

July 2008, Essay Question 1 (Professional Responsibility), Operant Score: 75

1. Did Alex act improperly by representing both Booker and Clare?

Under the rules of Professional Responsibility, a lawyer owes a duty of loyalty to his clients. This includes a duty to avoid conflicts of interests. In the event that there is a conflict of interest, a lawyer must be able to provide legal services without the conflict impeding their ability, and they must also disclose the conflict and get a written disclosure from their client(s).

Here, Alex had a prior personal relationship with Booker, because Booker was “a friend during college.” But Alex had no prior relationship with Clare. Between Booker and Clare, Alex would tend to have a preference for Booker because of his past relationship with him. There is no indication whatsoever that Alex disclosed to Clare his personal relationship with Booker. Additionally, because the issue here involves the formation of a partnership, there are some innate conflicts between the two partners (Booker and Clare) because each partner would want to ensure their personal legal rights are being protected. Here, Alex did not explain to both Booker and Clare the possible conflict that representing both of them might cause because Alex only had “a brief meeting with Booker and Clare.” Lastly, there are no facts whatsoever that indicate that Alex obtained a written disclosure from either client regarding those conflicts of interest.

Therefore, it appears that Alex acted improperly by representing both Booker and Clare because he (1) never disclosed his personal relationship with Booker, (2) never disclosed the conflict of interest that arises by representing both parties forming a partnership, and (3) never obtained a written disclosure from either client.

2. Did Alex act improperly by taking on legal work in which he was not experienced?

Under the rules of Professional Responsibility, a lawyer must not accept legal work which he is incompetent to handle. However, an inexperienced lawyer is not necessarily considered incompetent to handle legal work if s/he takes steps to adequately prepare for the legal work. A lawyer may do this by doing appropriate research into the law and/or by associating with a lawyer experienced in the area of law.

Here, Alex was inexperienced because he “is a recently-licensed attorney” and “had no experience with forming partnerships.” However, Alex did not associate with a lawyer experienced in forming partnerships because Alex had “a solo practice.” Rather, Alex only hired a “paralegal” to do the work. Although Dale the paralegal had decades of experience in the formation of partnerships, he was not an attorney because he was “recently-disbarred.” Nor did Alex do the necessary research to make himself competent in the area of formation of partnerships because he only spent “a total of two hours” on the matter, which included his meetings with the clients, and only a “reading” of the “partnership documents in order to learn about partnerships.” This “reading ... in order to learn about partnerships” was not appropriate legal research to learn about this

area of the law. In addition, the small amount of time spent doing the reading was insufficient as well.

Therefore, Alex acted improperly by accepting legal work which he was incompetent to handle and not associating with an experienced attorney on the matter or performing the legal research necessary to learn the area of the law.

3. Did Alex act improperly by assisting someone who is not licensed to practice law?

Under the rules of Professional Responsibility, a lawyer may not assist another in the unlicensed practice of law.

Here, Dale was not an attorney because he was “recently-disbarred.” Alex hired Dale to prepare the partnership documents for Booker and Clare. Dale was not supervised by Alex because Dale “spent four hours on his own preparing the partnership documents.” Also, Dale was unsupervised by Alex in meeting with the clients because Dale was “on his own ... meeting with Booker and Clare.” Alex did not supervise Dale’s finished work product either because Alex read “the partnership documents in order to learn about partnerships.” Alex could not have been supervising any of Dale’s work since it is clear that Alex was so inexperienced in formation of partnership matters that he would not be able to critique Dale’s performance. It does not matter that Alex notified the State Bar about hiring Dale and Dale’s involvement in the matter. Disclosure to the State Bar of improper activity does not excuse or validate improper activity. Nor does it matter that Dale had “decades of experience in law practice, including the formation of partnerships” because he was disbarred, and therefore practicing law without a license.

Therefore, Alex acted improperly by assisting Dale to practice law without a license.

4. Did Alex act improperly by charging an exorbitant fee?

Under the rules of Professional Responsibility, a lawyer must not charge an unfair fee. A fee is unfair if it is not representative of the relative experience and expertise of the attorney, the complexity of the legal matter, or the time and energy spent on the matter by the attorney. However, flat fees may be appropriate in some situations.

Here, Alex charged Booker and Clare \$5,000 to set up their partnership. Alex paid his paralegal \$250/hour to prepare the partnership documents, and it took Dale 4 hours to prepare those documents, for a total cost of \$1,000. Alex also spent 2 hours on the matter himself. Based on the 6 hours of work performed, and the \$1,000+ that was spent on the work, it appears that \$5,000 was far in excess of the reasonable value of work performed. However, it can be argued that because Dale “had decades of experience in ... formation of partnerships” and Alex “had no experience with forming partnerships”, it would have taken Alex much longer than it took Dale to do the same work that Dale performed, which would have made the cost higher. On the other hand, Dale was very highly paid for a paralegal, so it could be argued that the cost for such experience was already included in the \$1,000 that Alex paid Dale to do the work.

Another important factor that might help determine whether the \$5,000 was a reasonable fee would be the general rates that other solo practitioners with Alex's level of experience in formation of partnerships charge. If Alex's fee was significantly higher than those rates, then his fee might be considered to be unfair or exorbitant.

Therefore, Alex might have acted improperly by charging a high fee if the fee was unrepresentative of the value of the services provided to Booker and Clare.