

## QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

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

Answer according to California and ABA authorities.

**5) Please type the answer to Question 5 below.****Â**

**When finished with this question, click to advance to the next question.**  
(Essay)

**Agreement "to take on her case"**

In the present scenario, L agreed to "take on [C's] case" after she told him -- but had yet to demonstrate -- that she burned her legs from slipping on cleaning solution on H's sidewalk. He may have known at the time that H would be represented by his ex-fiancee, though this is uncertain from the facts -- as well as whether his ex-fiancee began representing H before or after L's agreement. A short time thereafter, he began making numerous attempts to contact C and terminate the representation.

His communication that he will take on C's case raises numerous issues of whether he can lawfully represent her.

False or Misleading Statement

Although this rule pertains specifically to advertisements and solicitation, lawyers have a duty not to portray themselves or their services in any false or misleading manner. When L "agreed to take [C's] case," he clearly misrepresented the service he would ultimately provide her, which is arguably a misleading means of securing word-of-mouth advertising.

Scope of Representation

The undescribed contents of the executed agreement raise the issue of whether L had properly described what the scope of C's representation would be. Before committing to represent an individual, the client must be informed of the scope of the representation.

L's agreement to take on C's case implies that he will see her claim to its finality,

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whether that results in a settlement, an award at trial, or losing/dismissing the case and being required to pay the costs. The facts state that they properly execute a retainer agreement without any discussion as to its contents. Even if the execution was plainly valid, the agreement itself is subject to a number of requirements, notably the scope of representation as noted above.

The agreement should inform C what the L services include in exchange for the fee arrangement, as well as the conditions under which L may be required to withdraw from representation. They must not guarantee an outcome. Because L ultimately withdraws from representation after destroying C's evidence, the agreement should have reasonably informed C that such withdrawal was a possibility.

#### Retainer Fee Terms

The agreement must indicate the arrangement of how fees for the lawyer's services will be calculated, whether that is an hourly rate, a flat rate for specific services, or a contingency fee.

A contingency fee agreement must disclose the potential liability to the client for costs if they lose their case.

Beyond mentioning a retainer, the facts do not indicate what fee agreement, if any, is understood by L and C. With the exception of express non-refundable retainers, a retainer seems to suggest that L may have required C to pay more than what L had earned pursuant to their agreement. If that was indeed the case, L would have developed a duty to place such funds in a separate trust.

#### Handling of Client's Money

A lawyer must place any unearned money from the client in a proper trust account that does not commingle with any other funds. The lawyer must only withdraw from this trust after completely earning the money, when it is not in

dispute.

#### Reasonableness of Fee

The lawyer also has a duty to charge only reasonable fees. This is determined by the lawyer's skill, experience, investment of time, difficulty of the case, the representation's resulting limitation for serving other potential clients, and other factors.

#### Malpractice Insurance Disclaimer

With some exceptions, lawyers or their firms are required to carry malpractice insurance before assuming representation of clients. This is true under the ABA model rules. The exceptions, which pertain to government attorneys, do not apply here.

In CA, a lawyer who does not carry malpractice insurance must advertise as such.

The facts indicate that L is badly in need of malpractice insurance, but make no mention as to whether he had an adequate policy at the time he agreed to represent L. If he did not have insurance at the time, his failure to advertise as such and include it in his retainer agreement with C would constitute a violation of CA rules. His failure to carry such insurance at all and proceed to represent C, destroy her evidence, and subsequently withdraw would be a clear violation of the ABA rule requiring malpractice insurance.

#### Duty of Loyalty/Conflicts

A lawyer has a duty of loyalty to their former clients in addition to their present clients. As is such, they must make reasonable attempts to determine conflicts of interests between clients before they arise or the lawyer enters into permissibly conflicting agreements without written informed consent.

In this case, we learn that L had severed his engagement from H's lawyer two years prior. There is no indication that they worked together, or that H has had this ongoing lawyer-client relationship, but if that was the case, L would have to inform H in writing before agreeing to represent C. If L had access to client privileged information when he cohabited with H's lawyer, he would not have been permitted to accept C's case without obtaining written informed consent from H.

### **L Files Against H**

L filed a complaint against H with the state court. Depending on the content of the complaint he presumably signed and his knowledge and beliefs at the time he filed, he may have violated several rules of professional responsibility.

#### Reasonable Competence

L's representation -- and withdrawal from -- of C raises a clear issue as to whether he met the requirement of reasonable competence. When a lawyer considers representing a client, they must not do so if they cannot represent the client with reasonable competence. This is measured by an objective reasonableness standard and includes factors such as the lawyer's availability to commit to the client while competently representing their other clients, the lawyer's health, conflicts of interest, whether the lawyer finds the client's objective repugnant, skill, knowledge, and relevant experience.

Accordingly, L should not have accepted C's case if his terminated engagement with H would substantially interfere with his ability to provide reasonably competent representation of C.

#### **C's Objective**

A lawyer may not allow clients to employ their services for the improper purpose of annoying or harassing another party.

When L agrees to take on C's case, he does not make any attempt to ascertain what C's motives or objectives are in seeking his representation. The facts are unclear as to the primary reason L ceases representation of C, though his being told by H that C had previously filed 13 lawsuits against H and H planned to move to have C declared a vexatious litigant. This indicates the possibility that C's objective may be to harass and annoy H. If that is the case, L must refuse to do so.

With respect to the reasonable competence rule, L should also have attempted to ascertain potential defendants other than H, as well as all the plausible legal causes of action before filing the case. If he failed to do so -- which appears to be the case -- this would serve as damning evidence of his duty to provide reasonably competent representation.

Similarly, a lawyer also may not further the objectives of client which they find repugnant.

Because L never asked C what her objective was, and never made a diligent attempt to find out, it's not clear whether L withdraws because he believes C's objective is to annoy H with frivolous legal proceedings in order to obtain an award, in the absence of a legitimate claim. He should have made a reasonable attempt to find out, and may be found in violation of the reasonable competence requirement for accepting the representation.

#### Duty of Candor

If the lawyer reasonably suspects their client may have provided them with false information, they are obligated not to represent such information to other parties or the court without satisfactorily investigating the truth. A lawyer may not allow a client to use their services to perpetrate fraud or further a crime, and must withdraw if the client is repeatedly doing so. Upon learning that a client has provided false information to the court, a lawyer has a duty to timely correct the

false information, although this duty ends at the termination of the proceeding. Although C does not begin to contradict herself until after L attempted to terminate the representation, L had a duty to reasonably investigate C's claim and the applicable law before filing in court. Here there is a risk that L may have filed a complaint in court with false information he reasonably should have known or suspected was false. As such, he may be subject to sanctions under this rule.

### **Storage of Client Records and Evidence**

A lawyer has a duty to properly store and maintain any records and evidence provided to them by the client, even after the termination of the representation.

Here L clearly breached that duty when he accepted C's clothes and placed them with his own in his office closet. He further breached that duty when he sent the clothes to the dry cleaner, destroying evidence essential to C's case.

### **Suppression of Evidence**

A lawyer may not conceal evidence of the case when it is unavailable to the opposing party. Although C did not indicate she wanted the clothes to be kept secret, L might have informed her that he would have a duty to give H access to it during discovery if it was kept in L's office.

### **Terminating Representation**

The professional responsibility rules provide for permissible withdrawal under certain circumstances, and require that lawyers withdraw in certain circumstances.

### Permissible Withdrawal

A lawyer may withdraw from representing a client if they believe the client is improperly using their services, breaks a promise or makes an untrue statement to the lawyer, consistently failed to respond to their attempts to reach the them, the client fails to satisfy agreed-upon fees, the client has fired them, and

numerous other circumstances. However, the lawyer must obtain permission from the court and inform the client with written notice of the terminated representation.

#### Improper Use of Services

As stated above, if H believed C was improperly using his services to annoy or harass H without any legitimate purpose, he may seek withdrawal of his representation. This exception will likely not apply since he never made reasonable attempts to investigate the case before agreeing to represent C and filing. Merely being told by opposing counsel that the client has previously filed 13 lawsuits against their client would be insufficient reason to withdraw after already agreeing to represent C and filing the complaint.

#### Dishonesty

A lawyer may withdraw from representation if the client breaks a promise to them or provides them with false information.

L does not apparently have enough basis for these grounds until after he first begins trying to terminate the attorney-client relationship with C, at which point C pretends not to know about her 13 previous lawsuits against H. However, this isn't a material misstatement of fact, and would still likely be insufficient grounds to withdraw.

#### Failure to Communicate with L

A lawyer may also withdraw from representation if the client repeatedly fails to communicate and cooperate with the lawyer as requested.

The facts do not state what L plans to discuss with C when he leaves his first voicemail asking her to call him back "about an important update in the case." But once he repeatedly sends her e-mails with the same request, receives an indication the e-mail was read but not responded to, sends another e-mail

inquiring about the read receipt with no response, and then sends a registered letter, the facts establish a clear pattern of C's failure to maintain communication with L as needed.

Accordingly, L may have had sufficient grounds to withdraw after the numerous ignored communications. But since L had already filed a complaint on her behalf, he would still have had to obtain permission from the court to do so.

#### Permission from Court

A lawyer must obtain permission from the court to withdraw from representation. The court will then measure whether withdrawing from the case would materially prejudice the client and have a fundamentally unfair result.

Since L had negligently sent C's evidentiary basis of her case to the dry cleaners, being permitted to withdraw would clearly result in prejudice to C and a fundamentally unfair result. If L had meant to terminate the representation when he first requested C call him, his failure to withdraw before the passage of several weeks would also have prejudiced C by preventing her from seeking another lawyer, although he is not clearly at fault since C acknowledges having ignored his attempts at communication.

L's failure to obtain permission from the court to withdraw from representation of C is a clear violation of the professional rules, and would likely result in sanctions.

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