insisted that he accept it, informing Todd that it was his "best chance." Her actions were unacceptable and violated her professional responsibilities to Todd as an attorney. She should be subject to discipline and Todd would have a good chance at success if he were to sue her for malpractice.

Duty of Competence

A lawyer also owes his client a duty of competence. This duty requires that the lawyer have the legal knowledge, the skills, the preparation, and thoroughness necessary for effective representation of his client. If a lawyer does not have experience in a certain field of law, he can still undertake representation if he can learn the necessary knowledge within a reasonable time that does not cause delay to the client, or if he associates with an attorney that does have such experience.

Here, the fact that Alice had never handled a criminal case before would not necessarily preclude her from taking the matter, if she reasonably believed she could prepare herself for effective representation, or if she associated herself with someone who had such experience. Here, Alice associated with Zelda, an experienced criminal lawyer. Zelda assisted Alice in interviewing Todd. However, Alice should have made clear to Todd that Zelda was there merely to assist, so as to not lead him to believe that he was forming the same attorney-client relationship with Zelda as he had with Alice. While obviously, an attorney-client relationship had been formed between Zelda and Todd, the parties should have been clear that Zelda's scope of representation was limited to assisting in preliminary matters.

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda

informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

Duty to Maintain the Proper Scope of the Relationship

In an attorney-client relationship, a client is the one that makes the substantive decisions regarding, among other things, whether or not to plead guilty. The attorney is the one who makes the decisions regarding procedural matters, such as which witnesses to depose, etc.

Here, the decision of whether or not to plead guilty to the simple felony possession was Todd's. Alice breached her duties owed to him, when she encouraged him to take the plea. While it was true that it was Todd that made the final decision, this was not an informed decision, but rather Alice's will. Thus, she improperly made a decision as to a substantive issue of Todd's matter.

Duty to Render Competent Advice and to Pursue Matter Diligently

A lawyer also owes his client a duty to render competent legal advice. If she is unaware of the current state of the law, she should research it. Furthermore, a lawyer owes his client a duty to pursue the matter zealously and diligently.

Alice breached all of these duties she owed to Todd. First, she failed to give him competent legal advice. She informed him that pleading guilty to the charge was his "best choice" without really understanding criminal law, or considering his options. Instead, she based her decision on Betty's wishes to resolve the matter "quickly and quietly."

Furthermore, she did not pursue his matter zealously, but instead, pursued it according to Betty's wishes and not Todd's interests.

Duty of Confidentiality

A lawyer also owes his client a duty of confidentiality. This duty requires that an attorney not use or reveal anything relevant to representation of a client without his consent, regardless of whether or not the client asked him to keep it confidential, or whether the attorney believes it would be harmful to the client or cause him embarrassment.

While the facts do not necessarily suggest that Alice breached this duty, Alice should be careful that she not reveal anything relevant to Todd's representation to any other party (excluding her agents assisting her in representation) INCLUDING BETTY. It is likely that Betty would like to know the progress of Alice's representation, however, Alice cannot divulge this information since Todd, and not Betty, is her client.

Fiduciary Duties

A lawyer also owes her client certain fiduciary duties, relating to among things, the fees of representation. Under the ABA, an attorney's fees must be reasonable. A lawyer is allowed to split fees with another attorney as long as he obtains his client's consent, and the fee is proportional to the amount of work done. In California, an attorney's fees must not be unconscionable. Furthermore, the lawyer can split fees with another lawyer, [as] long as he obtains his client's written consent. Unlike under the ABA, there is no proportionality requirement and referral fees are acceptable as long as it does not increase the overall fee.

Here, Alice has paid Zelda a consultation fee for assisting her in interviewing Todd. Before paying Zelda, however, Alice should have gotten Todd's written consent. If she had done so, then the payment to Zelda would be appropriate under the ABA if it proportionately represents the amount of work Zelda did in the interview. In California, upon consent, such a payment is acceptable regardless of the amount of work Zelda did, as long as it does not increase the overall fee.

Duty to Communicate with the Client

A major theme running through all of Alice's breaches also constitutes a breach in it of itself – Alice failed to communicate with Todd. Alice failed to communicate with Todd her conflicts of interest, her inexperience in the field of criminal law, and the options he had at plea hearing.

Duties Owed to the Court and Third Parties

Alice not only breached some duties to Todd, but she also breached duties owed to the court and third parties. Alice was not candid with the court, when knowing [she] allowed Todd to submit a guilty plea which she knew did not represent Todd's wishes, but rather those of her own and Betty. Furthermore, she breached her duties of dignity to the profession, in that she allowed herself to continue representation despite the countless conflicts of interest and breaches on her part.

ANSWER B TO ESSAY QUESTION 3

Question 3

Duty of Confidentiality

The duty of confidentiality arises any time a person seeks legal representation and discloses confidential information in the course of establishing an attorney-client relationship. The duty of confidentiality extends to all communications between the attorney and her client, whether or not the client has asked that they be kept confidential or whether or not use of them will damage the client. The duty of confidentiality attaches when a client seeks legal representation, whether or not it attaches. The duty of confidentiality extends to any information obtained in representing a client –whether from the client or her agents or other parties.

The facts are silent as to whether Betty thought she was entering an attorney-client relationship with Alice when she sought representation for her son, Todd. Perhaps Betty's statements to Alice were made in confidence, friend-to-friend. If so, then Alice likely did not even owe a duty of confidentiality to Betty at all. However, if Betty was impliedly seeking legal counsel from Alice—either erroneously thinking that Alice's relationship with Todd would extend to her, or seeking approval of her goals for the litigation as a separate attorney, then an attorney-client relationship attached. If it is the case that Betty was seeking legal representation for Alice or reasonably thought a relationship attached to her, then Betty's communications with Alice that she wanted the matter resolved "as quickly and quietly as possible" and that she wanted Alice to recommend an in-patient drug rehabilitation treatment program to Todd were confidential information that Alice could not use in any way in her representation of Todd.

If Alice violated her duty of confidentiality to Betty, she is subject to discipline and civil liability.

Duty of Loyalty: Potential Conflict

The greatest duty that an attorney owes her client is to act with great loyalty. An attorney's duty of loyalty to a client supercedes her duty to all other people. If an interest of another client, the attorney, or a third party stands in the way of this duty or threatens to materially limit the representation of a client, then an actual or potential conflict of interest exists and the duty of loyalty is in danger of being compromised.

When Alice agreed to represent her friend Betty's son on criminal drug charges, she faced a potential conflict. First, Betty was seeking representation on behalf [of] her son, who was not at the meeting. Alice likely wanted to do a good job for her friend who was in a tight spot and she also likely felt that it was important to protect Betty's reputation as a prominent real estate broker in the area whose reputation likely matter[ed] to the success of her business. When approached by Betty, Alice should have realized that a potential conflict existed between her representation of her friend's son, Todd, and Betty both paying for the representation and attempting to direct the representation, as well as the feelings of loyalty that one feels toward a friend.

With the existence of this potential conflict, Alice should have determined whether she thought she could have provided Todd with effective representation, and whether or not Betty's payment for the services and influence as a friend and person seeking to direct litigation would materially limit her representation of Todd. Perhaps Alice could have provided adequate representation to Todd if she had explained to Betty that Todd would be the client and made each person's role in the litigation and representation clear. It seems that even if Alice tried to make Betty's limited role very clear, it would have been very difficult for Alice to honor Betty's wishes to get the matter resolved "as quickly and quietly as possible" and to recommend an in-patient drug rehabilitation program and at the same time to reach a conclusion that would be the one that Todd wanted from the litigation. The potential conflict between the two parties is obvious. Alice likely should have realized that her effective representation of Todd would be materially limited by her friendship with Betty and Betty's payment for the services.

Even if Alice did reasonably believe that she could provide Todd with representation that would not be materially limited by Betty's influence, payment for the services, or friendship, Alice still breached the duty of loyalty. In addition to determining whether she believed she could provide Todd with adequate representation despite the existence of the potential conflict, Alice also should have (1) disclosed the actual or potential conflict to Todd, (2) received consent from Todd (in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent – written or otherwise – from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney

would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the potential conflict that existed. Alice is subject to discipline and civil liability.

Duty of Loyalty: Actual Conflict

An attorney also has a duty to keep her guard up for evolving conflicts of interest that arise as representation continues. While it is clear that Alice should not have taken on Todd's representation without adequately disclosing and obtaining reasonable consent regarding the potential conflict between Betty and Todd, she should have handled the actual conflict that arose later in the litigation differently.

When the prosecutor offered Todd one year of probation if he underwent a one-year period of in-patient drug rehabilitation, Alice should have realized that any recommendation she made to Todd about the program was an actual conflict. Alice was right to ask Todd what he thought about the program as an alternative to not reducing the charges. However, Alice responded to Todd's uncertain inquiries about what he should do by honoring Betty's wishes. Alice compromised her duty to Todd, which should have come before any other duty to any other party concerned in the matter. She recommended a course of action to Todd that Alice knew Betty wanted: a quick, hassle-free resolution with an in-patient drug rehabilitation program.

When Alice realized the actual conflict existed, she should have reevaluated whether or not she could continue the representation of Todd. In the unlikely event that Alice thought she could still proceed with the representation of Todd, Alice should have disclosed the actual conflict that existed, sought consent from Todd (in writing in California), and proceeded only if she determined that consent was reasonable. It seems that few disinterested attorneys would find consent reasonable in this instance, as Todd's interests in his liberty and having a guilty plea entered on the record against him was materially adverse to his mother's interest in a speedy resolution and getting Todd into an in-patient drug treatment program.

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained

from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

As discussed above, if Betty was seeking an attorney-client relationship with Alice when she sought representation for Todd (not knowing that the relationship would only extend to Todd), Betty disclosed confidential information that would make it impossible for Alice to provide adequate representation to Todd while ignoring Betty's wishes. By acting on the information that Betty provided to Alice, Alice breached her duty of loyalty to Todd, her duty of loyalty to Betty if a relationship attached, and her duty of confidentiality to Betty by acting on information she gave Alice rather than Todd's wishes.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the actual conflict that arose during the course of litigation. Alice is subject to discipline and civil liability.

Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

The duty of loyalty also provides that the client must make all decisions regarding substantive rights, including such decisions as whether or not to testify in criminal prosecution or whether to accept or reject a settlement offer. Alternatively, the attorney makes decisions regarding procedure or legal strategy. Alice in effect usurped Todd's ability to decide whether or not to accept the prosecutor's "settlement" offer for a plea bargain. While at first blush it seems that Alice did allow Todd to make the decision as to whether he should accept the plea agreement, she did not provide him with all of the necessary information he needed to make that choice. Alice did not disclose that she was giving him advice based on his mother's wishes, rather than what Alice thought was the best possible choice for him.

Thus, Alice breached her duty of loyalty to Todd by not allowing him to make an informed decision as to his substantive rights. Alice is subject to discipline and civil liability.

Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the

client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

Under both standards, Alice's paying of Zelda with the check marked "Consultation Fee, Betty's Case" was improper. While it may have been reasonable, neither Betty nor Todd consented and the fee was not proportional to the work done because Zelda did no more than sit in on one meeting with Todd. Under California law, the fee was likely not unconscionable (the facts are silent here) and it is not certain from the facts whether the overall fee was increased in order to cover the split. However, it is fatal that the fee split was not disclosed in writing to Todd or Betty and no consent in writing from either was obtained.

Thus the fee splitting with Zelda was improper. Alice is subject to discipline and civil liability.

Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less one that involved a serious drug felony. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

While Alice was prudent in seeking help from Zelda, she only sought her help with respect to the first interview with Todd. Zelda only informed Alice that “if Todd’s story was true” the prosecution had a weak case. However, Alice did not use Zelda to further inquire what kind of situation Todd would face if his story was not true. Zelda did not have the adequate knowledge to handle such a case. While consulting Zelda was proper, she should have sought more help from her in representing Todd, and she should not have shown herself as the only defense counsel on the case. In addition, she should have disclosed to Todd and Betty that she would need to employ Zelda’s help to get familiar enough to take the case and obtained their consent to using Zelda (in California, in writing).

Alice is subject to discipline and civil liability for her breach of the duty of competence to Todd.

Diligence

Finally, Alice has the duty to zealously pursue [the] case to completion for client’s best interests. She did not do this when she breached her duty of loyalty to Todd by honoring Betty’s wishes over his. She did not use diligence is [sic] advocating zealously for what was best for her client. When she knew that Todd was unsure about what to do when the prosecution offered a plea bargain and when he insisted on his innocence, Alice should have zealously pursued whatever cause or goal Todd wanted rather than what Betty wanted.

Alice is subject to discipline and potential civil liability for breach of her duty to treat Todd’s case with due diligence.

Duty to Communicate

Alice also has a duty to communicate with her client, keeping them abreast of the developments in his or her case. Alice should have kept in constant communication with Todd both inside and out of court about Zelda’s involvement or lack thereof in the case, the actual conflict that emerged, and her inability to advise Todd adequately about the plea agreement.

Duty of Candor/Truthfulness, Fairness, and Dignity/Decorum

Alice owes a duty of candor and truthfulness to all third parties and to the court and her adversaries to state the law truthfully and pursue her representation of

clients with honesty and integrity. When the actual conflict between Betty and Todd arose during Alice's representation of Todd, she should have sought withdrawal of her representation of Todd from the court. In addition to being honest with her client and notifying him of the actual conflict that existed, Alice also should have been up front with the court and the prosecutor that she was unable to properly and adequately advise her client on the option of the plea agreement in exchange for one-year probation that included a year-long in-patient drug rehabilitation program.