Question 1

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of $5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a "paralegal" at a wage of $250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale's involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale $1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

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

Answer according to California and ABA authorities.

Answer A to Question 1

In interactions with clients, an attorney owes a client four overarching duties: the duty of confidentiality, the duty of loyalty, the duty of maintaining financial integrity, and the duty of competence. In the practice of law, a lawyer also owes a duty of decorum to the profession. Attorney Alex's (A) actions in this matter raise issues under the duties of confidentiality, loyalty, financial integrity, and competence, as well as some question as to the duty of decorum to the profession. With these general principles in mind, each action will be analyzed individually.

Duty of Loyalty: Representation of Multiple Clients

An attorney owes a duty of loyalty to his or her client, to exercise his or her time and professional judgment and efforts solely for the benefit of that client, without any interference from outside loyalties of interests. This duty does not equate to an absolute prohibition or the representation of multiple clients, particularly in such matters as a business transaction; however, a lawyer generally must not accept the representation of more than one client if he believes their interests to be materially adverse or that any loyalties or interest might prevent the fair and competent representation of either or both clients. The ABA rules require that a reasonable attorney in [a] like situation would also believe in his ability to represent both clients without material adverse effect. California does not have this reasonable attorney standard.

Initially there do not appear to be direct conflicts in a matter regarding the construction of a partnership, so A's initial agreement to undertake the representation of both clients might be reasonable. However, one of the clients is a friend of A's from college, [a] potential source of loyalty that would potentially hinder the representation of Clare, should the interests ever diverge. Moreover, Booker, as a friend, sought out A as a new attorney for this representation, which might engender feelings of indebtedness to A that might hinder his representation of Clare. If Alex feels that he can competently represent both clients and there are no present conflicts, there is no violation under California law. However, under the ABA standard a reasonable attorney might not accept representation of multiple clients with the potential that he would feel more loyal to one than the other due to pre-existing friendship. Thus, there may be a violation under the ABA reasonable attorney standard.

In addition to only taking on the representation if the attorney deems he can properly represent both clients, the attorney has a duty to disclose the potential conflicts, including the potential that he will have to withdraw from the representation if a conflict arises. After this, the attorney must obtain the client's informed consent to the joint representation. California requires this consent to be in writing.

Here, it is unclear as to whether A discussed the potential of conflicts under this duty. The facts state only that the meeting was "brief" and that A agreed to represent both clients for a fee of $5,000. There is no mention of informing the clients or obtaining their consent. There is, further, no mention of a written consent. Thus, A has likely breached

both ABA and California rules regarding the representation of both clients by not informing them of potential conflicts and obtaining their consent. A should have made the potential conflict much more clear and obtained clear consent from both, in writing, to satisfy both standards.

Duty of Confidentiality: Representation of Multiple Clients

The ABA requires a lawyer not divulge any information obtained from the client in the course of the representation intended to be kept confidential. California has no on-point rule for confidentiality, aside from the lawyer's oath to 'maintain inviolate client confidences'.

Though not apparent from these facts, the representation of multiple clients may raise issues regarding the duty of confidentiality to each, because a conflict my only arise when one client discloses something to the lawyer. When the lawyer cannot make a due disclosure to the other client regarding the conflict without violating the duty of confidentiality, the lawyer must withdraw.

Duty of Competence

A lawyer owes a duty of competence to a client to exercise the amount of research and inquiry as well as to possess sufficient knowledge and skill regarding the matter to render competent services. If an attorney is not familiar with the subject matter of representation, he may still represent the client if he can do sufficient research to familiarize himself with the subject area and such research will not result in undue expense to the client or delay in the matter. An attorney may also elect to associate or solicit advice from an attorney with experience in the area.

Within this duty of competence is a duty of diligence to zealously pursue the matter to completion.

The facts state that A is a recently-licensed attorney and has no experience with forming partnerships—the subject mater of the representation. The facts also state that A spent only a total of two hours on the partnership matter, which included reading other partnership documents and his initial and final meetings with Booker and Clare. Given his status as a new attorney and his lack of experience with this subject area, it would appear A neither possessed the requisite knowledge and skill necessary to competently represent the clients in this matter, nor did he do sufficient research or training to make himself competent in the area.

A would likely argue that he remedied this shortcoming by hiring Dale as a "paralegal", who had decades of experience in the practice of law, including partnership formation. Had Dale been a duly licensed attorney, this may have been proper. However, because (as will be discussed below) only an attorney may engage in activities that call for the judgment, training, and skill of an attorney, hiring a paralegal with a good deal of knowledge may ameliorate this shortcoming to some degree, but it is unlikely that it totally accounted for it. This is primarily because the only way Dale could provide

sufficient help to remedy the violation of the duty of competence would be by violating the rule against the unauthorized practice of law.

Thus, it is likely that A also breached his duty of competence in the matter by accepting representation in an area he was not familiar with, not doing sufficient research, and not associating with a more experienced attorney who could function as an attorney. A should have either declined the representation, or undertaken steps to make himself competent in the matter, if possible, without undue delay or expense.

Financial Integrity: $5,000 fee

Under ABA rules, an attorney's fee for work must be reasonable in light of the skill, experience, time, degree of specialty, and difficulty required for the task. California merely requires that fees not be "unconscionable".

A $5,000 fee for setting up a partnership does not appear reasonable in light of the time, degree of specialty, skill, and difficulty of the task. The facts state that A himself spent only 2 hours on the partnership matter, including the initial meeting and a final meeting in which documents were signed. After paying Dale $1,000 for his work, this leaves a charging effectively a fee of $2,000 per hour. Given A's status as a new attorney and that lack of difficulty or specialty required in setting up a simple partnership agreement between a publisher and writer, the fee arrangement would appear to violate both the ABA standard of reasonableness and the California standard of unconscionability.

Additionally, California requires fee agreements to be in writing unless the situation constitutes an emergency, the client is a regular client, the client is a corporate client, or the fee is under $1,000. Here, there does not appear to be any emergency or exigency warranting an exception to the writing requirement. Though Booker and A were friends prior, A is a new attorney and there is no prior attorney-client relationship between the two. Thus, Booker would not qualify as a "regular" client. Booker is obviously not a corporate client and the fees are for $5,000.

Thus, A has violated the California rule regarding client agreements being in writing.

Financial Integrity: Fee Splitting

Whether or not A has also violated his duty of financial integrity to his clients depends in some part on whether or not Dale qualifies as an attorney or not, which will be discussed below.

Fee Splitting With Attorneys

If Dale qualifies as an attorney, under the ABA standard, A may split fees so long as the fee-splitting is proportional to the work done on the mater and the client consents. Here, A did notify both Booker and Clare about 'hiring' Dale, though it is not clear he notified them as to the $250 per hour salary. If he did notify them, there may not be a violation under ABA rules. However, if he did not, he may have violated the ABA rule, given he ultimately paid Dale $1,000 for his services. Dale may have also violated the proportionality rule, given that in this case, Dale should have received the bulk of the

fee, rather than simply $1,000 worth, given A's minimal work on the matter and Dale's four hours meeting with the clients and preparing the documents.

Under California law, an attorney may split fees with another if the split is reasonable. Here, there is likely nothing unreasonable about the arrangement, except that A took too much of the fee.

Fee Splitting With Non-Attorneys

The facts state that Dale is currently disbarred. This would make him a non-attorney and lawyers are prohibited from sharing fees with non-attorneys. However, attorneys may share fees with such personnel as paralegals and legal secretaries so long as the lawyer is ultimately responsible for the work done by the personnel. This latter issue raises the primary issue with the hiring and use of Dale's services: the duty not to assist in the unauthorized practice of law.

Duty Not to Assist in the Unauthorized Practice of Law

A lawyer has a duty not to assist in the unauthorized practice of law. The practice of law is defined as anything that would call for the judgment, reasoning, or skill of an attorney. Here A has hired Dale, a disbarred attorney, as a "paralegal". An attorney may hire a currently-disbarred attorney to do work [as] a paralegal or legal secretary, but, like with the work of a paralegal or legal secretary, the individual must not engage in activities that call for the special skills of an attorney and the licensed attorney, A, must be ultimately responsible for the work.

The fact state that A hired Dale, who spent four hours preparing the partnership documents and meeting with Booker and Clare about them. A paralegal may meet with clients to obtain information, but must not engage in explanations that require the judgment of a lawyer in so doing, such as explaining legal options or ramifications. A non-lawyer may similarly prepare documents to some degree, but generally not much more than in the capacity of a scrivener. Here it would appear that Dale functioned as an attorney for Booker and Clare in both meeting with them and preparing the partnership documents.

A's reasons for hiring Dale as a paralegal—for his experience in years of practice—would also be more germane to functioning as an attorney. Also, the fee of $250 an hour seems more akin to that of an attorney's fee than the fee charged for a paralegal in a simple matter by a new solo practitioner.

Moreover, A must ultimately be responsible for the work done by the non-attorney and, in this case, the facts do not make any mention of his review of the final version of Dale's preparation of the documents, only that he was present at the final meeting in which the documents were signed.

Thus, A breached his duty to the profession and the client not to assist in the unauthorized practice of law.

Answer B to Question 1

What Ethical Violations Has Alex Committed?

Duty of Loyalty

A lawyer owes his client the duty of loyalty. This duty requires a lawyer to work in the best interests of the client, and not for the lawyer's personal interest or for the interest of any third party.

Potential Conflict of Interest

When a lawyer is presented with a potential conflict of interest, the ABA Model Rules and California's ethical provisions differ slightly in terms of what a lawyer must do in order to undertake the representation. Under the Model Rules, a lawyer may undertake the representation of a client if the lawyer has a reasonable belief that there is no significant risk that a conflict of interest will materially limit the representation, and the client gives informed consent. CA rules do not have a "reasonable lawyer" standard, but rather state that a lawyer can undertake the representation if the client gives written consent.

In this case, Alex was contacted by Booker, who was a friend during college, to form a partnership between Booker and Clare. There are potential conflicts of interest present in this representation, because Alex agreed to represent Booker and Clare jointly. Because Alex may be tempted by his friendship with Booker to work to the disadvantage of Clare, he should have informed Clare of his prior relationship with Booker. Moreover, he should also have made clear whether he represents only Booker and Clare, or if he is also representing the partnership itself.

There are no facts, other than his prior friendship with Booker, to indicate that he would work to the disadvantage of Clare. Under the ABA rules, a reasonable lawyer under the circumstances would likely believe that he could undertake the joint representation of Booker and Clare without a material limitation. Thus, if Alex informed Clare of his prior relationship with Booker, she could likely still consent to the representation. Similarly, in California the decision to undertake representation was proper if Clare consented to the representation.

Duty of Competence

A lawyer owes his client a duty of competence, which means that the lawyer must exercise the ordinary skill, diligence, and zeal in representing his client that an ordinary lawyer would under the circumstances.

As part of the duty of competence, a lawyer must be knowledgeable regarding the subject matter of the representation. However, in both CA and under the ABA rules, a lawyer need not be an expert in all maters to undertake the representation. A lawyer without prior experience in a field of practice may still take a case so long as the lawyer

either 1) does the work to become educated and competent without any extra expense to the client or 2) associate with competent counsel, who can help assist the lawyer.

Here, Alex had no experience forming partnerships. Thus, Alex either had to do the work necessary to educate himself regarding the law of partnerships, or he could also associate with another counsel who had such knowledge. In this case, Alex did not educate himself, but rather hired Dales as a "paralegal". Dale had decades of experience in law practice, including the formation of partnerships. Thus, Dale was a person with the requisite knowledge and skill to form the partnership between Booker and Clare.

However, Dale was a recently-disbarred attorney. Thus, Dale was not a licensed counsel and Alex could not associate with him without violating another ethical duty – the duty not to engage in the unauthorized practice of law, discussed below. A reasonable lawyer under the circumstances would not have associated with a disbarred attorney in order to satisfy his duty of competence.

Alex may argue that he eventually became informed by reading the partnership documents in order to learn about partnerships. However, Alex spent a total of two hours on the case, including the initial meeting with Booker and Clare and a final meeting to have Booker and Clare sign the documents. While there are no facts to indicate the precise number of minutes Alex spent learning about partnerships, it is clear for someone with no prior experience handling the formation of partnerships, Alex's cursory review of the documents prepared by Dale could not have satisfied his duty of competence. Thus, Alex violated his ethical duty by failing to become informed regarding the subject matter of the representation.

<u>Fee Agreement</u>

Under the Model Rules, all fees must be "reasonable". Except in the cases of a contingency fee, an oral fee arrangement will not violate a lawyer's ethical duty per se. The courts look to several factors in order to determine if a fee arrangement is reasonable, including the lawyer's reputation, knowledge, skill, the fee customarily charged for such work, whether the work involved particularly novel claims, and, in the case of a contingent fee, the amount of recovery by the plaintiff.

In this case, a $5,000 flat fee is likely unreasonable under these circumstances. Alex had no prior experience handling partnership agreements, and thus his per-hour fee should not be too high. Moreover, Alex spent only two hours total in working on this case. A fee of $5,000 – or even $4,000 if Dale was paid out of this fee – for two hours of work. Thus, Alex essentially charged Booker and Clare a fee of $2,500 or $2,000 per hour to form the partnership. Formation of a partnership is a relatively simple legal process and does not involve any complex or novel legal argument. Alex also has no prior experience and thus had no reputation for being a particularly efficient partnership lawyer. Thus, on balance, Alex's fee arrangement violated his ethical duties to Booker and Clare.

In California, a fee must not be "unconscionable," which is to say that it must not "shock the conscience." A fee agreement must also be in writing, unless the fee is less than $1,000, the lawyer is representing a corporate client, or there is a long history between the attorney and client. On these facts, none of those exceptions apply. While Alex had a prior friendship with Booker, that is insufficient to constitute a long history of representation such that any fee arrangement would be understood by the client. The facts also state that Alex represents Booker and Clare jointly, rather than the partnership. Thus, the $5,000 fee had to be in writing, and Alex violated his ethical duty with respect to this fee arrangement in California.

Moreover, for the same reasons that make the fee unreasonable under the ABA rules, this fee would also likely be unconscionable in California. To charge a client over $2,000 per hour – especially by a recently-licensed attorney – would very likely "shock the conscience" of the court.

Fee Sharing

Similarly, under both California and the Model Rules, a lawyer cannot share any part of his fee with a non-lawyer. This is considered a duty to both uphold the dignity of the profession, and a duty to protect the public. The facts are unclear whether Alex paid Dale out of pocket, or whether Dale's $1,000 payment came out of the fee paid to Alex. If in fact, Alex planned to pay Dale his fee by deducting it out of the $5,000 paid to Alex, then Alex breached his ethical duty. Even if, however, Alex paid Dale out of pocket, this still violated his ethical duty because he did not inform his clients as to how costs would be handled in this mater. Rather, Alex simply charged a flat fee without any further disclosures.

Under the Model Rules, a lawyer may also not pay a "referral" fee to any other lawyer. That is to say that a lawyer may not only be paid a portion of a fee when the lawyer has actually done some portion of work on the case. It should be noted that in California, unlike the Model Rules, a referral fee is not a per se violation of ethical rules, so long as the arrangement is disclosed to the client and no extra amount is charged to the client.

Thus, Alex may attempt to argue that Dale's payment was a valid referral fee under California law. However, as noted above, Dale was a recently-disbarred attorney. Thus, he is considered a non-lawyer and, as such, cannot share in any part of the fee arrangement.

Unauthorized Practice of Law

Part of the lawyer's duty to uphold the dignity of the profession, and also his ethical duty to protect the public, prohibit a lawyer from assisting in the unauthorized practice of law. Such practice is defined as a non-lawyer doing something which requires exercising the judgment ordinarily required by a lawyer.

In this case, Dale – a non-lawyer by virtue of his being disbarred – prepared partnership documents at the request of Alex. There are no facts to indicate what Dale actually did in the four hours he worked on the case. However, while the filing of a partnership

document with the state would not likely require the judgment of a lawyer, the actual drafting of the documents would very likely constitute the practice of law. Dale would have had to make arrangements between Clare and Booker regarding the sharing of profits and losses, how they would be compensated in the event of a dissolution and winding up, whether either of them would enjoy limited liability, and various other important considerations. Such work would require the skill and exercise of judgment required by a lawyer. Thus, Dale was engaging in the unauthorized practice of law.

Alex, therefore, will have violated his ethical duty if he failed to supervise Dale in his work. A lawyer may delegate certain tasks to an employee, such as a law clerk or paralegal, but must always supervise such work. Here, Dale spent four hours on his own. Alex did not supervise Dale's work at all. Rather, Alex simply delegated the work to someone whom he knew was a disbarred attorney. Moreover, Dale had no paralegal training or certification. Thus, Alex could hardly argue that he delegated this work to a paralegal.

As such, Alex violated several ethical duties. First, he violated his duty of competence, because he failed to represent Booker and Clare with the ordinary skill a reasonable lawyer would have under such circumstances. Second, he violated his duty to uphold the dignity of the profession, because he permitted a non-lawyer to engage in the unauthorized practice of law and share in the fee. Third, he violated his duty of loyalty, because he delegated work [to] a recently-disbarred attorney, and thus put his clients' partnership in the hands of someone who had already been deemed by that state bar to be unfit to practice law. Finally, he violated his duty to the public, because he permitted someone automatically deemed incompetent (even though Dale clearly had the requisite skill) by virtue of the disbarment to continue in the unauthorized practice of law.

Duty of Confidentiality

A lawyer owes his clients a strict duty of confidentiality. Model Rule 1.6 prohibits the disclosure of any information "relating to the representation." California does not have any direct rule on point, but the Cal Business Code states that a lawyer must "protect inviolate" the confidences of his client.

Here, Alex disclosed to the State Bar that he had hired Dale to work on the partnership. This information would be confidential – and thus could not be disclosed – under both the Model Rules and in California. However, there are certain exceptions to the ethical duty of confidentiality. One such exception permits disclosure of certain information in order to obtain an advisory opinion from the state Ethics Board. Thus, if Alex was revealing this information to the Bar for the purposes of obtaining advice regarding his ethical duties, then such revelation was proper.

Therefore, on these facts, Alex likely did not violate his duty of confidentiality because he was probably attempting to obtain some sort of advice regarding how he should proceed regarding hiring Dale.

It should be noted that the related issue of Attorney-Client privilege is inapplicable here. The Attorney-Client privilege protects compelled disclosure of confidential communications between attorney and client made for the purpose of obtaining legal advice. If Alex had been called to testify regarding what he told Booker and Clare regarding the formation of the partnership, such information could not be revealed without waiver of the privilege by Booker and Clare.