

Question 1

Patty was hit by a car, whose driver did not notice her because he was texting. Joe, a journalist, wrote a story about Patty's "texting" accident. Patty contacted Tom, a real estate attorney, and asked him to represent her in a claim against the driver. Tom agreed, and entered into a valid and proper contingency fee agreement. Tom later told Patty that he had referred her case to Alan, an experienced personal injury attorney, and she did not object. Unknown to Patty, Alan agreed to give one-third of his contingency fee to Tom.

Thereafter, Alan sent a \$200 gift certificate to Joe with a note stating: "In your future coverage of the 'texting' case, you might mention that I represent Patty."

Patty met with Alan and told him that Walter, a homeless man, had seen the driver texting just before the accident. Alan then met with Walter, who was living in a homeless shelter, and said to him: "Look, if you will testify truthfully about what you saw, I'll put you up in a hotel until you can get back on your feet."

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

Answer according to both California and ABA authorities.

SELECTED ANSWER A

(1) What ethical violations, if any, has Tom (T) committed?

Lawyer/Client relationship

A lawyer owes duties to his client as soon as the relationship is formed. The relationship is formed even if the client never retains the lawyer but approaches him regarding legal representation.

Here, the relationship between P and T began as soon as she contacted him and asked him to represent her in a claim against the driver who hit her. Even though P never retained or ultimately 'hired' T, he owes her duties as his client from this point forward.

Duty of Competence

Under ABA and CA, a lawyer (L) owes his client the duty of competence, which requires using the requisite skill, preparation, thoroughness, and knowledge to adequately represent his client's interests. If an L is not competent in an area of law, he must become competent without undue expense or delay upon the client; otherwise, he should associate with an L who is competent in that area.

Here, T is a real estate attorney who was contacted by P regarding an injury she suffered after a car hit her. P's cause of action is a tort, likely negligence or battery, which is entirely unrelated to real estate. T should not have taken the case if he had no knowledge in this area of law. In fact, T 'later' told P that he referred the case to Alan. This is not 'associating' with an attorney to help with an area of law, nor is it becoming up to speed on the requisite area of law.

T has breached his duty of competence to P because he was not able to represent her interests in a tort claim and did not adequately respond by not taking the case or by the steps noted above.

Referring P's Case to Alan

Duty of Confidentiality

ABA: A lawyer has the duty to maintain all confidential communications acquired in the course of representation. In CA, there is no delineated duty of communication; however, the Attorney's Oath requires lawyers to maintain the client's secrets and confidences.

Here, T has contacted another attorney regarding information he has obtained from P in the course of representation – specifically that she was hit by a car and needs a lawyer, as well as her personal information. T has breached his duty of confidentiality by revealing this information to Alan.

Exceptions to duty of confidentiality – consent

If a client consents, a lawyer may reveal her confidences.

Here, T told P only afterwards that he was referring her case to Alan, an experienced personal injury attorney. While she 'did not object' she certainly did not consent to the disclosure in the first place because she was entirely unaware of it. Second, a non-response will not be considered affirmative consent to disclose. T will not be able to use P's failure to object as evidence of consent.

Duty of Communication

A lawyer has the duty to communicate with his client regarding all stages of representation, to return phone calls and inquiries promptly, and to communicate the ultimate strategy decisions to the client for her decision.

Here, T failed to communicate to P that he did not have the requisite experience to represent her and that he had referred her case to Alan. This is an important juncture for communication that T owed to P; he should have let her know he was unable to take the case but would be able to refer her to someone else.

Referrals & Referral Fees

Under the ABA and CA, a lawyer may refer a client to another lawyer with the informed consent of the client and as long as the referral agreement is 'non-exclusive.' Under the ABA, referral fees are prohibited; under CA, they are permitted as long as the client gives informed consent and the total fees are not increased due to the referral agreement.

Here, T has referred P to A but failed to tell P about the referral, breaching his duty to obtain her consent. Further, it appears T has obtained a referral fee for this referral paid by 1/3 of the contingency fees in this case (see below) which is absolutely prohibited under the ABA. In CA, fees are permitted if the total fees to P did not increase; however, without P's consent this was an improper referral. Further, if A and T have an 'exclusive agreement' to refer to each other, the referral agreement also breaches their duties.

Fee splitting among lawyers

Fee splitting is prohibited by both the ABA and CA with non-lawyers. However, under the ABA, a lawyer may split fees with another lawyer if (i) it is in proportion to the services rendered or both L's are jointly and severally liable, (ii) the total fee is reasonable, (iii) the client gives informed consent, and (iv) the total fee is not increased. In CA, an L may split fees with a non-lawyer if (i) the total fee is not unconscionable, and (ii) the client gives written consent.

Here, T has entered into a fee sharing agreement with A to give 1/3 of a contingency fee to T. Under the ABA, this is not going to be 'in proportion' to the services rendered by T because it is likely he will not be engaging in the litigation that is outside of his practice area. However, if T remains jointly and severally liable, he may rebut this requirement. However, there was no consent given by P per this fee splitting arrangement so the agreement violates the rules under the ABA regarding splitting. The total 'fee' will be determined reasonable because it is not 'increased' as a contingency fee.

This arrangement under the ABA is a violation of fee splitting because it was not consented to in writing by P and it is not in proportion to the efforts to be made by T.

In CA, lawyers may split fees in the fashion A and T did as long as the total fee is not unconscionable and there is written disclosure to P. While the total fee will be determined as a percentage of the contingency, it is clear that P did not consent to this arrangement because "unknown to P" A agreed to give 1/3 of the fee to T. T has breached the fee splitting rules under CA as well.

Contingency Fees

Contingency fees are fees to be paid as a percentage of a successful judgment. Under the ABA and in CA, contingency fee agreements must be (i) in writing, (ii) signed by the client, (iii) describing the duties of the lawyer and client, (iv) the percentage of fees to be taken for the lawyer, and (v) whether these fees are before or after legal fees have been paid. CA additionally requires the L to note that the fees are negotiable and to indicate how legal fees not covered by the contingency will be paid.

Here, T has entered into a contingency fee agreement with A, the subsequent attorney, not P, the client. P has not signed any agreements, no agreement in writing has been made, there is no description of duties and a percentage has not been indicated. This is a violation of a lawyer's duties regarding fees.

(2) What ethical violations, if any, has Alan (A) committed?

Attorney-Client Relationship

See above.

Here, A has obtained P's information from T regarding representing her in his capacity as a personal injury attorney. Therefore, because this is related to legal representation, A owes P duties as his client.

A and T's fee arrangement

Unknown to P, A agreed to give T 1/3 of the contingency fee to T, violating many of the same rules as T under this agreement.

Referral fees

See above.

A breached his duty related to referral fees under the ABA in relation to giving part of the contingency to T which is likely a 'fee' and under CA because this was without the consent of P.

Fee splitting

See above.

For the same reasons noted above, the fee splitting arrangement between A and T is prohibited by both CA and ABA.

Fees Generally

Under the ABA, fees must be reasonable and agreed upon by the client (consented to) in writing. In CA, the fees must be 'not unconscionable' and agreed upon (consented to) by the client in writing.

Here, it is unclear whether the contingency fee that A will be taking for this case is either reasonable or 'not unconscionable' under the ABA and CA respectively; however, because the fee was likely determined in advance of A ever meeting with P, A breached his duty to P regarding fees because they were not consented to by P.

Contingency Fees

See above.

For the reasons noted above, A also breached his duty regarding contingency fees to P for failure to get them in writing, with the required terms under both ABA and CA.

\$200 gift from A to Joe

Duty of Fairness

A lawyer owes the duty to the legal profession to maintain the public confidence, dignity, and efficiency of the legal system and the profession. Additionally, even those actions by an attorney that are not specifically prohibited by the ABA or CA professional conduct rules, or the law, may still be prohibited if they reflect poorly on the profession.

Here, A sent money to a journalist asking him to write in his newspaper coverage of the 'texting case' that A represents P. While it is generally public information as soon as a case is filed who is being represented by whom, this is an improper action by A to have a news organization write something in his favor so he gets public notoriety or even advertisement for his services. This reflects poorly on the profession because not only did A ask to be mentioned, he seems to have 'bribed' the journalist by sending a \$200 gift certificate. This is an unethical move that will be looked down upon as not maintaining the public confidence in the profession.

Advertisements

Solicitation

Out-of-court statements regarding a case

A lawyer may not make public statements that are substantially likely to materially prejudice the case. He may comment on those topics that are generally public knowledge (who the parties are, what the cause of action is) and he may conduct 'damage control' if his client has been prejudiced.

Here, A is looking to have information publically noted about his case in Joe's news organization. He has requested only the fact that he represents P to be printed; therefore, this will not be considered an improper public statement if published because it is public knowledge and does not risk prejudicing the case.

A's meeting with Walter (W)

Meeting with unrepresented persons

A lawyer, if meeting with a person who is not represented by an attorney, must not make any indications that he represents that person's interests or is impartial.

Here, A met with W after finding out he is a potential witness in the P's personal injury case. Upon meeting him, he must indicate that he does not represent W and is not impartial in the case, but rather represents the best interests of his client. It is not clear whether A clearly indicated his position, but by offering W a hotel until he gets back on his feet, W may feel his interests are being represented by A, in which case A has breached his duty to express partiality.

Duty of Fairness

See above.

A lawyer has the duty to refrain from altering or obstructing access to legally discoverable evidence.

Here, A has contacted a witness with personal knowledge of the accident and indicated he would put him up in a hotel. This may make W harder to find for the opposing party and unfairly influence his testimony, in effect, altering the evidence. A's actions also reflect poorly on the legal profession because it is not an honest or ethical action to pay homeless individuals to testify by baiting them with a hotel room until they are back on their feet – something that A may not ultimately do for W and creating a significant risk of biased testimony.

Improperly influencing a witness

A lawyer may not pay a witness for their testimony. If it is an expert witness, the expert witness's expenses for travel and time away from work may be paid for.

Here, A has effectively 'paid' a witness in this case by offering to pay W's hotel until he 'gets on his feet.' W is living in a homeless shelter, so moving to a hotel is a very serious and significant 'bribe' for W to do as A wants and W will be regarded as being paid to testify for P because he is receiving a direct benefit for his testimony. This is a violation of A's duty of fairness to opposing counsel and the legal profession by improperly influencing a witness and paying a non-expert witness to testify.

Perjury

ABA and CA: In a civil case, a lawyer must not call a witness whom he knows will perjure himself. An L may not encourage perjury as this violates both his ethical duty and the law.

Here, it is not clear that W will 'perjure' himself, as A has indicated that he wants him to "testify truthfully." However, A has made it seem that if W gives him the testimony that A desires, he will have a hotel until he gets back on his feet – a very big incentive for the witness to do as A desires. By A calling W as a witness whom he has in effect bribed, even with the caveat he told him to testify truthfully, A may be regarded as having suborned perjury should W state anything that is untruthful but bodes well for P and A.

SELECTED ANSWER B

TOM'S ETHICAL VIOLATIONS (Real Estate Attorney)

Agreement to Represent Patty

An attorney owes a duty of competence to his clients. An attorney should not agree to represent a client where the subject matter of the case is outside his area of knowledge, unless he can learn the relevant law without undue delay or expense to his client, or he can affiliate himself with an attorney who is experienced in that area of law. Here, Tom is a real estate attorney and he agrees to represent Patty in a personal injury suit. The suit is based on a personal injury claim because Patty was hit by a car whose driver was texting and thus did not notice her. Tom's experience in the area of real estate law does not relate at all to the area of personal injury. Thus, Tom must decline to take the case, learn about the relevant law, or affiliate himself with a knowledgeable personal injury attorney.

Here, Tom will argue that he referred the case to Alan, who is an experienced personal injury attorney, and thus did not violate the duty of competence. However, Tom did not merely affiliate himself with Alan and work with Alan on the case; rather, he referred the entire case to Alan, after entering into a valid representation agreement with Patty. Tom will argue that this may be deemed appropriate because Tom has no experience in the area of personal injury and thus is not competent to represent Patty in a personal injury suit. However, it would have been more appropriate for Tom to decline to take the case in the first place because, as a real estate attorney, he has no experience in personal injury law.

Tom acted appropriately in referring the case to a personal injury attorney, and thus did not violate the duty of competence; however, it would have been more appropriate for him to decline to take a case in the first place where the case necessarily requires knowledge of an area of law in which Tom has no experience.

Referral of Case to Alan for a fee

Under the ABA, an attorney may not refer a case to another attorney for a fee. Under California law, an attorney may refer a client to another attorney for a fee as long as the client is informed. Here, Tom referred Patty to Alan and accepted one-third of the contingency fee as a possible referral fee. Here, Tom did refer Patty's case to Alan, in breach of ABA rules. He also breached California rules because he failed to tell Patty that he made a referral to Alan until after the fact, and did not tell her at the time of the referral. Thus, he violated rules regarding referral of a client for a fee under both ABA and California.

Failure to Communicate to Patty that the case was referred to Alan

An attorney has a duty to communicate with his clients regarding the representation. Here, Tom referred the case to Alan without consulting with Patty first. Because Tom had agreed to represent Patty and had entered into a contingency fee agreement with her, and thus Patty was expecting Tom to be her attorney, Tom should have consulted with Patty and obtained her permission before referring the case to Alan. Because Tom failed to communicate with Patty when he failed to acquire her permission to transfer the case to Alan, Tom violated his duty to communicate with his client.

Contingency Fee Arrangement

A valid contingency fee agreement must be in writing, signed by the client, include the lawyer's percentage, the expenses to be deducted, and whether the lawyer's percentage will be paid prior to or after the expenses are deducted from the award. In California, the agreement must also include a statement as to how services not provided for under the contingency fee agreement will be provided, and that the lawyer's percentage is negotiable. As it appears that a valid and proper contingency agreement was entered into, no ethical violations arise from this agreement.

ALAN'S ETHICAL VIOLATIONS (Personal Injury Attorney)

Fee Splitting with Tom

An attorney may split fees with other attorneys outside of his firm, subject to certain restrictions. Under the ABA, the total fee must be reasonable; under California law, the fee may not be unconscionably high. Further, the client must be informed about the fee splitting and must consent to it. Finally, the fee must be split proportionately in accordance with the relative amount of work that each attorney performs.

Total Fee

Here, we do not know what the total amount of the fee was, but it appears that the total amount was the same amount agreed to under the original contingency fee agreement. We know this because Alan agreed to give one-third of his contingency fee to Tom, and thus Tom's share comes out of the original amount agreed on. Thus, if the original contingency agreement included a valid fee, then there should be no violation regarding the total fee due to the attorneys.

Informing the client

Here, Patty was not informed of the agreement between Tom and Alan. Because Patty should have been informed about the fee-splitting arrangement between Tom and Alan, the failure to notify her of the agreement constitutes a violation of fee-splitting rules under both the ABA and California law.

Proportionately splitting the fee

Here, Tom appears to be doing none of the work and Alan is doing all of the work in the representation of Patty's case. Under the rules on fee splitting, Tom should thus receive none of the fee and Alan should receive the entire fee. Because Alan has actually promised to give Tom one-third of his contingency fee, where Tom is not performing any of the work, Alan has violated the rules on fee splitting.

Alan has violated the rules on splitting fees with attorneys outside his firm, because he did not inform Patty that he was giving Tom one-third of the contingency fee, and

because the fee is not split in proportion to the amount of work that each attorney is actually performing in the representation.

Gift to Joe and Request that Joe Report Alan's Representation of Patty

An attorney has a duty of candor to the public. An attorney may not attempt to influence the press by granting gifts to journalists. Because a journalist has a duty to report fairly and in a manner that is not unduly affected by outside influences, an attorney's attempt to interfere with a journalist's duty of fair reporting constitutes a violation of the duty of candor. Here, Alan gave Joe a \$200 gift certificate with a note stating that Joe might include the fact that Alan is representing Patty when Joe is covering the case. The gift certificate would appear to be a means of attempting to influence the journalist's coverage, in that Joe might feel compelled to actually include information favorable to Alan when reporting the case. The gift certificate might be seen as a gift, but it might also be seen as payment. Alan will argue that he is simply requesting that Joe include truthful information in his coverage, such as the fact of Alan's representation, and that the information does not influence the case in any way. However, because Alan made a gift and is attempting to influence the journalist's coverage of the case, he has violated a duty of candor to the public.

Advertising

Attorney advertising must abide by certain rules. An attorney cannot engage in real-time phone or live contact with prospective clients with whom he has no prior personal or business relationship. Any advertising must be labeled attorney advertising, it cannot make any misrepresentations or be misleading, and it must state the name of at least one attorney responsible for the material. In California, making any guarantees or warranties as to results is considered presumptively improper and constitutes a misrepresentation.

Here, Alan is essentially attempting to purchase advertising from Joe, by "paying" Joe with a gift certificate and asking Joe to essentially include Alan's name in coverage of the texting accident. This appears to constitute advertising, but in a way that makes it

appear that it is not advertising. The news article will be read by the public as impartial news, and will not be labeled advertising, even though Alan “purchased” the coverage regarding his relationship to the case. Alan will argue that the coverage merely states his representation of Patty, and the article does include his name as a responsible party.

However, if the coverage later states that Alan won the case for Patty, that may constitute a misrepresentation under California law, as the outcome may imply to the public that a certain result is guaranteed, even if it is the case that Patty’s success is an anomaly and not indicative of typical results. Thus, depending on how Joe writes the coverage, including the information about Alan could pose an improper misrepresentation or otherwise be misleading to the public in violation of California rules.

Thus, because the coverage of Alan’s representation of Patty in the case could be misleading in the message that it sends to the public, and because there would be no express indication in a news article that Alan is essentially advertising his services, Alan is violating the rules regarding proper attorney advertising by asking Joe to include Alan’s name in Joe’s coverage of the case.

Solicitation

An attorney has a duty not to solicit prospective clients. Solicitation is live or phone contact with potential clients with whom the attorney has no preexisting personal or business relationship. Alan has not violated any solicitation rules because newspaper articles and advertising do not constitute solicitation.

Offering to Put Walter Up in a Hotel

An attorney may pay reasonable expenses for a witness in connection with testimony at trial; however, any payment cannot be made in connection with the witness’ testimony at trial. Here, Alan violated both of these rules.

Reasonable expenses

Reasonable expenses in connection with a witness' testimony could include travel expenses, a place to stay and meals during the time that the witness is required to be present at trial. However, here, Walter lives in a homeless shelter and Alan offered Walter a place to stay "until you can get back on your feet." This implies an indefinite period of time, and not just the time necessary for Walter to testify at trial. Because Alan is offering Walter a place to stay for a period of time that potentially exceeds the time of the trial, Alan has violated the rule that he may not pay expenses other than those that are reasonable in connection with a witness' attendance at trial.

Payment in connection with testimony

An attorney may not make the payment of reasonable expenses contingent on a witness' testimony at trial. Here, Alan stated that if Walter will testify truthfully at trial about what he saw, then Alan would put Walter up in a hotel until he can get back on his feet. It appears that Alan is making his offer to pay for a hotel contingent on Walter's truthful testimony at trial. Alan will argue that he simply wants to assure that Walter will testify truthfully, and that he is fulfilling his duty of candor to the court by ensuring truthful witnesses. However, because Alan conditioned his "payment" of a hotel stay to Walter on the nature of Walter's testimony, he violated an ethical rule, nonetheless.

Alan violated the rules regarding the payment of a witness' expenses in connection with testimony at trial because he offered to pay expenses that exceeded a reasonable limit, because he offered to pay for a hotel for an indefinite period of time, and because he conditioned the payment of expenses on the nature of Walter's testimony.