

QUESTION 3

Contractor and Lawyer had been in a consensual sexual relationship for months. Contractor could not afford to hire an experienced lawyer to defend him against Plaintiff's complex construction defect case and to bring a cross-complaint. Contractor told Lawyer, who had never handled such matters, that he wouldn't sue her for malpractice if she would defend him for half her regular rate. Lawyer felt pressured because of their relationship.

Lawyer told Contractor she would defend him for half-price, but she would only bring his cross-complaint on contingency at her regular rate of 30 percent of any recovery. Contractor agreed. Although they continued to have sexual relations, their personal relationship deteriorated. Lawyer forgot to make a scheduled court appearance in the case.

At trial Plaintiff lost, and Contractor won \$100,000 on his cross-complaint. Lawyer deposited the \$100,000 in her Client Trust Account. She told Contractor she would send him \$70,000. Contractor said Lawyer must send an additional \$15,000 because she agreed to represent him for half-price on everything, including the contingency fee.

1. Did Lawyer commit any ethical violation by agreeing to represent Contractor? Discuss.
2. Did Lawyer commit any ethical violation by failing to make the court appearance? Discuss.
3. What should Lawyer do with the money in the Client Trust Account? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

1. L committed several ethical violations when she agreed to represent C:

The ABA Model Rules of Professional Conduct ("ABA Rules") and the California Rules of Professional Conduct ("CA Rules") both contain provisions relating to sexual relationships with clients. The ABA Rules prohibit sexual relationships with clients, unless there was a preexisting sexual relationship. The CA Rules also allow for a preexisting sexual relationship, but also allow for new sexual relationships so long as sex is not a condition for professional representation, the client is not unduly influenced or coerced into sex, and the lawyer's performance is not negatively affected by the sexual relationship. Here, Contractor ("C") and Lawyer ("L") had already been in a consensual sexual relationship for months prior to L agreeing to represent C. Therefore, this would not be an ethical violation under the ABA Rules by itself because the sexual relationship was already existing at the time L agreed to represent C. The relationship may be considered a violation under the CA Rules, because while it was a preexisting relationship, L's performance and representation of C deteriorated such that she forgot to make a court appearance in the case.

L may have also violated the duty of loyalty. When there is a significant risk that the interests of another client, the lawyer, or a third person could materially limit the representation of the client, there is a conflict of interest. Here, the lawyer's own personal interest in attempting to appease her lover could be seen as materially limiting her competent representation of C, as it would be difficult to separate their personal relationship from the professional one. Further, L felt pressured to take on the case, and it is arguably likely that her professional obligations could be also subject to pressure from C.

L also agreed to represent C despite not having any experience in complex construction defect cases. Under the ABA Rules, a lawyer has a duty of competence, which is to possess the necessary skill, knowledge, preparation and thoroughness reasonably

necessary to represent the client. If the lawyer does not have the requisite competence, the lawyer must either learn the law without undue delay or expense, or associate with a lawyer who is well-versed in the law (subject to client approval in bringing on this new lawyer). Since L was not experienced in complex construction defect cases, and does not appear to have taken any action to educate herself in this field of practice or associate with a lawyer who is experienced in these matters, she breached her duty of competence. Further, she failed to appear at a scheduled court hearing, which is also a violation of her duty of competence that may subject her to disciplinary action. Under the CA Rules, a lawyer has breached her duty of competence if the lawyer intentionally, recklessly or repeatedly fails to provide competent representation would they be subject to discipline. Here, L may be found to have been in violation of the CA Rules as well since she intentionally or at least recklessly took on the matter while knowing she was not qualified to do so (and only took it on because she felt pressured). The failure to appear at court because she forgot may not rise to a violation of the CA Rules; however, since it does not appear to be intentional, reckless or repeated - it is probably negligent at the most.

L also agreed to represent C if he wouldn't sue her for malpractice if she would defend him for half her regular rate. Under the ABA Rules, a lawyer may not limit a client's right to seek disciplinary action or to participate in an investigation. The ABA Rules allow for the client and lawyer to limit malpractice liability, so long as the client is represented by independent counsel. The CA Rules, however, expressly forbid any limitation of malpractice liability. Therefore, L is in breach of the ABA Rules because C was not represented by an independent attorney when L's malpractice liability was limited, and is in breach of the CA Rules because they do not allow for any limitation on malpractice liability.

Further, L agreed to represent C for a contingency fee for the cross-complaint, but it does not appear the fee agreement was in writing. A contingency fee agreement under the ABA Rules must be in writing, state the percentage of fees that the lawyer would receive, what expenses would be deducted from recovery, and whether the lawyer's

percentage would be deducted before or after expenses were deducted. Under the CA Rules, the fee agreement must also state how other costs will be paid, as well as that the fees are negotiable. Here, it does not appear that L and C entered into a fee agreement, but rather orally agreed on the contingency.

Note that the agreement to represent C for half price under the ABA Rules did not have to be in writing, but under the CA Rules likely should have been. The CA Rules require written agreements for non-contingency fees unless the fees will be under \$1,000, is for a corporate client, is for routine matters, the client agrees otherwise in a separate writing, or there is an emergency or other good reason. Here, it is likely even with L's fees being half price for defending C, the fees will be over \$1,000; the matter is not for a corporate client but is instead for C individually; the case is not a routine matter that L normally handles for C; C has not agreed otherwise in a separate writing; and there is no emergency or other good reason. Therefore, L would be in violation of the CA Rules because her agreement to defend C for half her normal price was not in writing.

2. L committed several ethical violations when she failed to make the court appearance:

As stated above, L owed C a duty of competence. She breached this duty under the ABA Rules by agreeing to take on his matter without experience, and also by failing to appear at court. She likely breached this duty under the CA Rules by intentionally agreeing to take on a matter in which she was not experienced, but would probably not be in breach under the CA Rules for failing to appear, as this did not appear to be intentional, reckless or repeated conduct on her part.

L also breached her duty of care. A lawyer must act in good faith and as a reasonably prudent person with the same care, skills and caution as would be expended on her own matters. L breached this duty by failing to appear at court, as a reasonably prudent person would not have forgotten to make a scheduled court appearance.

L also breached her duty of diligence to C. A lawyer has a duty to pursue cases to completion, and to diligently represent clients in their matters. Part of this duty under the ABA Rules is the duty to act promptly and expedite a client's case if it is in the client's best interest. Under the CA Rules, the lawyer may not unduly delay for improper purposes or for her own convenience. She breached the duty of diligence because she failed to appear. If she caused a delay in the proceedings due to the rescheduling of the court appearance, she again breached this duty.

3. L should send C the undisputed amount from the Client Trust Account, and is entitled to keep the disputed amount in the Client Trust Account until the dispute is settled.

A lawyer has the duty to notify the client and distribute client funds promptly when funds have been received on the client's behalf, and to distribute funds to third parties (if the client knows and has consented to having third parties being paid out of the client trust account). Here, it appears L has properly maintained a separate client trust account for C. When L deposited the \$100,000 in the Client Trust Account, she also appeared to have promptly told C that the funds had arrived. However, C disputed the amount L was to send - L said she would send \$70,000, which reflects the \$100,000 minus her 30% contingency fee, but C said the contingency fee should also have been half price, so only 15%. Therefore, C claims L should send him \$85,000. When there is a dispute as to the fees owed, the lawyer must send the undisputed portion to the client, and is entitled to keep the disputed portion in the client trust account until the dispute has been resolved. As a result, L should send C \$70,000, which they have both agreed to, and can transfer \$15,000 to her own account as part of her fees. The disputed \$15,000 must remain in the client trust account until the dispute has been resolved.

As a side note, the ABA Rules encourage arbitration to resolve fee disputes, while the CA Rules mandate arbitration if the client demands it.

QUESTION 3: SELECTED ANSWER B

1.

Consensual Sexual Relationship

Under the ABA Model Rules (ABA), it is permissible for an attorney to represent a client with whom she has a pre-existing relationship, as long as the sexual relationship will not compromise the attorney's competence or duty of loyalty to the client. However, the ABA, lawyers may not enter into sexual relationships with clients that begin after they take on the clients. In California, attorneys may carry on sexual relationships that pre-existed the lawyer-client relationship, as well as being sexual relationships during the pendency of the representation, as long as competence and loyalty are not compromised. In addition, under CA rules, an attorney cannot condition acceptance of a client on agreement to have sex with the attorney. Here, the contractor and the lawyer had a preexisting sexual relationship, so their relationship did not automatically violate ABA or CA rules. However, the sexual relationship may have violated both ABA and CA rules because it conflicted with the duties of competence and loyalty (see below).

Duty of Competence

An attorney has a duty to competently represent her client which means using the knowledge, skill, thoroughness and preparation reasonably necessary for the representation. However, an attorney is permitted to take a case which she might not otherwise be competent to take if she can acquire through study the skills/knowledge necessary to represent the client and/or work with another attorney who specializes in that area.

Here, the attorney had never handled a complex construction defect case before. Thus, it appears she was not competent at the outset to do so. We have nothing in the facts

to indicate that the attorney studied day and night to become reasonably competent to represent her client in this matter. And she did not partner with another attorney with expertise in construction defect cases.

Therefore, she violated her duty of competency when she agreed to represent contractor.

In addition, it appears that lawyer's pre-existing sexual relationship with client encouraged her to take a case for which she was not competent ("Lawyer felt pressured because of their relationship" may refer to taking the case as well as the fee she accepted.) Therefore, the lawyer also violated the duty not to let sexual relationships with clients interfere with your work, in violation of both ABA and CA rules.

Agreement not to sue for malpractice

Under ABA rules, a client can only contract away her right to sue an attorney for malpractice if the she is represented by outside counsel and agrees in writing. CA rules prohibit attorneys from contracting out of malpractice liability under any circumstances.

Here, Lawyer violated both ABA and CA rules. There is nothing on the facts to indicate that client was represented by outside counsel when he agreed not to sue for malpractice, or that the agreement was in writing. Thus, the ABA rules were violated. Because it is an agreement to limit malpractice liability the attorney violated CA law when she agreed to take on the case on this basis.

Duty of Loyalty

The duty of loyalty is always potentially implicated when a client and a lawyer have a sexual relationship. The duty of loyalty requires an attorney to avoid conflicts of interest. A conflict of interest exists when the interests of another client, a third party or the attorney herself are adverse to materially conflict with those of the client. Here,

there is a potential conflict of interest between the lawyer's personal interest (her relationship with the client) and the representation. Under the ABA, when a conflict exists, an attorney can only represent a client if she reasonably believes she can do so competently, she discloses the conflict to the client, and gets the client's consent in writing. In CA, the belief need not be reasonable but only sincerely held, and personal conflicts only require written disclosure, not written, consent. Here, the attorney should have disclosed the nature of the potential conflict and gotten written consent at the outset (ABA). If she reasonably believed she could represent the client she could have done so with written consent, but here her belief would not be reasonable because she already felt pressured at the outset. Therefore, she violated ABA rules by taking on the case. Under CA rules, she would have had to provide only written disclosure (there is no indication of this on the facts) and the fact that her belief she could competently represent him would not matter. However, mere failure to provide written disclosure means that she already violated the CA duty of loyalty when she took the representation.

Fee agreement

Under the ABA, fee agreements must be reasonable. They don't have to be in writing, unless they are contingency agreements, in which case they must state the percentage of the attorney's fee, what expenses will be deducted, whether expenses will be deducted before the attorney's fee, and must be signed by the client. Under CA rules, all agreements over \$1000, not with corporate clients, regular clients, or under exigent circumstances must be in writing. In addition to the ABA contingency fee requirements, CA contingency fees must include in writing that attorney fees are negotiable and state how non-covered services will be paid. In addition, the entire fee must not be unconscionable.

Here, attorney agreed to defend client at half her regular price, but his cross-complaint on a 30% contingency basis. Under ABA rules, the first part of the agreement did not need to be in writing but the second part did. There is no indication of a writing;

therefore the contingency agreement violated ABA rules. In addition, the agreement was probably per se unreasonable because it was the result of duress or undue influence exerted by the client.

Under CA rules, the whole agreement would have to be in writing unless they regularly worked together as lawyer-client or the first part was under \$1000. Definitely the second contingency part had to be in writing, as it was not here, and lacked everything required in CA. In addition, despite the fact that 30% seems reasonable, it may be considered unconscionable because it was agreed to under duress and undue influence.

2. Failure to make court appearance

When the attorney failed to make the court appearance, she violated her duty of loyalty and competence to the client, and duty to pursue the case diligently. She didn't come to court due to what appears to be the deterioration of the sexual relationship. This means that she violated the duty not to let sexual relationships interfere with the representation, as well as the duty not to let her personal interests conflict with those of her client. In addition, she failed to pursue her case diligently in violation of her duty to her client and to the judicial system.

3. When there is a dispute over fees, the lawyer must retain the disputed portion in the client trust account pending resolution of the dispute. Here, the lawyer can send the 70k to the client, but must retain the additional 15k in the client trust account until the dispute is resolved.