

QUESTION 3

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for \$100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for \$100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for \$50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return \$10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

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

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Formation of Client Relationship

Formation

A lawyer-client relationship is formed when the client reasonably believes that the relationship has been formed. Here, Clint (C) asked Linda (L) to represent him, and L agreed. At this point, C would reasonably believe that L was his lawyer so a lawyer-client relationship had been formed.

Duty of Competence

A lawyer should not accept representation of a client unless they are competent to perform the duties or can reasonably become competent through preparation. Here, there is no evidence that L has experience doing anything to do with personal injury law. If she did not have personal injury experience, then she either needed to ensure that she could adequately represent C through adequate preparation, or associate with a competent lawyer with C's permission, or decline the representation. Because there is not enough information to determine if L was competent to accept representation, there is no clear violation here.

Conflicts of interest

A lawyer also must ensure that they have no conflicts of interest that would prevent them from providing competent and diligent representation to the client before accepting or continuing representation. This could be due to personal conflicts or current, former, or prospective client conflicts. Here, there is no evidence of conflicts of interest, so there is no violation.

Working with an indigent client

A lawyer may waive fees for an indigent client and may advance reasonable expenses for litigation. If the client is in fact indigent, then the client does not need to pay the lawyer back. If the client is not indigent, then there must be arrangements for the client to repay the lawyer for the advanced costs. Here, it states that C cannot afford to pay L so there is some indication that he may be indigent. Therefore, L could ethically advance only the legal costs and is not obligated to force C to repay her for those if he is in fact indigent. Otherwise, C must repay her.

Contingency Fee Agreement

A lawyer is permitted to work for a contingency fee in most cases. The exceptions are when there is defense of a defendant in a criminal case or when the lawyer is working on a divorce or divorce settlement case and the contingency fee is based on obtaining a divorce or the amount of settlement. Here this is not the case, so L is able to agree to a contingency fee.

Writing Requirement

Under both the ABA and CA rules, all contingency fee agreement must be in writing.

For the ABA, the agreement must be: (1) signed by the client; (2) include the allocation of expenses; and (3) outline the scope of the representation. Under CA, the agreement must: (1) be signed by both the client *and the lawyer* and a copy must be given to the client; (2) include allocation of expenses; and (3) outline the scope of performance.

Here, L did not comply with the ABA or CA requirements. This is a contingency fee arrangement because it is based on a percentage of the outcome of the case. However,

it is not in writing, it is not signed by anyone, and C never got a copy. C and L merely agreed orally to the arrangement. L did state that it would be "less any costs," but this was not an exact definition of what costs C should be expected to pay and what costs L will pay as is required. It also did not dictate when this would be paid, nor did it state the scope of their relationship.

Therefore, L violated her ethical duties through making this oral agreement with C for a contingency agreement.

Fee must be reasonable / not unconscionable

Any time a lawyer represents a client, the fee must be reasonable (ABA) and not unconscionable (CA). Under the ABA, the reasonableness of the fee is determined by the complexity of the case, the preclusion of other employment, the expertise and reputation of the lawyer, the actual outcome achieved, structure of the fee (fixed v. contingent), and community standards for these kinds of cases.

Characteristics of the case

Here, this is a very easy case of a personal injury suit negotiating with an insurance company. L did not have to give up any other employment as she ended up doing no real work on the case. She also was likely not expecting to give up substantial work as this is a one-off personal injury case, so it was unlikely to lead to wide reaching conflicts of interest. While this case may have taken some work, it was not likely to dominate her entire practice and preclude her from taking on other jobs. This kind of case requires some expertise, but not extensive as it seems like it is a standard accident personal injury negligence case and there is also no information on L's reputation in the field.

L's Actual Work, Fee structure, and Community Standards

Her actual outcome was good for C as it was a fast and efficient resolution getting him a large settlement, but that was not actually due to anything that she did, but rather her just accepting a settlement so this does not deserve such a large fee. This is a contingent fee agreement, which does inherently come with more risk for the lawyer. Therefore, in general, it is reasonable for the fee on contingency to end up being higher than a fixed fee as the lawyer takes on more risk when structuring the agreement this way. However, it is not justifiable to have a fee that is grossly disproportionate to the amount of work done. Contingency fees also must still be reasonable on community standards. There is no information about the kind of fee normally charged, but, in general, contingency fees tend to be 20-30% of the settlement, not 50% plus fees. Here, L is getting \$50,000 plus costs for doing no substantive work at all on the case other than accepting an unauthorized agreement for settlement. This fee is grossly disproportionate to the services that she rendered to the client and would imply an outrageous hourly rate of about \$100,000, assuming she even did 30 minutes of work total on the case. Therefore, this fee seems unreasonable.

CA's Unconscionably also looks to the negotiation process

Under CA, most of the above elements are also considered. CA does not expressly look at the community standard for fees, but they do take into account the complexity, time/skill, reputation of lawyer, structure of the fee, and preclusion of other employment when considering the fee. In addition, they add several more requirements to these by looking at the time when the agreement was made. This includes elements such as if the lawyer committed fraud or misrepresentation in making the agreement, the relative

sophistication between lawyer and client and the existence of a preexisting relationship. Here, this fee was also likely unconscionable. L had a duty to memorialize this agreement in writing and get C to sign it, but she did not. Instead, she spoke it orally when C was likely desperate for a lawyer. Therefore, the instance of negotiating this fee was unethical on L's part. Additionally, there is likely a large discrepancy in the sophistication of the parties because C was a potentially indigent client who could not pay. He is seeking a lawyer because of a personal injury suit, not a business relationship, which indicates that he may have no prior experience with the law. Therefore, there is a substantial power imbalance here that makes the negotiation and agreement to the fee unconscionable as well as the rest of the factors described above. Therefore, the fee is unconscionable as well and L violated both her duties under ABA and CA.

C has option to void, and L would get reasonable fee

Because the writing requirement for a contingency fee was not met, C would have the option to void the contingency fee contract. In this instance L would get a reasonable fee, which would be substantially less than \$50,000.

Agreement to settle

Duty to communicate settlement offers

A lawyer has a duty under the ABA to communicate all settlement offers. Under CA, the lawyer in a civil case has a duty to communicate all written settlement offers and all oral significant settlement offers. Here, this is a written settlement offer being made by Acme (A) to settle the claim. This means that under both ABA and CA, L had a duty to

communicate this settlement offer to C. She failed to communicate this offer to him prior to accepting the deal. This was a violation of her ethical obligations under both ABA and CA.

Client's decision to accept settlement offers

The clients and lawyers have different spheres within the representation. The lawyer has control to make decisions regarding the strategy of the case, but the client has complete authority to make all decisions that are substantively related to the rights under the case, such as acceptance of settlement offers, plea deals, or demand for a jury trial. Here, it was only within C's power to accept the settlement offer. L was not permitted to accept the settlement offer without express authority from C. If C had given her express authority to accept any settlement above \$90,000, then L's acceptance would have not been unethical, but here there was no such agreement beforehand. Therefore, L violated her ethical duties by accepting this agreement.

L may argue that C was happy with the settlement and was not harmed by this.

However, a client need not be harmed for an ethical violation to occur. Therefore, L has still violated her ethical duties and should still be punished accordingly.

Duty of Competence

A lawyer has a duty of competence to their client, which means that the lawyer must act with the required knowledge, skill, thoroughness, and preparation of a reasonable lawyer to provide services to the client. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation to a client. The standard of competence for CA is similar, requiring knowledge and skill as well as the appropriate physical and emotional state to serve the

client.

Here, L likely breached her duty of competence to her client. She failed to take any investigation or preparation to uncover if the \$100,000 settlement offer was in fact in the best interest of her client. She took no action to understand similar claims, what her client's claim may be worth if they went to trial, or what the chances of success on the merits would have been. By accepting the settlement offer without making any effort to properly investigate the claim or the potential alternatives that C would have if he did not accept it, L breached her duty of competence.

Duty of Diligence

A lawyer has a duty of diligence to their client, which means that the lawyer must act with the reasonable promptness to provide services, managing their workload to ensure that they can see the matter through to the end. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation to a client. Here, L could have also been said to have violated her duty of diligence by quickly accepting the settlement offer and cutting short the chance to fully explore all the options. However, she did respond quickly and take prompt action, which is also required under the duty of diligence. Therefore, this violation is less clear.

Duty of Loyalty

The lawyer also owes a duty of loyalty to act in the best interest of their client. A lawyer need not press for every possible advantage for the client, but they must reasonably act to serve the best interest of their client and not act in a self-serving manner that undermines the best interest of the client.

Here, L violated her duty of loyalty by accepting the settlement offer without making reasonable investigations into the true value of the claim. L was acting in her own best interest when she did this because she was going to make \$50,000 for doing no work. However, she clearly did not adequately consider the client's best interest as she had completed no substantive work yet on the case. Therefore, it was not possible for her to reasonably know if accepting the settlement offer would be in C's best interest. As a result, it was a violation of the duty of loyalty to accept this settlement (regardless of the issues with lack of client consent) without proper investigation.

Receiving settlement check

Client Trust Account and Commingling Client Funds

When a lawyer receives client funds, they must keep that money in a separate client trust account. A lawyer is strictly prohibited from commingling the client funds with the lawyer's personal assets or firm's assets.

Here, L violated her duty to keep the client funds separate. She took the \$100,000 check that was given to her from A as the settlement and deposited the check into her law firm's business account. This meant that she commingled C's settlement with the rest of the firm's assets. This is strictly prohibited and is a violation of both ABA and CA rules.

Disputed amount

L then sent C the amount that she believed that he was entitled to under their agreement by mailing him a check for \$50,000 less fees. L was right to promptly deliver the client their funds from a settlement. A lawyer has a duty to hold client property and

promptly distribute all client settlements to the client once the settlement is complete. Therefore, this action itself was not a violation.

However, once there became a dispute with the funds L was obligated to continue to hold the rest of the fee, or any disputed amount if not all the amount is disputed, in the client trust account until the matter was resolved. Here, L never had a client trust account which was a violation, as explained above. Now that there is a dispute, it continues to be a violation as L is required to hold all disputed funds in the client trust account. Only funds that she has a clear legal and undisputed right to can be deposited into her own account. Here, she deposited the funds in her own account prematurely and this is a violation.

Settling claims of malpractice

A lawyer under CA rules is strictly prohibited from making agreements to prospectively limit their malpractice liability. Under the ABA, a lawyer is permitted to do this only if the client is represented by independent counsel when they make this release. Here, under both rules, L would have violated as C was not represented by counsel.

Here, L is negotiating after C has threatened her to sue for malpractice. Therefore, this should be analyzed as a settlement offer for malpractice rather than a prospective release.

Written Release and Representation by independent counsel

Here, when negotiating settlements of malpractice liability, the client should be advised and given an opportunity to seek external counsel. This makes the negotiation process substantially more fair and will allow the client the best chance to protect their own

interest. Here, L never told C that he should seek independent counsel, nor did she give him an opportunity to do so.

L and C only negotiated orally on the release after C threatened to sue. L offered to return him \$10,000 of the settlement that she had withheld in exchange for him not suing. While under contract law, this likely would be an enforceable contract. This is also unethical because this was purely an oral conversation in which C had no counsel. Additionally, C did have a reasonable claim and could have voided the entire agreement. This was an option that C was not aware of because he was not advised of his rights. Therefore, L violated her duty of loyalty to C in this situation as well by failing to provide him with an adequate warning and opportunity to seek counsel.

QUESTION 3: SELECTED ANSWER B

Fee Agreements

Under the California rules (CA), a written fee agreement is required if fees will likely exceed \$1,000. It must be signed by the client and attorney, and the client must get a copy. It must explain the basis of the fee. Under the ABA Model Rules (MR), a writing is not always required except for contingency fees. Under both rules, cases on a contingency fee basis always require a writing. In CA and the MR, fees must be reasonable. Under CA rules, they must not be unconscionable.

Even if this were not a contingency fee case, the fact that the agreement was oral, not written, would violate the California rules. Were it not contingent, the lack of a written agreement would be acceptable under the MR, though that is not the case here.

Reasonable Fee

Fees must be reasonable, and this is evaluated on factors including the skill of the attorney, the time the matter will take, the matter's complexity, the amount to which the work will preclude other employment, and the standard fees generally charged in related matters and circumstances. In California, the prohibition on unconscionable fees also looks to the relative sophistication of the parties in negotiation.

50% of a client's recovery in a case is very high for a personal injury contingency fee.

Contingency fees are generally around 30%, so this is significantly higher and could be viewed as unreasonable.

Clint is likely not a sophisticated negotiator regarding personal injury representation.

There's no indication he has prior experience seeking legal services, nor that he works

in a related field. This made him lack knowledge about negotiating the fee and could suggest procedural unconscionability. Clint also said he is unable to pay for a lawyer, so is in a disadvantageous financial position, giving him less power in negotiating a fee. Due to his inability to pay, he may think that he is unable to afford a lawyer at all, and this offer may seem generous to him, or at least, the only offer he is able to get.

The fact that C was surprised at how low his cut of the settlement amount was also indicates that he was not provided with information on how the fees and costs would be allocated--another ethical issue.

Contingency Fee Agreements

Under both the CA and MR, a contingency fee requires a written fee agreement. Under the MR, this requires a writing signed by the client indicating the basis of the fee and the extent to which the client will be responsible for costs at the end of the case. The CA rules are more stringent and require the agreement, again, to be signed by both the client and the attorney. They require noting the basis of calculation of the fee, the extent to which the client is responsible for costs in the outcomes of the case, and a statement that the fee is negotiable, if it is not a medical malpractice case.

When C told L he didn't have money for an attorney, L told C not to worry about payment and that instead she could provide legal services where she took 50% of the ultimate recovery. This is a contingency fee agreement and, under MR and CA rules, requires a writing signed by the client (MR and CA) and, in CA, also the attorney. There was no writing here, as C orally agreed to the terms.

There is no indication C knew the fee was negotiable, which would violate CA rules.

L told C she would take 50% as well as "any costs" she incurred. This is likely insufficient information to meet the requirements that the agreement specify his responsibility for costs. It doesn't indicate what types of costs that could include, and whether and to what extent he would be responsible for them in the case that he did not prevail. This would likely violate CA and MR rules.

CA also requires an explanation of how fees are calculated. L would say that noting the 50% split is sufficiently specific. However, this doesn't make any explanation of costs of litigation, which may be insufficient. She merely told him to "not worry about it," which is vague, providing no basis or explanation.

Advancing Costs of Litigation to Clients

An attorney may not give money to clients, however under CA and MR, an attorney may advance litigation costs so long as the client must repay those at the end of litigation.

L did not pay C but did front litigation costs as under their agreement she would pay for any costs and then recoup them from the ultimate recovery amount at the end of the case. This was permissible.

Scope of Employment

In an attorney-client relationship, the client has control over setting the goals of the case, while the attorney can make strategic decisions. The client controls aspects of the representation such as whether to waive a jury trial, testify in a criminal case, or accept settlement offers among others.

D's insurance company emailed L with a settlement offer for \$100,000. L accepted it without D's consent. This violated her duty as that was D's choice, not L's.

L would argue that D was relieved when he heard of the settlement, so there was no issue, but that does not absolve her of her violation.

Communicating Settlement Offers

A lawyer has a duty to communicate with the client, keeping them reasonably apprised of the status of the case. In the model rules, the lawyer must communicate all settlement offers to a client. In CA, the lawyer must communicate all written offers as well as any oral offers that are a significant advancement in the case.

Dan's insurance company emailed Linda with a settlement offer. She did not communicate it to Dan before accepting it. This violated the CA and MR rules as it was both written and a significant advancement in the case.

L would argue that D didn't object to the settlement as he was "relieved" it settled so quickly. However, this doesn't cure her ethical violation. Dan did object later once he came to understand how little he would recover (again indicating the issue of fee reasonableness discussed above). Also, harm to the client is not required for an attorney to be in violation of ethical duties.

Duty of Competence

Under MR and CA rules, a lawyer has a duty of competence and must have the requisite skill, knowledge, training, and preparation to represent the client. In CA, an attorney may not repeatedly, recklessly, or grossly negligently fail to provide competent representation. If a lawyer is not competent in an area, they may accept representation if they are able to educate themselves on the matter enough to become competent in a timely manner, seek assistance from another attorney who is competent in the area, or

in an emergency.

Here, L didn't set an appropriate fee agreement, which arguably shows a lack of knowledge regarding how to proceed in a personal injury case on a contingency fee basis. She also accepted a settlement offer without asking for C's permission, also arguably demonstrating a lack of competence as a client advocate.

There is no indication whether L has experience in personal injury cases, or whether this was an area she was unfamiliar with. Her overall conduct indicates lack of competence which may suggest this wasn't her usual area of practice; if so, she should have not taken the case, done additional preparation, or retained co-counsel to assist. This situation was also not an emergency.

L didn't do any substantive work on the case before accepting a settlement offer, also indicating lack of preparation and skill in negotiating and advocating for a client. L likely violated her duty of competence.

Duty of Diligence

Per the MR and CA rules, a lawyer has a duty represent the client diligently, including keeping the client reasonably apprised of updates in the case, pursuing a matter to completion, meeting all filing deadlines, and managing workload.

L had not done any substantive work on the case when she received and accepted the settlement offer. This is clearly a lack of diligence as she did no work on the case. Had she done work on it, she would have had the knowledge about the extent of his injuries, applicable law, and comparable amounts of recovery at trial or by settlement in comparable cases. As it stands, she has seemingly no basis for determining whether

this was a reasonable settlement offer in the circumstances (this overlaps with the competence issue). It also violates this duty in that she did not keep her client updated on a serious development in the case.

As noted above, the duty of diligence also includes the duty to keep clients reasonably updated on their case. Here, L only informed him after she accepted the offer. Based on C's surprise at how little he received, it seems that her explanation of the situation to him did not in fact provide him with a reasonable amount of information, suggesting failure to adequately communicate regarding substantive information as well as timing.

Client Trust Account

An attorney may not mingle their assets and a client's assets under the CA and MR. A lawyer must keep all a client's money in a separate client trust account. An attorney may only move money out of the trust account into their account once they have earned the fees.

Here, A gave L a \$100,000 check and she put it in her firm's business account. She did not put it in a client trust account. She mingled this with her assets. After depositing the money in her account, she then wrote a check to C for \$50,000 minus costs.

She would argue that she paid C in a timely manner, but that is not sufficient to meet the requirements of either the MR or CA rules.

Disbursement of Disputed Fees

When there is a dispute about the fees owed to an attorney or payment due to a client, the attorney must immediately pay the client all money that is not disputed as theirs and maintain the rest in the trust account until the matter is settled.

D disputed that the amount L took as costs deducted from the check was not acceptable, complaining about it and threatening to sue her. At that point, L should have maintained the disputed amount of money in a trust account until the issue of fees was resolved. But she did not, as she had the money in her firm account and kept it there.

Settlement of Malpractice Claims

Under the CA and MR, an attorney may not settle a malpractice case with a client before advising the client to seek independent legal counsel and giving them an opportunity to do so.

C threatened to sue L for malpractice and report her to the State Bar. L offered him \$10,000 to settle the malpractice allegation as well as all liability with the representation. L did not advise C to seek independent counsel, nor gave him the opportunity to do so. C accepted the money and executed the release without having the opportunity to seek counsel. L violated her ethical duties here.