

Question 5

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to “pass the word around that I have opened a solo practice specializing in personal injury law.”

Lawyer’s brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another’s wrongdoing, Bert gives them Lawyer’s business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him \$500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul’s behalf against Dinoworld. Dinoworld’s attorney immediately filed an answer to the complaint. Lawyer and Dinoworld’s attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer’s brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special “passholders-only” event at Dinoworld, at which Dinoworld’s CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld’s finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

Answer A to Question 5

5)

Duty of loyalty: special concerns for prior government lawyers

A lawyer has a duty of loyalty to her client. This includes a duty to avoid conflicts of interest. Under the ABA rules, a lawyer who was a previous government lawyer, must avoid working on the same matter in private practice as she worked on as a government lawyer unless there is informed consent from the client and agency. In California, there is no such general rule; however, the rule does apply to former prosecutors representing defendants. There does not appear to be any conflict here, regarding Lawyer's new work. First, she is going into personal injury law. Therefore, she is unlikely to work on the same matters as she worked on as a prosecutor. Second, there are no facts in this problem that show any conflict of interest has arisen. Therefore, Lawyer has violated no rules, but she must be careful to avoid conflicts of interest.

Duty to profession: Lawyer's request of family and friends

Previously, lawyers were not permitted to advertise their services because it was considered unprofessional. However, the United States Supreme Court has since held that lawyers have a constitutional right to engage in truthful, non-misleading advertising. A lawyer may not, however, solicit clients in person or hire others to do so as her agents if she has no prior relationship with the person she is soliciting.

Here, Lawyer asks her friends and family to pass on the word that she has opened a solo practice. This does not appear to be direct, in person solicitation or requesting her friends to solicit. Rather, it appears to more [sic] just "getting the word out," which is really the same as advertising. She is simply letting her friends and family know, so that they can let others know, about her practice. There does not appear to be anything misleading about what she is asking them to do. They are not expected to make any representations about her practice, only to let people know that the practice exists. Therefore, this appears to be proper.

Duty to profession: getting clients from hospitals

In California at least, it is presumed to be misleading advertising to advertise at a hospital. Here, the facts show that Bert works as an emergency room clerk at a hospital, and that there, when he admits patients, he advertises Lawyer's business by giving people her business card. This is presumptively misleading because people are in an especial vulnerable state when they are very sick or injured. Therefore, Lawyer would have to somehow overcome the presumption that she has mislead [sic] people by advertising her services at a hospital.

A lawyer must also not use cappers to do what she could not do. As noted above, in person solicitation of people with known legal problems when there is no prior relationship with those people is prohibited, and it is prohibited if someone else does it for the lawyer as well. A lawyer cannot avoid the rules by having someone else do the act. Here, the facts show that Bert is soliciting clients for Lawyer; he is acting as a capper. He is suggesting that the injured people “talk to her about filing a lawsuit.” This is direct solicitation. There is no evidence that Lawyer previously knew the people he is soliciting. The fact state [sic] that he does this “whenever he admits patients,” which implies that Lawyer does not know any of the people solicited. This is improper solicitation, so the Lawyer has breach [sic] a duty to her profession.

Duty to profession: Sharing fees with non-lawyers

A lawyer cannot pay a fee to a non-lawyer to refer him. All a lawyer can do is pay regular costs for advertising or join a referral service.

Here, the facts state that “each time” Lawyer is retained after Bert refers someone, Lawyer takes Bert out to lunch and gives him \$500. This is improper. First, it is improper because Bert is not a lawyer. He works as an emergency room clerk at a local hospital. Second, the lunch and the \$500 are evidently consideration for his referral. Lawyer may argue that Bert is her brother, and that she is simply taking him out to lunch to be with him, and that there is nothing usual [sic] about a sister taking her brother out. However, the correlation of the lunches with the referrals would belie this assertion. Additionally, the brother-sister relationship does not explain the \$500. No facts indicate that Lawyer should have any motive for giving Bert the money except that he made the referral. Therefore, this practice is improper and violates Lawyer’s duty to her profession.

Duty of Competence

A lawyer owes her client a duty of competence. This means she must keep the client informed, and act with the legal knowledge, skill, thoroughness and preparedness necessary for the work. Here, the facts show that after being retained by Paul, Lawyer filed a personal injury action on Paul’s behalf and that she and Dinoworld’s attorney arranged for a deposition. Assuming all proper consultation with Paul regarding the filing of this suit, there does not appear to be any violation here. As long as there was a basis for the suit, Lawyer did the proper research before filing it, and Lawyer prosecutes it faithfully and vigorously, there is no violation of the duty of competence.

Duty of Loyalty: trip to Dinoworld

A lawyer has a duty of loyalty, including a duty to avoid making her client’s interests adverse to her own personal interest.

Here, the facts show that after filing a lawsuit against Dinoworld, Lawyer accepted a special “passholders-only” invitation to the amusement park. This may or may not be a conflict of

interest. On the one hand, it seems like Lawyer is accepting personal benefits from Dinoworld. The facts imply that the ticket was free, but it sound [sic] like the ticket came from her brother-in-law. But Lawyer is getting a benefit from Dinoworld. She is receiving a special tour and is permitted to enjoy herself at Dinoworld's invitation. Arguably, this places her personal interest adverse to her client["s]. Lawyer would probably argue that this was a one-time event, and that it is not the sort of event that would compromise her representation with her client. This is probably true. However, on the whole, this action creates an appearance of impropriety, which a conscientious lawyer should avoid. Probably, Lawyer should have informed her client of her intent to go to Dinoworld and gotten Paul's informed consent. Then, Lawyer would not be putting Paul in a position where he could potentially question her loyalty and there would be some question as to whether he should trust her. Whether or not this was strictly a violation of the rules, probably not. Whether Lawyer could have avoided even the appearance of a problem, she could have, and probably should have proceeded accordingly.

Duty to Opposing Parties: duty to avoid deception

A lawyer has a duty of fairness to opposing parties. This involves avoiding making material misstatements of fact or omission where there is a duty not to omit.

Here, the facts state that at the event, Lawyer declined to wear a name tag and avoided introducing herself. This makes it sound like she was being deliberately deceptive as to Dinoworld's CFO, that she did not want him or her to know who she was. This is material omission. The CFO probably would have been more on guard about answering Lawyer's questions, or he or she would not have answered them at all, if he/she was aware who Lawyer was. Her efforts not to introduce herself seem to be motivated by a desire to ask the CFO questions and receiving unguarded responses. Therefore, she is deliberately deceiving the CFO in order to receive information. Lawyer will argue that she did not want to introduce herself or wear a name tag because she was simply trying to enjoy a day at Dinoworld without the lawsuit becoming the focus of the event. She will argue that this was to avoid any conflicts. However, this assertion is countered by her decision to ask the CFO questions. The facts that she chose to ask questions speaks to her motive not to wear a name tag. Therefore, Lawyer violated her duty of fairness to opposing parties in failing to identify herself.

Duty to 3d parties: Duty not to speak with parties represented by counsel

A lawyer had a duty not to speak to someone she knows is represented by counsel without the counsels' permission. When the "person" is a corporation, it is less clear who the lawyer may or may not speak to. This is because corporations tend to have many employees, some of who would be considered the "client" and others who would not. To determine who[m] is covered by this rule, who is the "client" of the other lawyer, courts look at the nature of the employee. People who (1) regularly consult with or supervise; (2) people who can bind the corporation with their statements; and (3) people whose statements may be imputed to the organization are considered the client, and a lawyer

must not speak with those people without the corporation's counsel's permission.

Here, the CFO is probably the "client" for purposes of this rule (and probably for most other purposes as well). The CFO is the Chief [F]inancial [O]fficer, and the person whose deposition will be given within the next 90 days. As the CFO, this person is the corporation's agent. This person's statements can be imputed to the organization, and this person can bind the organization. The CFO is one of the "highest" people in an organization. Therefore, Lawyer has a duty not to knowingly speak with him because Dinoworld has an attorney. The facts state that Lawyer and Dinoworld's attorney decided mutually that Lawyer could depose CFO within the next 90 days. This facts [sic] shows two points: first, it shows that Lawyer knows that Dinoworld is represented by counsel and that the CFO is a person who can bind the corporation. Otherwise, she would not want his deposition. Second, it shows that she did not have consent to speak with CFO. If she has consent to speak with him outside of the deposition, there probably would not have been a reason to schedule the deposition. Additionally, it is reasonable to assume that Dinoworld's attorney would want to be present when the CFO was giving information so she could properly prepare him/her. She would not want him/her to talk unwittingly to opposing counsel. Finally, no fact states that any permission was given. Therefore, Lawyer violated a rule by talking to the CFO without his/her attorney's permission.

Answer B to Question 5

1. Duty of dignity to legal profession

– Solicitation –

Neither a lawyer nor his agents may approach a party for potential representation in person, by telephone or in real time electronic manner for the purpose of pecuniary gain if that party is not an existing client or relative.

Here, Lawyer (L) through her brother Bert (B) contacted clients in person upon their arrival at a local hospital. In California, such activity is presumed to be improper solicitation. It is solicitation in violation of ethical rules in California to approach an injured person while they are in a vulnerable state. When an individual is being admitted to the hospital for injuries they are clearly vulnerable and solicitation is impermissible.

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

Thus, although L herself is not approaching these accident victims while in a vulnerable state, her agent B is and that is impermissible and an ethical violation.

– Referrals –

Payment to another by a lawyer for referral of a client is not permissible. Referral payments are an ethical violation.

Here, L pays B \$500 each time L is retained by someone referred by B. B also gets lunch. This is especially improper because B is an emergency room admitting clerk and not a lawyer.

Thus, L is also in violation of the no referral rule.

– Advertising –

Generally, advertising of a lawyer's services is permissible if it is not false or misleading. All advertising must be labeled as advertising and at least one person responsible for the ad must be identified. General written advertising is also permissible (like direct mail).

Here, L's request of her friends and family to "pass the word around" could be advertising. This is problematic because it is not labeled as advertising or doesn't appear to be and it is unclear who is responsible for it.

Most significantly, L asks her friend[s] and family to pass the word that she is “specializing in personal injury law.” Traditionally, the only specializations that were recognized were patent and admiralty law. However, certain other specialties are recognized if they are approved and if the lawyer is certified by the appropriate organization approved by the ABA or state.

Here, nothing indicates that L has received any special certification for her “specialty” in personal injury law.

Thus, this “ad” by her friends and family is both false and misleading. Therefore, L is in violation of the duty to advertise truthfully.

2. Duty of Candor/Fairness

A lawyer is also bound by a duty of candor and a duty of fairness to both the court and the other side or opposition.

– Represented Person –

One of the major issues of fairness and candor is to the other side and involves speaking to individuals who are represented by counsel without getting permission.

Here, L went to Dinoworld and approached Dinoworld’s CFO. Without identifying himself, in fact purposely concealing his identity, D spoke with the CFO about finances and made notes about the conversation.

What makes this a problem is that L knew CFO was represented by counsel because L had already spoken with CFO’s attorney about the deposition of CFO.

Thus, L had a duty to get permission from Dinoworld’s attorney before speaking to anyone associated with Dinoworld, including the CFO. So, L knowingly spoke with a represented individual before obtaining permission from the attorney and thus violated her duty of fairness.

In conclusion, L is in violation of her duty to the dignity of the profession because of her solicitation, advertising and referrals. Also, she violated her duty of fairness by talking to a represented person without permission.