

Question 5

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Answer A to Question 5

Question 5

The issue is whether lawyer has committed any ethical violations in his representation of Client, either under the ABA Code ("Code"), the ABA Model Rules, or the California rules of professional responsibility. Based on the facts provided, Lawyer has committed a number of ethical violations, each of which will be discussed in turn.

Contingency Fee Agreement

In general, a lawyer is prohibited from taking a proprietary interest in the case he is working on. However, all 3 bodies of law discussed above recognize contingency fee agreements, or agreements in which the lawyer and client agree that the lawyer's fee will be paid out of any recovery the client receives. Lawyer and Client had such an agreement in this case.

Under the ABA Model Rules, a contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery and must state whether such expenses will be paid before or after the lawyer's percentage is calculated.

In addition, California law requires that the agreement state that the lawyer's percentage is negotiable, i.e. that it is not fixed by law, and that it state how other, non-covered expenses will be paid.

In this case, Lawyer and Client entered into a valid, written contingency fee agreement under which it was agreed that Lawyer would receive 1/3 of Client's recovery. Assuming that all of the above elements were also included in the agreement, it will be enforceable as a valid contingency fee agreement.

Expense Advances and Loans

Next, there is the issue of whether Lawyer violated any ethical duties by advancing Client's litigation costs and lending her \$1000 in living expenses.

Under both the ABA Code and Rules and California law, a lawyer may advance an indigent client's litigation expenses, provided that the lawyer may later recover them as part of his contingency fee. In this case, therefore, Lawyer did not violate any ethical duties simply by advancing client's litigation expenses.

However, as stated above, the contingency fee agreement must include how all expenses will be paid, and whether they will be paid, and whether they will be paid before or after the lawyer's percent is taken. Here, Lawyer and Client orally agreed on the advance, and it is not clear when it was to be repaid - before or after Lawyer's fee was deducted. Failure

to reduce this agreement to writing with precise terms therefore constitutes a violation of Lawyer's ethical duties.

The ABA Code and Rules prevent lawyers from making loans to their clients in excess of litigation expenses. However, California permits lawyers to make such loans, so long as the payment is actually a loan that must be repaid and not an outright gift. Additionally, the lawyer and client must enter into a written loan agreement, signed by both parties.

Here, Lawyer's loan of \$1000 for living expenses would be banned under the ABA Code and Model Rules. Although California law is more permissive with respect to loans, Lawyer's actions would also constitute a violation of California's rules of professional responsibility, as he did not ensure that the loan agreement was reduced to writing and signed by Client. Furthermore, as with the litigation expenses, it is not clear whether Lawyer's loan will be repaid before or after his 1/3 of the recovery is calculated.

Lawyer's Assurance to Physician - Duty of Communication

Lawyers owe a duty of communication to their clients, according to which they must relate information about a case's progression and status to the client on a periodic basis so the client can make informed decisions regarding the case.

Here, Lawyer made a side agreement with Physician by sending Physician a letter stating that he would receive full payment from the recovery in the case. Lawyer did so without Client's knowledge or consent. Because this is an important matter that ultimately affects the amount Client will receive to compensate her for her injuries, she should have been informed of this agreement. Therefore, Lawyer violated his duty of communication by failing to disclose the contents of the letter to client first.

And again, because the agreement with Physician addressed the payment of expenses out of client's recovery, it should have been included in the terms of the contingency fee agreement.

Duty of Due Care/Competence

An attorney also owes a duty of competence, which means he must act with the care, skill, preparation and diligence of a reasonable practitioner under the circumstances.

Here, the facts state that the case would not settle for the amount Lawyer initially forecast due to Defen[d]ant Driver's strong case. If Lawyer was negligent, or failed to adequately investigate the case before arriving at his initial estimate, and if that error harmed his initial negotiating position, he may be found to have violated the duty of competence as well.

Duty of Loyalty

A lawyer owes a client a duty of loyalty, according to which the lawyer must act solely to further the client's best interests. He may not sacrifice the client's interests to his own or to those of a 3rd party.

In this case, the facts suggest that Lawyer pressured Client into accepting the settlement offer, even though she was reluctant to do so at first. Indeed, Client had already incurred \$10,000 worth of expenses, and the offer was only for \$15,000. Lawyer appears to have convinced her to accept by taking her out to dinner, engaging in sexual relations with her, and renegotiating their oral contingency fee agreement.

The facts also suggest that Lawyer's interests in so doing were not solely to ensure Client received the largest possible award, but also to ensure that he too would recover his expenses.

Under these facts, therefore, it appears Lawyer has violated his duty of loyalty to client by using undue influence to ensure that he is able to recover his contingency fee, regardless of how much is left over for Client.

Consensual Sexual Relations

The ABA Code and Model Rules expressly forbid lawyers from engaging in consensual sex with their clients. California, by contrast, allows such relations where the Lawyer and Client are involved in a preexisting sexual relationship and where the nature of their personal relationship will not affect the Lawyer's care, judgment, skill, etc.

Here, Client and Lawyer engaged in consensual sex after drinking two bottles of wine with dinner. This would be grounds for an ethical violation under the ABA Model Rules and Code.

Under California law, the answer is slightly less clear. There is no indication that Client and Lawyer had a previous relationship. Furthermore, as discussed above, the circumstances indicate that Lawyer was using sex as a means to exert undue influence over client's decision to accept the settlement offer. The presence of wine certainly doesn't help Lawyer's case.

Therefore, Lawyer will likely be found to have violated California's rules as well by engaging in consensual sex with client.

Substantive Decisions

Clients have a right to make substantive decisions about their cases, while lawyers typically choose the legal strategy to be employed.

Here, Client had a right to decide whether or not to accept the settlement offer, as this was

a decision affecting her substantive rights. Lawyer's exertion of undue influence over this decision therefore violated her right[.]

General Duty of Good Faith

Finally, Lawyer will likely be found to have violated his general duty of good faith by failing to pay Physician after expressly agreeing to do so earlier, albeit without Client's knowledge or consent.

Answer B to Question 5

The question asks what ethical violations the lawyer in this fact pattern may have committed. There are five events which might have given rise to ethical violations by the Lawyer (L): 1) The agreement to advance legal and living expenses; 2) The letter to the Physician (P); 3) Sexual relations between L and Client (C); 4) The settlement offer agreement decision by C; and 5) Failure to pay P.

1. Agreement to advance expenses

The issue is whether the lawyer committed any ethical violations regarding the advances from L to C. Under ABA rules, a lawyer may advance litigation expenses to clients unable to afford such expenses, but he may not advance living expenses for fear that a lawyer is buying a client. Under CA rules a lawyer may advance both legal and living expenses, but the lawyer must get any loans to a client in written form with the client's knowing consent that such funds are loans that must be paid back. Further, the advancement of legal expenses in both CA and ABA must be contained in the writing of any contingent fee agreement.

Here, the lawyer advanced living expenses[,] which is strictly forbidden under the ABA, so he could be subject to discipline. Also, the expense arrangement was oral[,] not in writing, so in CA, the lawyer has also violated the ethical code re: loans to clients.

In addition, in any contingency fee agreement, it must be explained in the writing whether the lawyer's percentage is pre- or post- expenses. On these facts, it is unclear whether L put such arrangement in the writing. L should be subject to discipline[.]

2. Letter to Physician (P)

The next issue is whether L committed any ethical violations re: his letter to P that P's fee would be paid out of the accident recovery. L potentially violated his duty of loyalty to C, his duty to communicate to C, overstepped the proper scope of his representation of C, and his duty of confidentiality to C.

Duty of Loyalty

A lawyer owes his client a high duty of loyalty - the lawyer must act in accordance with the client's best interest. Here, L assured P that P would be paid out of the recovery of [the] case without informing C of such agreement. This action possibly created a conflicting duty on L because L had sent a letter to P which P may have relied upon and considered a contract or surety created by L. Since L's duty of loyalty to P extends beyond the representation, L created a potential conflict in that he may have been personally liable if C did not pay P and hence he would have an incentive to ensure payment even if C had a good faith reason not to pay P. This potential conflict could have been overcome if

contin[gen]cing in the representation would have been reasonable (likely on these facts since there is no indication that C was not going to pay when the letter was sent) AND if L had gotten C's informed consent under ABA and written informed consent under CA.

Duty to Communicate

A lawyer also has a duty to keep a client informed about his representation, particularly of important points regarding the representation.

Here, the agreement with P was of great interest to C since the amount that P would receive was possibly a very substantial amount of any recovery that C could have expected. C was entitled to know from L that L had ensured the P that he would be fully compensated for treatment out of C's potential award.

Overstepping Scope of Representation

In general, clients are permitted to make any decisions regarding the ends of the litigation, while lawyers make decisions regarding the means of the litigation, such as legal strategy. Here, a decision regarding the use of any recovery funds are not clearly about legal strategy or means of representation, so the action of commit[t]ing C to payment of P is not clearly within the scope of L's duties. Although a lawyer is assumed the power to make an action on client's behalf necessary to the representation, this may be outside the proper bounds. At the very least, L should have gotten C's informed consent to enter into this agreement on C's behalf.

Duty of Confidentiality

A lawyer also has a duty to keep confidential any information related to the representation without client consent. The lawyer has the imputed authority to disclose any information reasonably necessary to the representation. Hence, although it is not clear whether he gave any confidential info related to representation to P, if he did give such information it would have been a breach of confidentiality to the extent it was not reasonably necessary to the representation of C.

3. Sexual Relations between L and C

The issue here is whether the consensual sexual relations between L and C violated any duties. Under the ABA standard lawyers are not permitted to engage in sexual relations with clients, consensual or otherwise, as presumptively creating a conflict between the lawyer and the client. In CA, consensual relations between lawyers and clients are discouraged, but permitted as long as no duress or illegality is involved. Here, sexual relations are stated to be "consensual", and so permitted under CA law, but still impermissible and a violation under the ABA.

4. Settlement Offer Agreement

The issue here is whether the L committed any violations in convincing C to enter into a settlement agreement with driver. The issues here are whether L acted improperly in convincing client and in counseling C not to pay P.

A client has the ultimate decision in whether or not to accept any settlement agreement as part of the ends of representation discussed above. However, it is appropriate for a L to persuade a client to accept a settlement as in her best interests as long as L is acting according to his duty of loyalty. The duty requires that L act in good faith with the client and make sure that the client's decision is informed and reasonable by apprising the client of her rights and what a settlement means regarding those rights.

Here, it is not clear whether the L is acting in the best interest of the client because of the guarantee that he made to P and because of his own interest in recovering expenses and his fee. However, if the L made a good faith evaluation about the merits and worth of the lawsuit, L may have satisfied his good faith determination.

There is a possibility, however, that the L did not obtain intelligent, knowing consent from C because L and C had been drinking. Any settlement decision should have been made when C was not impaired in judgment.

Counseling C to not pay P

In counseling C to not pay P, lawyer may have violated his duty of loyalty to client and his duty of loyalty to client and his duty of fair dealings and honesty to the public and to P.

Under duty of loyalty, a lawyer should not counsel acts that may subject a client [to] liability without a good faith belief that such decision is in client's best interest. Here, it seems as if L is more interested in getting expenses and fees than protecting C. L is liable for breaching his duty of loyalty to C.

In addition a lawyer has a duty of fair dealings and honesty to the public and specifically to P. A lawyer may not counsel criminal or fraudulent acts by their clients. Here, L has counseled C to break a contract with P, violating his duty to the public.

Finally, L has violated a duty of fair dealing to P since he has both counseled fraud and disbursed funds to C over which he knew P had a legitimate claim to and that C was preparing to violate. In addition L may be a surety for C's actions. L may be held liable for breaching his duty of fair dealing and fiduciary responsibility over settlement funds to P.

