

Question 6

Lou is a lawyer. While he was having lunch with a friend, Frank, he learned that Frank's sister, Sally, had decided to dissolve her marriage. At Frank's request, Lou telephoned Sally, told her that Frank had asked him to call, and offered to represent her. They set up an appointment for the next day.

During the appointment, Lou began the discussion by talking about his fee. Sally told Lou she had no money, but admitted jointly owning with her husband some art valued at \$1,000,000. Lou agreed to accept a payment of fifty percent of any assets awarded to Sally in exchange for representing her. Lou and Sally memorialized the agreement in writing.

Over the next month, Lou found himself attracted to Sally and eventually asked her to go out with him. She accepted, and they began dating on a regular basis, including having consensual sexual relations with each other.

Soon after Sally filed for dissolution, her husband's lawyer called Lou and made a property settlement offer. Lou told the lawyer the offer was ridiculously low and he would not insult Sally by telling her about it. Sally learned about the offer from her husband. She thought it was a good offer and was incensed that Lou had turned it down. When she asked Lou about it, he told her he was looking out for her best interests.

What ethical violations, if any, has Lou committed? Discuss.

Answer A to Question 6

6)

Lou has potentially violated the ABA [R]ules of Professional Conduct and the model code of Professional Responsibility. He has potentially violated the California [R]ules of Professional Conduct, and where there is a distinction in the law, I will address it.

Here, Lou telephoned Sally at Frank's request to tell Sally that he would offer to represent her. The general rule is that an attorney may not instigate direct, in person solicitation for legal services unless they are talking to a former client or the person comes up to them. In this case, Lou was having lunch with Frank who asked him to call Sally because Sally is his [s]ister. While Lou did not directly make the contact with Sally in person, he is still not allowed to call Sally and offer her his services because they do not have a previous legal relationship. It is also immaterial that Lou told Sally that he is calling because her brother told him to. Lou should have told Frank that he cannot call Sally because it would be violating his ethical obligations. Lou could have told Frank to tell Sally to call him if she really needed help and was looking for legal representation. Thus, because Lou instigated client contact and solicited his services to Sally, he has breached his ethical obligations.

When Lou agreed to take 50% of Sally's assets she would be awarded after the dissolution, he is basically having an interest in the litigation. Generally, a lawyer may not have an interest in the litigation and thus, what Lou should have done is the following: 1. He should have given Sally consultation as to what fees are, 2. He should have given her informed consultation, 3. He should have given her the chance to see outside counsel if she wanted (in writing in CA), 4. He should have obtained her waiver or consent to this agreement (in writing in CA). However, a lawyer may have an interest in the litigation if, for example, it is a contingency fee arrang[e]ment.

Generally under the ABA rules, a lawyer may not engage in a contingency fee arra[n]gement with a client when the case is about a dissolution of marriage because it would violate public policy concerns. However, in California a lawyer may enter a contingency fee arrang[e]ment so long as the arrang[e]ment does not encourage the divorce. Since Sally is in need of a lawyer to have her divorce, it appears that Lou's representation is not encouraging the divorce. Thus, Lou should have given Sally consultation about the fee arrangem[e]nt, put the contingency in writing, he should have also told her and [sic] what his obligations are under his representation (written in CA), and he should have written what the amount of his services would be after he subtracts any court costs, and obtained her written consent to the arrang[e]ment. While the [sic] memorial[i]zed this arrangement in writing, Lou did not give Sally informed consent about the arrang[e]ment nor did he write down what his responsibility and liability is under his representation. Thus, Lou has breached his ethical obligations.

Lou agreed to accept 50% of any assets awarded to Sally in the divorce. A lawyer has a duty to not make his fee unreasonable or unconscionable. In this case, Sally had no money except she jointly owned art with her husband valued at 1 million dollars. Thus, taken into consideration that Sally and her husband may have a lot of money, some courts would find that 50% of Sally[’s] divorce decree would amount to an unreasonable fee for Lou. Plus, it may also be uncons[c]ionable to take so much money from a client. In this event, what Lou should have done was determine what the normal percentage was for a contingency fee in the general area that he lived in. For example, he could have asked other lawyers and taken note of payment in divorce decrees. He should have also determined if this percentage would actually reflect the amount of work he would be doing. Additionally, Lou should also know that 50% may be too unreasonably high as his fee percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally’s assets as this is most likely far to[o] unreasonable and unconscionable.

Lou and Sally began a relationship during his representation of her case. Under the ABA rules, a lawyer may not engage in sexual relations with a client. However, in CA it is permissible so long as it does not affect the lawyer’s representation of their client. Here, they began dating regularly and had consensual sexual relations. One the one hand, while this is permissible in CA, it may have affected Lou’s duties as a lawyer because this is a divorce situation where Lou’s emotions may be entangled with the fact that his client is still married. Plus, Lou may be engaging in adultery since Sally only filed for the divorce after she started dated [sic] Lou, subjecting him to more potential ethical violations. Lou has a duty to place his client’s interest in front of his own and now Lou may be placing his emotional interests first. For example, when Husband’s lawyer called, Lou said that he would not take the property offer nor tell Sally about it because he did not want to insult Sally. Here, Lou may be protecting his relationship with Sally rather than being her loyal lawyer.

Also, when Sally asked Lou why he didn’t tell her about the offer, he said that he was looking out for her interests[,] which may not have been true. A lawyer has a duty of loyalty to their client to place their client’s interest first and Lou may have breached that duty by saying he was looking out for her interests when he was really looking out for his relationship with Sally. In this event, Lou should have consulted Sally about their potential conflict of interest (since Lou may place his interest in front of Sally’s best interest), he should have given her informed consent that he may not be able to put her interests first, and he should have asked her to seek another outside counsel’s advice (in writing in CA), then obtain her consent or waiver (in writing in CA). Lastly, if Lou could not reasonably represent her, he should have withdrawn from representation [so] as to not prejudice his client. For example, he could give Sally adequate time to find another lawyer and give her all the documents she would need to continue on her case.

Lou told Husband’s lawyer that he would not tell Sally about the settlement offer. Generally the lawyer is entitled [to] decide the technical and procedural decisions of a case while the client must decide on all the objectives and goals. One major goal is whether or not a client

wants to accept a settlement offer. Here, Lou had a duty to tell Sally about the settlement offer because it was her right as his client to know about it and decide if she should reject it or not. Lou cannot reject a settlement offer and since Lou rejected it, he has breached his duty to behave like a competent lawyer.

Lou did not tell Sally about the settlement offer. A lawyer has a duty to communicate with their client and tell them of all material aspects of their case, especially in a situation like this where Sally would have to know about the settlement offer. Here, Sally found out the settlement from her Husband, not her own lawyer. What Lou should have done is when he received the settlement offer, he should have consulted Sally as to its terms, explained the pros and cons of it and thus, allowed her to make the final decision. Then Sally could ask Lou what [sic] the best thing to do would be since Lou could give her consultation as to the legal implications of accepting a settlement offer. Yet, Lou just rejected the settlement and did not communicate any material terms of the settlement to Sally. Because Lou did not take these necessary steps, he has breached his duty as a lawyer.

Answer B to Question 6

6)

Applicable Law

An attorney in California is bound by the California Rules of Professional Conduct (RPC) and the California's Attorney's oath. The RPCs are similar but not identical to the ABA Model Rules[,] which govern a lawyer's ethical duties in the majority of jurisdictions. Because it is unclear in which state Lou is a lawyer this essay will apply the majority view of the ABA Model rules but also include distinctions in the California RPCs.

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this case once Lou and Sally meet for their appointment a lawyer-client relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

Telephone Call To Sally

Breach of Duty of Candor to the Public and Dignity of the Profession

A lawyer owes a duty of Candor to the Public and a duty to act in a way that does not bring his profession into disrepute. These duties may be violated by in person solicitations for profit.

In Person Solicitation

The [C]onstitution guarantees the right to free speech. However, the Supreme [C]ourt has ruled that this right is limited in the context of commercial speech. Specifically, they have ruled that the [F]irst [A]mendment does not protect false, misleading or inherently deceptive speech. One category of inherently deceptive speech is live contact by a lawyer of a prospective client for profit. Therefore state bar associations can constituti[onally] regulate this conduct.

Under the Model Rules a lawyer is prohibited from engaging in in person, live electronic or telephone contact, for profit, with a person that is not a lawyer or with whom the lawyer has no preexisting personal, legal, or family relationship.

Here Lou telephone[d] Sally[,] which qualifies as a live telephone contact. Furthermore, he offered to represent her in her action to dissolve her marriage for which he was planning on charging her a fee and make [sic] a profit as later evidence[d] by their fee agreement. Finally, Sally was not a lawyer and Lou had no preexisting personal, legal, or family relationship with Sally. Although Lou was asked to contact Sally by her brother

Frank, who was Lou's friend, this contact was not sufficient to qualify as a preexisting personal, legal or family relationship. In fact up until the time of the phone call Lou had no relationship with Sally and she had no idea who he was.

Therefore, by engaging in this live telephone contact, for profit solicitation Lou violated his duty of candor to the public and the duty he owes to the dignity of the legal profession.

What Lou should have done is tell Frank to have Sally call him to ask for representation. In that case Lou would not have initiated the contact and would not have violated any ethical duties.

Fee

Breach of Fiduciary Duty to Client for an Improper Fee

A lawyer owes a fiduciary duty to his client to charge a proper fee that conforms to all the requirements laid down by the ethical rules.

Fees Generally

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money but her and her husband had \$1,000,000 worth of art. This would mean that Lou's fee was at least \$250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of \$250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

A fee should be in writing under the Model Rules and must be written under the California RPCs unless it is for less than \$1000, for an existing client in a routine matter, exigent circumstances exist, it is waived, or it is for a corporation. This fee was in writing; thus in that regard it complied with the Model Rules and the California RPCs.

Therefore, because the fee is unreasonable it is an ethical violation. Lou should have charged a fee that was less than or around 33% or a fee that was charged for similar work in such a locality in order to have a reasonable fee.

Contingency Fee

A contingency fee is one that is a percentage awarded to the lawyer if and when the client prevails. A contingency fee must be in writing, must otherwise be reasonable, must

discuss how work not covered by the contingency fee will be paid, and must provide a formula for how the contingency fee was determined. Here the fee was in writing. However, the fee may not have been reasonable as stated above.

Furthermore, under the Model Rules a contingency fee may not be taken in a domestic relations matter. However, under the California RPCs a contingency fee may be used in a domestic relations matter as long as it does not incentivize [sic] divorce. Therefore, if Lou is in a state that applies the Model Rules this contingency fee is an ethical violation because it involves a domestic relations matter of a dissolution. However, if Lou is in California his contingency fee is likely not an ethical violation because he made the fee with Sally after she had decided to dissolve her marriage and thus did not incentivize [sic] her decision to seek a divorce.

Lou should not have charged a contingency fee if he was in a Model Rules Jurisdiction but rather should have found some other way for Sally to pay her fee, perhaps by asking Frank to loan her the money necessary.

Breach of Duty of Loyalty to the Client

A lawyer owes a duty of loyalty to their client. The lawyer must act with the utmost good faith and in a way she reasonably believes is in the best interests of her client[,] having no other considerations in mind. If the lawyer becomes conflicted and that conflict materially limits the representation the lawyer may continue the representation only if he informs the client in writing of the conflict, receives written consent that a reasonable lawyer would advise their client to give, and he reasonably believes that he can continue the representation without it being materially limited.

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases. Here Lou has taken an interest in the subject matter of the litigation because his fee is based on the amount and kind of assets he recovers for Sally in her divorce proceedings. However, this is clearly a contingency fee as it depends on assets actually being awarded to Sally in the divorce, thus it is contingent on Lou's success. Therefore, it does not breach Lou's duty of loyalty. However, because as stated above it is a contingency fee in a divorce proceeding it may not be a valid contingency fee if Lou is in a Model Rules jurisdiction. In such a jurisdiction the court may consider it an interest in the litigation rather than a contingency fee and therefore an ethical violation.

Therefore, the fee agreement breaches Lou's fiduciary duty to his client Sally and possibly his duty of loyalty to her as well.

Consensual [sic] Sexual Relations
Breach of Duty of Loyalty to the Client

The duty of loyalty that a lawyer owes a client is laid out above.

Model Rules

Under the Model Rules a lawyer breaches the duty of loyalty by entering into a consensual sexual relationship with the client, regardless of its effect on the representation. However, the Model rules do allow preexisting consensual relationships to continue as long as they do not materially limit the lawyer's ability to represent the client. Here Lou and Sally's relationship began after the[y] entered into the lawyer[-]client relationship. Therefore, under the Model Rules Lou breached his duty of loyalty to Sally by entering the relationship with her.

Lou should have never entered consensual sexual relations with Sally nor even asked her to go out with him. If Lou had really wanted to date Sally he should have asked her to consent to his withdrawal as her lawyer and then started to date her.

California RPCs

Under the California RPCs a lawyer may enter a non preexisting consensual [sic] sexual relationship with a client without breaching the duty of loyalty as long as he reasonably believes the representation of the client will not be materially and adversely affected, the relationship is not in payment of any of the client's obligations to the lawyer, and the relationship is not entered into by the client because of duress or undue influence. Here there appears to be no evidence that the relationship was in part payment of the fee because the written fee agreement predated the relationship and was for a large amount of money[;] additionally there is no evidence of duress or undue influence.

However, there is evidence that the relationship materially and adversely affect[ed] the representation. Lou later received a call from Sally's husband[']s lawyer and turned it down and refused to communicate it to Sally because it was ridiculously low and he did not want to insult her. His motive in not wanting to insult her may have been do [sic] to their personal relationship. Furthermore, his failure to communicate the offer to her was a breach of his duty of care that he owed to Sally as will be discussed below. If his relationship was causally related to his breaches of duty of care then certainly the representation was materially limited by the sexual relationship. This is further reinforced by the fact that Sally learned of the offer and though[t] it was a good offer. Because the relationship was materially limiting the representation it violated the California RPCs.

Lou should never have entered the relationship with Sally and certainly should have withdrawn after his feelings for her began to limit his representation of her. Lou should certainly have received Sally's informed written consent as to the continued representation, however, once he rejected the settlem[e]nt offer it appears that the representation was

materially limited and he could not reasonably continue the representation. Therefore, at that point he should have withdrawn.

Failure to Communicate the Settlement Offer and Rejection Thereof **Breach of Duty of Care Owed to the Client**

A lawyer owes their client a duty of care. This duty requires that the lawyer act with the skill, knowledge, thoroughness, and preparedness reasonably necessary to effectively carry out the representation. If Lou rejected the offer and it was a good offer then he may have violated the duty of care because a reasonable lawyer would at least entertain a decent offer and communicate it to their client. We do not know anything about the terms of the offer but we do know that his client Sally believed that it was a good offer. Because of this and because of his failure to communicate the offer to Sally, as discussed below, Lou violated his duty of care.

A Lawyer's duty of care includes a duty to communicate with the client. The duty to communicate requires that the lawyer keep the client reasonably informed about the representation and respond to the client's reasonable requests for information. Here Lou failed to communicate the settlement offer to Sally as communicated by Sally's husband's Lawyer. Failing to inform a client of a settlement offer is a failure to keep them reasonably informed about the representation because a decision whether to settle or not is one that is solely in the purview of the client and the client cannot make that decision unless they are informed of that offer. Furthermore, Lou knows that Sally's husband's lawyers [sic] is ethically prohibited from communicating with Sally because she is a party adverse in the matter whom the lawyer knows is represented. Thus Lou must have known that there was virtually no way for Sally to find out about the offer. Therefore, Lou violated his duty to communicate and thus his duty of care.

A Lawyer's duty of care also includes a duty of diligence. That is[,] the lawyer must diligen[t]ly and zealously pursue the interests of his client. Here by failing to communicate the settl[e]ment offer and thus possibly losing the ability to settle, Lou has violated the duty of diligence because a diligent lawyer would at least communicate the offer to his client and discuss it with them.

Scope of Representation

The objectives of the representation are decided by the client subject to the lawyer's advice on the ethical rules and other law. The means of the representation are decided by the lawyer. The Advisory notes to the Model Rules state that decisions regarding the settlement of a civil case are considered to be objectives. Therefore, the decision to settle or not was one that should have been made by Sally rather than by Lou and Lou violated his ethical duty by not communicat[e]nt to her and by deciding on his own that the offer was ridiculously low and an insult.

If Lou felt that the settl[e]ment was inadvisable he should have counseled Sally on that fact rather than withholding information. If he thoug[t] such action was repugnant he may have sought permissive withdrawal to end the representation. However, he did none of these things and therefore violated the Model Rules and the California RPCs.