

Question 2

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

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

Answer A to Question 2

Anne's Ethical Violations

Duty of Loyalty

An attorney must not represent a client when there is a concurrent conflict of interest. A concurrent conflict occurs when the interests of one client are directly adverse to those of another or the representation of one client will be materially limited because of the interests of the attorney, a third party, another client or a former client. An attorney can nevertheless take on representation if she reasonably believes that she can competently and diligently represent the interests of all effected clients, discloses the conflict and gets informed written consent from the clients. The CA rules do not apply the "reasonably believes standard" and require written disclosure in situations where the conflict involves a former client.

Potential Conflict

Here, Anne is the longtime tax attorney of Owner (O). She agrees to represent O, Fred (F) and Hap (H) is a case where they are each being required by the County to clean up a hazardous substance spill. Anne has agreed to represent them as her joint clients against County. The County has made it clear that if each party does not pay his share, County will impose joint and several liability one each of them. This means that County can recover the full amount of the costs from either of them. Here, O is wealthier than F and H. We are not aware how wealthy F and H are. Due to County's decision to pursue joint and several liability in case each person does not pay, there is a potential conflict of interest. If either of the parties turns out to be insolvent or does not pay his share, the others are exposed to liability for the full amount, which likely will be a lot. Also, each party has been notified of his culpability. It might be that the parties each have an argument for why they are not at fault and for why another party is more at fault. For example, F is the former owner of the site and may want to argue that he does not have any responsibility for the spill. H produces the hazardous material that is dumped on the site. Thus, H might argue that he is not responsible for the release because O as the owner of the site has responsibility to prevent a release.

Thus, Anne must have realized that there was a potential conflict of interest between the parties and [it] must [be] determined whether she reasonably believed she could effectively represent O, F and H as her joint clients. Here, Anne might reasonably believe that she can do so because their interests are all aligned against County. However, because of each party's different involvement and responsibility for the spill, as well as the County's decision to pursue its claims under the theory of joint and several liability in case one party does not pay, Anne should have realized that she could not make arguments on behalf of each client without taking a position adverse to the others. However, if she reasonably believed that the conflict was consentable, she should have disclosed the conflict [to] the parties, preferably in writing, and received their informed written consent to proceed. Anne must have been careful not to disclose any confidential information about O and his finances since Anne had such information as O's tax attorney. If she could fully disclose the conflict without revealing O's confidential information, and the clients each gave their informed, written consent, then Anne could have proceeded to represent all three of them. However, the conflict would be unconsentable if Anne did not believe she could effectively represent them all. For the reasons discussed above, Anne might have believed that this conflict was not consentable and thus could not have advised the clients to consent.

Also, there is a potential conflict stemming from the fact that O is Anne's former client. [Anne] must not take on representation of a client in a matter that is the same as or substantially related to a matter in which she represented a former client if the former client's confidential information might be relevant. Furthermore, Anne cannot use any confidential information against O in this matter without O's consent. Since O has arranged for Anne to represent O, H and F, O has consented to the representation. However, Anne must be careful not to reveal any confidential information about O without O's consent during the course of her representation.

The fact that O is Anne's current client creates a conflict. Anne may feel a greater sense of loyalty to O to protect his interests because O is already her client and she likely wants to keep O as her client in her tax practice. Thus, Anne might not be able to effectively and fairly represent the interests of F and H. She must also disclose this conflict to F and H and only proceed if it is reasonable to do so and F and H provide

their informed consent. Given that this lawsuit is not related to Anne's tax practice, Anne might reasonably believe that she can fairly represent the clients' interests as joint clients, especially because they are all defending against County. However, given her loyalty to O, perhaps this conflict is also not consentable. It would be useful to know just how long O has been Anne's client. In any case, if the additional facts make it such that a reasonable attorney would not advise F and H to consent to Anne representing all three clients, the consent of F and H will not be effective.

Actual Conflict

An actual conflict can develop in the course of representation. If it does, Anne must revisit the process discussed above, disclose the conflict and only proceed if she has written, informed consent from the parties to proceed. If Anne proceeded with the representation despite the conflicts discussed above, she must be aware of any actual conflicts that might arise. For example, if any of the three parties decides to argue in his own defense that culpability lies with another one of the parties, Anne must realize that continuing with representation is no longer reasonable. At that point, she must disclose the conflict (subject to any limitations due to her duty of confidentiality) and advise the clients to seek independent counsel. Depending on how much confidential information she has at that point, she may be able to continue representing one of them. In this case, that party would likely be O because she already has confidential information about O due [to] previously representing O for tax purposes. However, if she learns confidential information from the parties and an actual conflict arises, she may have to withdraw completely and advise each of them to seek independent counsel in this matter.

Duty of Competence

A lawyer has a duty to competently represent her clients. She must use the skill, knowledge, thoroughness and preparation reasonably necessary for effective representation. Here, we are told that Anne is a longtime tax attorney. The case she is hired to work on involves a major release of hazardous substances from a waste disposal site and cleanup required by County. As a longtime tax attorney, she likely does not have much experience in this particular area of the law. The case relates to matters outside of the scope of a tax attorney's area of practice. However, Anne may

take on representation if she can become competent in the areas of the case by researching and preparing herself in the pertinent field. If she can do so without causing any harm to the clients or causing an undue delay, she may represent them in the matter. Also, she can associate with another attorney who has more experience in the specific area. If Anne takes these measures to prepare herself or associate with another competent attorney, she will not have violated this duty. However, if she proceeds to represent the clients in this matter without becoming competent in this particular area, she will have breached her duty of competence.

Duty of Confidentiality

Under the ABA, an attorney has a duty not to disclose confidential information related to the representation of that client. It does not matter from whom or how the information was acquired. In CA, this duty of confidentiality is recognized in the attorney's oath. There are exceptions for disclosing confidential information: 1) express consent, 2) implied consent, 3) disclosure ordered by court, 4) disclosure to prevent a crime or fraud likely to result in substantial financial loss when the attorney's services have been used to commit the crime or fraud, and 5) disclosure if the attorney reasonably believes it's necessary to prevent certain death or substantial bodily injury. CA does not recognize the exception for crimes and fraud and limits the disclosure to prevent death or bodily injury to situations where the act to be prevented is a crime.

During the course of representation, Anne must take care not to disclose the confidential information from one client to another without their consent, unless one of the other exceptions discussed above applies. Also, if Anne discovers an actual conflict of interest during the course of representation, she must take care to protect such confidences when making any disclosures related to resolving the conflict of interests. If Anne does not properly protect the confidential information from her clients, she will have breached this duty.

Attorney-client privilege

This privilege is an exclusionary rule of evidence. The plaintiff can refuse to testify and prevent his attorney from testifying as to confidential communications between them and their agents during the course of representation. The communications must have

been intended by the client to have been confidential and must have been made for the purpose of legal services. Under the ABA, this privilege lasts even after the client dies. Under the CA rules, the privilege ends when the client's estate is finalized after his death. There are exceptions to this privilege; the attorney may testify 1) to prevent a future crime or fraud when the client has used the attorney's services to commit the crime or fraud, 2) when there is litigation related to a breach of duties between the client and attorney and 3) when joint clients are later involved in civil litigation. CA also allows disclosure to prevent a crime that is likely to result in death or substantial bodily injury. The client holds this privilege and may waive it.

Under this privilege, Anne may not testify as to confidential communications between herself and the three clients unless the clients waive it. If the crime/fraud exception applies or the CA exception for death or bodily injury applies, then Anne can testify as to the confidential communications. Also, if the joint clients are later involved in civil litigation against one another, the clients will not be able to assert this privilege. Anne should make it clear to O, H and F that she may have to testify against them if they are later involved as adversaries in a civil case.

Fiduciary Duties of Attorney

Under the ABA, fees must be reasonable under the CA rules, fees must not be unconscionable. Thus, Anne must make sure that her fees meet these standards based on the amount of time and skill she will use and the level of difficulty in the case. Also, under CA rules, a fee arrangement must be in writing if it is for over \$1000 unless the client waives the right to get a writing, there is an emergency, the attorney is performing routine services for an existing client, or the client is a corporation. Thus, the fee arrangement must be in writing to meet the CA requirements if it is for more than \$1000 and the clients do not waive their right to a writing.

Receiving Payment from One Person for Representing Another

An attorney may receive payment from one person to represent another so long as 1) the client being represented is aware of this arrangement and provides written, informed consent, 2) the attorney's judgment and the effectiveness of representation will not be affected because of the interests of the person paying for the services, and 3) the

client's confidential information is protected. Here, O is the wealthiest of O, H and F. O offers to pay the attorney's fees for all three of them. Thus, F and H must be made aware of the arrangement. Also, Anne must ensure that her representation of H and F is not affected by the fact that O is paying for her fees. Because O is also a client in the case, the fact that he is paying the fees might interfere with Anne's judgment. Anne might feel a greater sense of loyalty and duty to O not only because O is her current client but also because O is paying for her fees. Thus, she might choose to pursue O's interests at the expense of the others. Thus, Anne may violate her duties of loyalty to F and H if she lets the fact that O is paying her fees influence her judgment. Also, as discussed above, Anne must protect the confidential information of all three clients. If she fails to, she will have violated this ethical duty.

Anne should have disclosed this conflict when she disclosed potential conflicts to all three clients and obtained their informed, written consent. F and H must have been made aware of this situation before agreeing to be represented by Anne and accepting O's offer for O to pay the attorney's fees. If Anne failed to inform the clients when they agreed to the joint representation, Anne has violated her duty to loyalty.

Duty to Communicate – Settlement

Anne also has a duty to communicate to her clients all material developments in the case and to keep them informed. Thus, Anne must communicate material information to all three clients and not rely on one of them to communicate it to the others. If she does [not] she will be found to have violated this duty.

The client has the power to decide whether to settle. Here, if there is a settlement offer by the County or any resolution that affects all three clients, Anne must communicate it to each of them individually, make sure that they understand it and only proceed with their consent. Anne cannot rely on the consent of only one client to proceed. Furthermore, she must clearly explain the terms of any settlement to each client and how it affects each of them.

Answer B to Question 2

Duty of Competence

A lawyer has a duty to the clients to provide competent representation. Competence is defined as the skill, thoroughness, and preparation reasonably needed to provide adequate representation in a case. Whether an attorney is competent is dependent on the complexity of the case, the availability of other lawyers in the region to take the case, the circumstances the case was brought to the attorney, the ability of the attorney to research and become acquainted with the case without undue expense to the clients, and the ability of the attorney to consult with local counsel. Here, Anne may have violated this duty. The nature of this case is a complex environmental case arising under state and federal law, CERCLA liability. However, the facts state that Anne's area of expertise is tax. Environmental law requires significant technical training and experience and knowledge of the federal statutes and state statutes. There is no evidence Anne has practiced in this area in the past. Further, there is no evidence that other attorneys in the region are not competent to practice in this area of law. Further, there is no evidence to establish that Anne has attempted to consult with a local expert on environmental law in order to provide competent representation to the clients. Finally, no evidence establishes that Anne has done any research to become familiar with this area of the law. Therefore, under the circumstances she has probably violated her duty of competence by taking a case in an area of the law in which she is extremely unfamiliar.

Conflicts of Interest

Both the ABA and California Model Rules limit an attorney's representation of clients with conflicting interests. Under the ABA rules, an attorney may not represent a client if representation would be directly adverse to a client or there is a significant risk his representation of one client would be materially impaired by his duty to himself or another client, unless the attorney reasonably believes he can provide competent and diligent representation, does not involve a claim by one client against another in the same case, and is not prohibited by law. Under the ABA rules, an attorney only needs to get informed consent in a situation where an actual conflict exists. Anne may argue

that under the ABA rules no informed consent was necessary here because all the parties had the interest in avoiding liability from the county and therefore all of the interests were aligned at the time. Further, she will argue that this offense is a strict liability offense so none of the parties can absolve liability by placing the blame on another party.

However, it may be argued that the parties did have conflicting positions. As parties who were to be jointly and severally liable and had the right of contribution under the act, all parties wanted to shift the blame to the other party and recover from the prior landowners. Generally, environmental statutes allow the nonactive party to seek contribution from the active party; here Hap is the active party. Therefore because each side is trying to place the blame on the other party, it is likely that there is a current conflict of interest. If there is a current conflict of interest, the attorney must reasonably believe she can provide diligent and competent representation to all clients and must give full informed consent, confirmed in writing. The ABA suggests that an attorney notify the clients on the risks of the duty of loyalty, confidentiality, and the lack of privilege if a suit were to arise between the clients. There are two problems here. First it would be tough to argue that Anne reasonably believed she can provide competent and diligent representation to all clients. Given that all the clients are attempting to push liability on each other and will want to recover contribution from each other in the case, it is likely that a reasonable attorney would not believe that they would be able to provide competent and diligent representation. This is not simply a case where the parties are trying to avoid liability, but it also involves relative contribution if the county is to recover from one client. Further, given her continuing business with Owen, it would be tough for her to argue she could provide equal representation to F and H.

Under the ABA, it will also be unconscionable to receive this consent if Anne's duty of confidentiality to Owen prevents her from making a full disclosure of the potential conflicts of interest to the parties. There is no evidence that her duty to Owen will prevent her from fully disclosing the risks and circumstances of joint rep to the other clients because she represented Owen on a totally unrelated matter and the details of that matter are not necessary for full informed consent of the clients.

Further, Anne failed to get the informed consent of any of the clients confirmed in writing. She only distributed retainer agreements but did get the informed consent of any of the clients in a case of actual conflict between the clients. Therefore she has violated her duty for concurrent conflicts of interest under the ABA rules.

She also violated this duty under the California rules. California has similar requirements but extends the conflicts to potential conflicts as well as actual conflicts, requires disclosure of the risks of the conflicts, and the attorney only needs to believe in good faith that she can provide competent representation, not the reasonable attorney standard adopted under the ABA rules. Anne may be able to argue that she honestly believed that she could provide competent and diligent representation to all the clients and may be able to prevail here, which she would not under the ABA rules, which require an attorney's reasonable belief. However, under the CA rules, Anne failed to give full disclosure to the clients of the risks provided by joint representation and failed to get their written consent to these conflicts. Therefore Anne violated the ethical rules relating to joint representation under CA law also.

Therefore, Anne should withdraw from representing all three because she has received confidential information from H and F.

Fee Payor Interests

Anne violated her duties under both the California and ABA authorities by having Owen pay the fees for all three defendants. Under the ABA rules, an attorney may not have a party pay all of the fees for a group of clients unless the attorney reasonably believes it will not interfere with her professional judgment, confidential communications will not be shared with the party, and the nonpaying clients give informed consent. California has similar requirements but also requires that the informed consent be in writing. Here, Anne may run into a few problems. First, it may be argued that by having one of the joint clients paying the interest of all three clients in a joint liability context may interfere with her professional judgment. However, in offering to pay the fees Owen did not require that Anne exercise her judgment in a certain way or proceed in a certain way under the case. Therefore, the payment probably did not interfere with her professional judgment. Next, the payment probably did not interfere with the duty of confidentiality

to the other clients because the fee payor, Owen, did not request that confidential information be given to the other clients. Under the ABA rules, H and F need to give informed consent. There is no evidence of this. Although they both knew that Owen was paying, Anne never disclosed to them the risks of the fee payor interest. For that reason, informed consent was never given. In addition, under California law, informed consent must be given by F and H in writing. Since informed consent, even orally, was never given, Anne violated her duties under the ABA and California authorities.

Duty of Confidentiality

As a past attorney for Owen, Anne has a duty to Owen not to reveal information learned in the course of her past representations of Owen without the consent of Owen, where consent is implicitly given, or where another exception exists. Here, there is no evidence that Anne has revealed any information learned in the course of her past representations of Owen on tax matters. Further, it is unlikely she even came across this information. Therefore a violation of her duty of confidentiality has [not] been violated in this instance, unless she revealed this information. There is no evidence here that she had revealed any of this information but she needs to be sure she does not reveal any of this without the informed consent of Owen.

Further, Anne has a duty of confidentiality to all current clients, Owen, F, and H. In representation she may not reveal information learned in the representation of the other clients unless the clients give informed consent confirmed in writing or an exception exists. Before revealing any information and before jointly representing the clients, Anne should have the clients waive their right for the information to be kept confidential. If this is not done either before rep or during rep, she will probably be forced to withdraw because her duty of loyalty to the other clients requires her to do so.

Duty to Keep Reasonably Informed

Anne [as an] attorney has a duty to keep all clients reasonably informed as to the status of their litigation. Here, this may conflict with Anne's duty of confidentiality to the other clients. If Anne learns of a matter central to her representation of the group, her duty of loyalty to a certain client may conflict with the duty to keep the other clients reasonably informed. As stated above, Anne should inform the clients ahead of time of this duty

and require them to waive their duty of confidentiality so she can fulfill her duty to keep all clients reasonably informed. If a client refuses to waive the duty of confidentiality, she should withdraw from representing all clients.

Duty Not to Use Information of past Clients to Disadvantage

Similar to the duty of confidentiality, an attorney may not use any information to the disadvantage of past clients unless the information is public or the client has given informed consent confirmed in writing. Here, Anne should be sure not to use any information learned in the representation of Owen to the disadvantage of Owen, even if the information is not itself revealed. This is particularly tough situation for Anne if she does come across a situation where some information used in the past representations may be used to the disadvantage of Owen; she will need to be sure not to reveal this information or get Owen's informed consent.

Fee Agreement

The ABA rules do not require a noncontingent fee arrangement to be in writing, although they highly suggest doing so. Further, the ABA rules require the attorney to notify the client within a reasonable time of representation of the fee arrangement.

The California rules that all fee arrangements, including noncontingent fee arrangements, be in writing, unless the services are for less than \$1,000, it is a corporate client, the client has received the services in the past, or it is otherwise impracticable to do so. Here, none of the exceptions are met, unless Anne plans on charging less than 1k. Further, the payor, Owen, is an individual, not a corporation. She should give a written disclosure of this arrangement.

Duty of Loyalty

Anne has a duty of loyalty to all clients, which includes the duty to put the interests of your client before all others. In a joint rep situation this is tough to do, but it is required that all clients get treated fairly. Here, Owen is a past client of Anne and Anne hopes for future representation of Owen on his tax matters. Therefore, it will be tough for her to treat all clients equally. She should withdraw from rep for this reason.