

## Question 2

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.
2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

## **Answer A to Question 2**

### **1. A's Ethical Violations**

As an attorney, under both ABA and CA authorities, A has a blanket duty of fairness to the tribunal and opposing counsel and a duty to maintain the dignity of the profession.

#### Extrajudicial Statements

A lawyer has a duty to not make any extrajudicial statements which he knows or should know will be disseminated by means of public communication which have any likelihood of prejudicing the proceedings. The exceptions to this duty revolve around permitting extrajudicial statements that do not contain a substantial likelihood of prejudice. The exceptions include making statements regarding any information contained in public documents, the results of any hearing, routine booking information, scheduling of public hearings, or in the case of prosecutors, requesting the public to come forward with any information or evidence of the crime or to aid in apprehension, and to possibly warn the public of any reasonable danger presented by a criminal on the loose. Additionally, a lawyer may make an extrajudicial statement when it is reasonably necessary to rebut a violative statement made by opposing counsel.

#### Public Dissemination

Here, A held a press conference in which he stated that his client was unquestionably innocent and that P was only pursuing the case because he wanted to make a name for himself by prosecuting a well-known movie actor as part of his bid for District Attorney. First of all, A had to know that his statements would be disseminated by means [of] public communications. In fact, not only did he know his statements would be disseminated, he specifically intended that they be. That is why he called the press conference. He did so to get his message out to as many people as he could.

#### Likelihood of Prejudice

Moreover, these statements present a strong likelihood of prejudice to opposing counsel. By making such statements, it creates disdain in the public eye with regard to P's conduct. It makes the public believe that he is only acting for the personal gain of

becoming an elected official as opposed to acting in their best interest to get criminals off the streets. A jury is going to be more likely to side against P in any later trial because they believe he is only prosecuting D because of the personal motive. Moreover, by stating that “any intelligent jury” will find D innocent, A was representing to the public as fact something which may not be so. By using his position in society and the words “any intelligent jury,” it is likely that if a potential juror hears this statement he will be more likely to find in favor of D out of fear that he otherwise may be labeled as unintelligent.

### Conclusion

None of the normal exceptions apply here. Moreover, since A held this press conference preemptively instead of in response to other extrajudicial violations, A is most likely to be subject to discipline under both the ABA and CA rules of professional conduct.

### Dignity of Profession

A lawyer has a general duty to always uphold the dignity of the profession and to do nothing which would bring disdain to it in the public eye. Here, A has likely violated this duty by asserting that P is acting for an improper purpose without any actual knowledge of its truth. When a lawyer represents publicly, without justification, that another lawyer is dishonest or otherwise untrustworthy, it leads the public to believe that all lawyers are dishonest and untrustworthy. This detracts from the dignity of the profession and all lawyers must strive to avoid it wherever possible.

### Improper Influence of Jury

A lawyer has a duty to not seek any improper influence over any jurors. Here, as stated above, A’s statement basically amounted to a claim that only unintelligent people could convict his client. He thus is seeking to gain influence over potential jurors in any future hearings by these statements. However, he may not be subject to discipline on this basis alone because it is unclear whether a jury has been sworn or not. If a jury has not been sworn, then there are not really any jurors, in the literal sense, which could be improperly influenced. He would only be tainting the potential juror pool, but there is no

guarantee that a future juror would have heard this statement or, depending on how long before the trial, there's no guarantee that they will have remembered it. Moreover, there is likely to be actual cause to strike from the venire any person who has been influenced by the statement. Therefore, A is probably not subject to discipline merely because of this aspect of the statement unless a jury has already been sworn.

## **2. P's Ethical Violations**

### Fairness to Opposing Counsel

Though all lawyers must be zealous advocates of their positions, there remains a duty of fairness to opposing counsel which may trump zealousness in certain situations.

### Allow Access to Evidence

A lawyer has a duty to not alter, destroy, or obstruct access to evidence or to counsel, aid, or encourage any other person to do so. Here, upon receiving a copy of the police report describing D's conduct, P asked the police officer to destroy the record and replace it with one that included more details of D's alleged criminal behavior. Although it may have been proper for P to ask the officer to include more details in a supplemental report, by instructing him to destroy the original report, P has obstructed A's access to such evidence. It is highly unfair to opposing counsel to destroy a substantial piece of evidence just because it does not clearly favor your position. Here, A had a right to see that report in its unaltered state and then to point out any discrepancies contained therein at trial.

### Instructing Witnesses to Remain Silent

Related to the duty to allow access to evidence, a lawyer has a duty to not instruct or encourage a witness to remain silent about relevant knowledge unless that witness is the employee/agent of the lawyer's client and the lawyer reasonably believes that the witness' refusal to testify will not cause the witness any harm. Here, P interviewed D's housekeeper who witnessed the alleged criminal battery. The housekeeper, H, [said] D

did not knock down V as V had alleged. Thereafter, P told H to avoid contact with the opposing counsel, A. H clearly has relevant knowledge about the incident. He was a percipient witness of it and could accurately testify about what he saw. However, because H's perceptions were harmful to P's case, P instructed him to remain silent and not offer up his story to opposing counsel. This is most likely a violation of the rules of professional conduct because the exception does not apply. Though P may reasonably believe that H's interests will not be harmed by refusing to relate his story, P's client is the State and thus H is not an employee/agent thereof.

#### No Falsification of Evidence

Along with the duty of access to evidence comes the duty to not falsify evidence or put on false testimony and not counsel, aid or encourage anybody to falsify evidence or testimony. It is unclear exactly what occurred when P instructed the officer to destroy the report and draft a new one with more details. P could have legitimately felt the original report was vague and wanted the officer to include additional accurate details to avoid the vagueness. However, there is a legitimate possibility that P was impliedly asking the officer to exaggerate the details to make P's case more compelling. If this is the case, P is certainly subject to discipline as it was a direct encouragement to falsify evidence.

#### Special Duties of Prosecutors

Under both the ABA Model Rules and the CA Rules of Professional Conduct, because of the prosecutor's role as defender of the public, he is held to special heightened duties in a few areas. After all, his duty is to protect the public, but a criminal defendant is a member of the public as well and is owed at least some duty of fairness by the prosecutor.

#### Exculpatory Evidence

A prosecutor has an absolute duty to divulge any and all possible exculpatory evidence to the defense in sufficient time to allow proper preparation for the trial. Here, P

instructed the officer to destroy the original report. Exculpatory evidence is any evidence which weighs in favor of acquitting a criminal defendant. The facts indicate that the report was vague as to the details surrounding the alleged battery. Thus, it is not certain that the report was exculpatory in the sense that it stated that D was not responsible for the crime. However, that is not the standard by which exculpation is judged. The evidence must only have a tendency of favoring the criminal defendant. And if this report was so vague that P felt it necessary to destroy it, surely there was substantial probative value for D's case. A could have used this report to, at the very least, point out an inadequate investigation and discredit the police officer who arrested D.

Moreover, P interviewed H, who basically said D is innocent. This is direct exculpatory evidence. And even though it is not in P's possession because H is a live witness, he has a duty to disclose its existence to A.

Thus, by failing to inform A of H's existence and by instructing the officer to destroy evidence, P is likely to have violated his special duty to inform opposing counsel of any exculpatory evidence.

#### Absence of Probable Cause

The other special duty of prosecutors is to not proceed with a case in the absence of probable cause. Probable cause is facts sufficient to lead a man of ordinary caution to believe that a crime was committed and the defendant was the one who committed it. Here, P has filed a criminal complaint alleging battery by D against V. However, P has been unable to obtain V's version of the events because he has been overseas and he will not be back by the preliminary hearing. Moreover, the only witness P has spoken to, H, said that D is innocent. Thus, it appears that the only evidence of criminal conduct that P had was the vague police report which he requested the officer to destroy and embellish. This seems to be an absence of probable cause. If the only incriminating facts regarding the incident were those contained in the vague police report, it would not lead a reasonable person to believe that an offense was committed

by the defendant. P should not have filed suit and proceeded to the preliminary hearing without at least hearing V's testimony regarding the matter. P should have waited until V returned before filing suit. By failing to wait, P has violated his duty to not proceed with criminal cases in the absence of probable cause.

## Answer B to Question 2

### 1. Alex's Ethical Violations

#### Duty of Fairness to Opposing Parties – Press Conference

A lawyer owes the opposing party a duty of fairness, which includes not making public, extrajudicial statements that have a substantial likelihood of materially prejudicing the case.

Alex held a press conference and told the press that “Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney.” Because Alex’s statement was made to the press at a press conference, he knew that this extrajudicial statement would be widely publicized. This statement also has a substantial likelihood of materially prejudicing the case because his statement was inflammatory and may influence potential jurors to cause them to make up their mind or at least to have some pre-existing beliefs or bias regarding the case.

The one exception to this rule against extrajudicial statements is that a lawyer may make a public extrajudicial statement if necessary to protect his client from the undue influence of recent adverse publicity that was not self-initiated.

Alex might argue that he only made this statement to the press because he was trying to defend his client from what he believed was Paul’s desire to publicize the arrest of a high-profile defendant as part of an election bid for District Attorney. However, Paul has not yet made any public statements regarding the case against Dusty, and, therefore, there is no recent publicity to defend Dusty against. Hence, this exception does not apply, and Alex has violated his duty of fairness to the opposing party.



## 2. Paul's Ethical Violations

As a prosecutor, Paul has many additional ethical duties that are particular to prosecutors, in addition to all of the professional responsibilities that all lawyers are subject to.

### Duty of Fairness to Opposing Parties – Destroying Original Police Report

A lawyer owes the opposing party a duty of fairness, which includes the duty not to tamper with, alter, or destroy evidence.

Paul asked a police officer to destroy the existing police report describing Dusty's alleged criminal behavior. The original police report was a piece of relevant, material evidence for the case against Dusty. By asking the police officer to destroy the original police report, Paul violated his duty of fairness to Dusty.

### Duty of Candor to the Court – Creating New Police Report

A lawyer also has a duty of candor to the court, which requires not making a false statement of material fact and not presenting false evidence.

Paul asked the police officer to draft a new report that included more details of Dusty's alleged criminal behavior. If Paul's request to include more details of Dusty's alleged criminal behavior required the police officer to make up details that he did not in fact remember, this would entail the creation of false evidence, in violation of Paul's ethical duties. Furthermore, even if the new police report only contained truthful information that the police officer remembered from the incident, if the police report is offered by Paul as the original, rather than disclosing that it was a second version created at his request, then Paul would be making a false statement of material fact and knowingly presenting false evidence, in violation of his duty of candor to the court and his duty of fairness to the opposing party.

### Exculpatory Evidence

A prosecutor has a duty to disclose exculpatory or mitigating evidence to the defendant.

Paul did not disclose the original police report to Alex and Dusty. The original police report described Dusty's behavior in a vague manner, such that Paul was concerned about the police report in making his case. Therefore, this police report could be viewed as potentially exculpatory or mitigating evidence, and Paul, as prosecutor, had a duty to disclose it to the defense. His failure to do so violated his ethical duties as prosecutor.

Paul also did not disclose his interview with Henry, Dusty's housekeeper. Henry had witnessed the incident, and he told Paul that Dusty did not knock Vic down. Because this is exculpatory evidence, Paul had a duty to disclose the interview to Alex and Dusty. Paul might argue that since Henry was Dusty's housekeeper, Dusty is probably already aware of his version of events. Nonetheless, Paul has the duty to disclose all exculpatory or mitigating evidence to the defense, even if he suspects that the defenses might be aware of it. His failure to do so violated his ethical duties as prosecutor.

### Duty of Fairness to Opposing Parties and Third Parties – Telling Henry to Avoid Alex

A lawyer has the duty not to tell a third party not to voluntarily speak with the opposing party, unless: (1) the third party is a relative/employee/agent of the lawyer's client, and (2) not voluntarily speaking will not be adverse to the third party's interests.

Paul told Henry to avoid contact with Alex, Dusty's lawyer. Because Henry is a third party, Paul may not ask him to refrain from voluntarily speaking to Alex. (The exceptions do not apply because Henry is not a relative/employee/agent of the state, whom Paul represents, and failing to speak to Alex may actually be adverse to Henry's interests because he is Dusty's housekeeper and may lose his job as a result.) Paul might argue that since Henry is Dusty's housekeeper, he probably has already spoken to Dusty himself. Nonetheless, Paul may not ask a third party to refrain from speaking with the opposing party's counsel, and by asking Henry to avoid Dusty's lawyer, Paul violated his duty of fairness, both to Dusty and to Henry.

### Probable Cause

A prosecutor has the duty to only prosecute when there is probable cause.

During Paul's investigation of the case against Dusty, he found a police report where Dusty's behavior was only vaguely described, and he spoke to Dusty's housekeeper, who witnessed the incident and said that Dusty did not knock Vic down. Dusty claims that Vic simply tripped, and Paul has not been able to obtain Vic's version of events because Vic has been on an extended trip abroad. Based on these facts, Paul does not have probable cause to prosecute the case against Dusty. Paul might argue that the police report does not entirely clear Dusty's name because it is only vague, not exculpatory, and that Dusty's housekeeper was likely an interested, biased party who had reason to lie. However, Paul does not have sufficient evidence affirmatively establishing probable cause for finding Dusty guilty. Even though Paul subjectively felt confident that Dusty was nevertheless guilty, probable cause is an objective standard, and this standard has not been met on the facts. Therefore, Paul's decision to proceed with the preliminary hearing anyway, without having spoken to Vic or obtained other evidence of Dusty's guilt, violated his ethical duty to prosecute only when there is probable cause.