

Essay 1 – 60

Donor comments:

Three missed issues (communication, contingency fee, referral to non-atty). Presentation is not how it needs to be.

1)

Tom's Ethical Violations

I. Competency

The issue here is if Tom is competent to take on Patty's personal injury case when Tom is a real estate attorney.

The ABA authorities ("model rules") and California Rules of Professional Conduct ("CRPC") both require that an attorney have the relevant learning, skill, and legal knowledge to be competent in a matter. The CRPC additionally requires that an attorney have the mental and physical ability to carry on the representation. If an attorney does not presently possess the required competency, he may undertake the learning required to become competent in order to properly represent the client.

Here, Tom is a real estate attorney and has agreed to represent Patty in a personal injury case. There is an argument that, as a real estate attorney, Tom may lack the relevant learning, skill and legal knowledge to represent Patty in a personal injury matter. There is no indication of Tom's mental or physical inability. Tom, however, will argue that the mere fact that he carries on a real estate practice does not mean that he is deficient in his ability to handle a personal injury matter. Additionally, Tom does later refer this case to Alan who is, in fact, a personal injury attorney (referral discussed below). So even in the scenario where Tom was found to be incompetent, he has properly sought assistance from a competent attorney. Tom Will not be found to lack competence.

II. Referral to Alan

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The issue here is if Tom's referral to Alan was proper.

If an attorney feels that he lacks competency in a matter, he may seek to undertake the learning required to achieve competency, or he may also refer the case to a competent attorney. Under the model rules, the referral must be done with the express consent of the client. Under the CRPC, this consent must be informed written consent.

Here, Tom refers the case to Alan and Parry "did not object." Tom will argue that Patty had opportunity to say that she did not approve of the referral. The model rules, however, require consent. Lack of objection is not the same as affirmative consent. Further, under the CRPC, Tom is required to have express written consent, which he clearly did not obtain in this scenario. Although Tom referred the case to an attorney he may have thought to be more competent than him in the matter, he did so without express consent of his client and will likely be found to have committed an ethical violation.

Tom and Alan's Shared Violations

I. Fee Sharing

The issue here is if Tom's agreement with Alan to share fees was in violation of the rules of professional responsibility.

An attorney may share fees with another attorney under the model rules where the fee is reasonable, and the fees are shared proportional to the work completed in the matter. Under the CRPC, there is no proportionality of work requirement; however the client must provide written consent to the arrangement.

Here, Alan and Tom agree to an arrangement in which Alan keeps two-thirds of the contingency fee and gives 1/3 of the contingency fee to Tom. Under the

model rules, Tom will argue that this arrangement is proportional to the work done because he found the client and may have done some preliminary work in fact finding before referring the case to Alan. Alan then went on to hand the majority of the workload. It can be argued, however, that Tom did not really do any of the work and is simply collecting a dollar amount for connecting Patty and Alan. No evidence of Tom doing one-third of the work is presented so it is possible that he will be found to have violated the model rules. Under the CRPC, the agreement must have been made with informed written consent of the client, although there is no proportionality requirement. In this scenario, the one-third to two-thirds split in fees is not a problem, but there is no indication that Patty approved of this split in fees. Tom and Alan's agreement would be violative of the CRPC.

Alan's Violations

I. Alan gives a \$200 gift card to Joe, the reporter.

The issue here is if Alan's \$200 gift certificate, given to Joe the reporter, can be considered improper advertising, an improper payment to a referral service, or even a statement to the media.

An attorney may advertise as long as that advertisement is free of misrepresentations, has clear language that it is an advertisement, and states the attorney's name and place of business.

Here, it is possible to consider Alan's gift to the reporter a fee paid in exchange for advertising because Alan may be doing it for the purpose of getting his name out in circulation and increasing his business. According to the rule on advertising (both model and CRPC), however Alan's statement that Joe should mention him during future discussion of the case in exchange for \$200 does not

conform to advertising requirements. If Alan tries to call this advertising, he will have violated the rules.

Alan may consider this a payment for a referral service. Generally, according to both model rules and the CPRC, and attorney may not pay others to refer work to him unless it is a valid referral service.

Here Alan pays \$200 to a reporter, not a valid referral service, for the possible purpose that he may gain referral work from the publicity. Alan may argue that his intent was simply to increase notoriety of his name and services, however this seems a clear misuse of a reporter as a referral service and will likely be found to violate the rules if Alan claims it is such.

The payment of \$200 may also be considered a statement to the media about the case. In general, attorneys are discouraged from making media statements about ongoing matters. Under both model rules and the CRPC, an attorney should only make such statements where it is necessary to cure some sort of falsity that has already been released to the media. Alan may claim that it is necessary for the public to know who is representing Patty in this high-profile case; however this does not rise to the level of necessity to cure an prior harm that may have occurred due to media exposure. If considered a statement to the media, Alan's payment to Joe will be a violation.

Further, the payment of \$200 to place Alan's name in the paper implies that Alan may be focused on media attention more than the resolution of his client's issues, violating his duty to faithfully perform for Patty.

II. Alan's offer to put a homeless witness up in a hotel until he gets back on his feet.

The issue is if Alan's offer to put the homeless witness in a hotel until he gets on

his feet can be considered payment of reasonable expenses for a witness at trial.

The model rules and the CRPC permit the payment of reasonable expenses for witnesses that will be appearing at trial such as travel expenses, lodging, and other incidentals.

Here, Alan offers to put the homeless man up in a hotel until he can get back on his feet. Alan will argue that such an expense would be paid for any other client that was planning to testify and that hotel expenses are included in the list of those reasonable under ethical rules. But Alan does not just offer to pay the expense for the duration of the trial. He offers to pay them until the homeless man is back on his feet. Because the duration of the lodging seems to be longer than that of the trial (assuming it takes longer than the trial period for the witness to find a job and stop being homeless), this will be found to be in excess of what would be considered a reasonable payment of expenses and Alan will be found to have violated the rules.

Alan may then try to argue that any excess is simply a loan, which he is entitled to make to the witness. The model rules govern the loan of funds to clients and allows them when they are to indigent clients for living expenses or to any client to advance the cost of litigation. The CPRC only requires that a loan to a client have a written promise of repayment from the client.

Here, Alan will argue that this indigent witness should be treated no differently than a client. If the witness is not put up in a hotel, he will be impossible to track down again. The witness has no money to pay for lodging to be kept safe and secure during the trial and he is necessary to advance the litigation. The rules apply to clients, however, so it will be unlikely that Alan will be able to bring his treatment of the witness into the scope of the rules for loans. Further, the CRPC would require that a written promise to repay exist from the witness, which does

not exist here.