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Ethics

I. Study Hints – unique California areas
   a. Diminished Capacity -- guardianship
   b. Conflicts of interest
   c. Gifts from clients
   d. Likely to be asked:
      i. COI
      ii. confidential information
      iii. use of client property
      iv. dishonesty rule
      v. lying client who wants to take stand
   e. Unlikely to be asked:
      i. Judicial ethics
      ii. **Bar discipli**ne

II. Clients in General
   a. General duties to clients
      i. Competency: knowledge skill and prep reasonably necessary to rep
      ii. Diligence
      iii. Communication: keep reasonably informed
   b. Diminished capacity
      i. Lawyer may seek appointment of guardian if
         1. he reasonably believes that
         2. the client cannot adequately protect himself
         3. from substantial harm
      ii. California
         1. lawyer may NOT seek appointment of a guardian if it is against client's wishes, EVEN IF lawyer reasonably believes client cannot protect himself from harm
   c. Malpractice claims
      i. Limiting liability
         1. client must be independently represented in making the agreement
      ii. Settling malpractice claim
         1. must advise person in writing
         2. that independent counsel is desirable; and
         3. give person a reasonable chance to consult with indep counsel

III. Conflicts of Interest
   a. Concurrent COI
      i. Exists where
         1. rep of client is *directly adverse* to interests of another client; or

        2. there is *significant risk* that rep of client will be *materially limited* by lawyer's interests or interests of another client or person
    ii. Consent to Concurrent COI requires:
        1. lawyer reasonably believes he can competently and diligently represent each affected client;
        2. rep is not prohibited by law;
        3. rep does not involve asserting a claim against another of the lawyer's clients; and
        4. each affected client gives informed, written consent
    iii. NB: COI unconsentable if:
        1. lawyer would recommend against consent; or
        2. duty of confidentiality prevents disclosure of info the other client needs to understand the COI
    iv. Imputed COI
        1. if one laywer faces a COI, then no lawyer in the same firm may rep the client without informed consent
        2. NB: California RPC silent on imputed conflicts. Therefore
            a. CA lawyer can't be disciplined for such a conflict, but can be disqualified by a court
b. Former client COI
    i. May not rep another client in the same or substantially related matter if
    ii. That client's interests are materially adverse to the interests of the former client
    iii. UNLESS the former client gives informed, written consent
    iv. NB: this applies if a lawyer's former firm repped the former client
c. COIs in representing organizations
    i. If person associated with organization advocates an action that may cause it substantial injury, the lawyer must protect the organization
        1. lawyer must report to higher authorities, and if necessary, to the highest authority
        2. if highest authority fails to take action, lawyer *may* disclose relevant info to persons outside the organization if
            a. reasonably believes it is
            b. necessary to prevent substantial injury
        3. California
            a. PROHIBITS disclosure to an outsider UNLESS
            b. it is necessary to prevent a criminal act that will cause death or substantial bodily harm to someone.
            c. However, a CA lawyer may withdraw if the action is of lesser magnitude
d. Specialized Conflicts Issues
    i. Private practice Screens
        1. RULE: lawyer and lawyer's new firm can't accept a client if that acceptance would have created a COI had the lawyer remained employed by the former firm
    ii. Govt lawyer to private practice screen

1. former govt lawyer who participate personally and substantially in the matter imputes conflict to firm unless screened
2. screen requires that lawyer will not share in any fee from the matter AND that appropriate govt agency is notified
3. California only uses this procedure with former criminal prosecutors, not on civil matters!!!

e. Private practice to Govt screen
    1. must get informed, written consent of
        a. former client AND
        b. of govt agency before working on the matter

f. Closely-related lawyers (blood or marriage)
    1. must obtain consent before they represent different client in the same matter or substantially related matters
    2. California extends to additional relationships
        a. One lawyer is client of other lawyer
        b. Two lawyers live together
        c. Two lawyers have an intimate personal relationship

g. Client vs. Lawyer conflicts: <u>almost always consentable</u>
    i. **Business transactions** with client and client expects lawyer to exercise *professional judgment*, then:
        1. terms of transaction must be "fair and reasonable" to client;
        2. terms must be fully disclosed and transmitted to client and in a manner reasonably understood *by client*;
        3. client advised in writing to seek independent legal counsel; and
        4. client consents in writing to essential terms of transaction and lawyer's role in transaction
    ii. **Use of client's information** by lawyer:
        1. not to disadvantage of the client, except as permitted by law or after informed consent
    iii. **Receiving gifts** from client:
        1. can't solicit substantial gifts or prepare an instrument giving lawyer or relative a substantial gift,
            a. UNLESS related to client
        2. California:
            a. Lawyer may not induce the gift, but is permitted to prepare the instrument [← major difference]
    iv. **Media rights**:
        1. during rep, can't get literary or media rights to client's story
        2. California permits such agreements, so long as trial judge believes client fully understands the agreement and client waives conflict
    v. **Advancing money** to client:
        1. only litigation expenses; nothing else
        2. California rule:
            a. Applies in all contexts, not just litigation
            b. Prohibits lawyer from "buying" a client by promising to pay personal/business debts;

c. Permits lawyer to lend client money for *any* purpose after lawyer is hired if client gives *written promise* to repay the loan

vi. **Fees paid by third party**:

1. may accept compensation as long as:
   a. client provides informed (in CA: also written) consent;
   b. no interference with professional relationship; And
   c. confidential info is protected

vii. Acquire **interest in litigation**:

1. only liens or reasonable contingency fee contract permitted

h. Lawyer as Witness

i. Called by client

1. cannot do it; UNLESS
   a. uncontested matter
   b. nature and value of lawyer's services rendered
   c. disqualification would work substantial hardship on client
   d. lawyer is pro se
   e. another member of firm is called as witness

ii. Called by opponent

1. if obvious that lawyer may be called against client, may continue in representation until it IS apparent that lawyer's testimony is prejudicial OR may be prejudicial to case

iii. California rule

1. counsel is *prohibited* from testifying before a jury unless
   a. uncontested matter;
   b. nature and value of services; or
   c. client consents

i. Sex with client

i. Just say no to sex with current clients

IV. Confidential Information

a. Atty-Client Privilege

i. A rule of evidence

ii. THEREFORE, only applies in COURT OF LAW

iii. Applies to confidential communications between client and lawyer

iv. EXCEPTIONS to privilege:

1. client seeks lawyer's advice to assist in future crime or fraud
2. relevant to malpractice action
3. joint clients of attorney sue each other
4. atty can furnish evidence of competency or intention of client who has attempted to dispose of property by will or inter vivos transfer
5. (CA only) to prevent a criminal act likely to result in substantial bodily injury or death of a person

b. Work Product Doctrine

i. A rule of discovery

ii. Don't talk about on ethics exam

c. Duty to Maintain Confidences

i. Applies to all information relating to representation of client that *would be privileged if we were in a court of law*
ii. Applies to "secrets": info lawyer learns in course of representation that fits 3 categories:
    1. client requested info be held in confidence
    2. disclosure would be embarrassing to client
    3. disclosure would likely be detrimental to client

d. Some special problem areas:
    i. Documents
        1. separate past and present
        2. if doc *preexisted* lawyer-client relationship, then likely not privilege
        3. if doc made *during* relationship, then was doc made for the lawyer?
            a. Yes = privileged
    ii. Crime Exception
        1. separate past from future
        2. if client seeks advice to commit a crime, then no duty of confidentiality
        3. if client merely commits a crime or fraud during course of representation, then that is considered a past crime and therefore is confidential
            a. Urge client to rectify consequences
        4. if client tells lawyer he intends to commit a crime, lawyer has discretion as to whether disclose
            a. if chooses to disclose, may disclose:
                i. confidential info that evidences intent to commit crime; and
                ii. confidential info needed to prevent crime
    iii. Disclosure to Prevent Bodily Injury
        1. **regardless of whether activity constitutes a crime**,
            a. a lawyer MAY reveal infor relating to rep to prevent *certain* death or *substantial* bodily harm
    iv. Disclosure for Lawyer's self-defense
        1. malpractice or billing dispute
    v. Duty to Report Child Abuse
        1. Layer has
            a. Reasonable cause to believe that
            b. Any child with whom lawyer comes in contact
            c. Has suffered abuse
            d. Or that any person with whom lawyer contacts has abused a child,
            e. Lawyer must <u>immediately report</u> or cause to report
        2. Child Abuse
            a. Physical assault/injury
            b. Any injury at variance with cause given

c. Mental cruelty
d. Sex abuse
e. Negligent mistreatment if likely to endanger health
f. EXCEPTIONS:
    i. Does not include reasonable discipline
    ii. **Duty to report does not extend to**:
        1. info protected by atty-client privilege; AND
        2. communications in course of rep if info would be detrimental to client

V. Multi-Jurisdictional Practice
    a. Permissible **Temporary** MJP
        i. Association with local lawyer
        ii. Pro hac vice permission from local tribunal
        iii. Mediation or arbitration arising out of practice in home state
        iv. Other temporary practice arising out of practice in home state
    b. Permissible **Permanent** MJP
        i. Lawyer is salaried employee of only client (ie, in-house counsel); or
        ii. The legal services are authorized by federal or local law
    c. California MJP rules
        i. In-house counsel
            1. register with bar
            2. pays annual dues
            3. complies with education, character, and disciplinary measure
            4. no court appearances
            5. no individual rep of client's officers, employees, etc
        ii. Legal Services Atty
            1. practice for a max of 3 years without passing bar
            2. work under close supervision of CA lawyer
            3. register with bar
            4. pay annual dues
            5. comply with education, character, and disciplinary measures
            6. NB: if failed CA bar within preceding 5 years, can't do this

VI. Lawyer Trust Accounts
    a. Trust account is clearly defined and designated as a “trust account” and separate from any office account and used for client’s money only
    b. Seven principles:
        i. Give money back to client
        ii. If client wants you to have money, put in LTA
        iii. If client wants you to hold property, perform as a professional bailee
        iv. If money belongs to you, take it out of LTA right away
        v. If ownership disputed, leave in LTA
        vi. Lawyer must promptly account to and notify client of any changes
        vii. Only lawyer money in LTA to cover bank fees
    c. Special situation: fees and costs paid in advance
        i. Any sums paid in advance are presumed to belong to client and put in LTA and are presumed to be drawn down as work progresses

ii. Fees deposited in office account if written agreement that fees consitute a non-refundable retainer

VII. Dishonesty [**always mention**]

a. Laywer can't engage in <u>dishonesty, fraud, deceit, or misrepresentation</u> that *reflects adversely* on the lawyer's *fitness to practice* law.
b. Is a violation even if act proscribed by another provision in ethics code
c. EXCEPTIONS:
   i. Lawyer may give advice regarding covert criminal or civil investigations without violating his duty of honesty
   ii. <u>Good Faith Needed</u>: lawyer believes there is a reasonable possibility of illegal activity

VIII. Client Who Intends to Lie as a Witness

a. Lying in court is perjury and should be treated as a future crime with discretionary disclosure
b. Steps:
   i. Lawyer must attempt to dissuade client from lying;
   ii. If client persists, lawyer must withdraw
c. Even if arguable legal, lawyer may refuse to go forward if lawyer believes the conduct to be illegal
d. If lawyer knows of the lie and goes forward, then has violated:
   i. Using perjured testimony
   ii. Creating false evidence
   iii. Dishonesty duty
e. Witness who HAS already LIED
   i. Lawyer realizes client has lied on stand
   ii. If evidence is *material*, then
   iii. Lawyer shall take reasonable remedial measures, including disclosure to tribunal
f. Criminal D testimony
   i. ABA
      1. attempt to dissuade from lying; then
      2. ask permission to withdraw
      3. disclose lie to tribunal
   ii. CA: try to persuade D to tell the truth; may ask permission to withdraw; if not given, lawyer should let D testify to falsehood in a narrative fashion and must refrain from using falsehood in closing statement

IX. OTHER AREAS THAT MAY BE TESTED

a. Advertising: communication with public at large
   i. RULE: prohibits advertisements that are false or misleading
      1. no material misrepresentation of law or fact; or
      2. no omissions of info necessary to prevent the communication from becoming materially misleading as a whole
   ii. Regulation permissible if:
      1. govt asserts a substantial interest;

        2. govt demonstrates that the restriction directly and materially advances that interest; and
        3. the regulation in narrowly drawn
    iii. California Advertising restrictions:
        1. no guarantee or warranty of the outcome of case;
        2. nothing suggesting quick cash or quick settlement;
        3. must disclose impersonation of atty in ad;
        4. must disclose dramatization of accident; and
        5. contingent fee offers must warn client has to pay litigation costs if that is the arrangement.
    iv. California communications rebuttably presumed to be false or misleading:
        1. delivered to potential client who is in hospital suffering from physical or mental stress;
        2. mailings seeking fee-paying work that are not clearly labeled as "advertising" material
        3. testimonials or endorsements without disclaimer on results

b. In-Person Solicitation
    i. Personal contact; live personal contact; real-time electronic communication *if done* with purpose of seeking a personal relationship
    ii. RULE: Lawyer may not solicit professional employment from client if *significant* motive is lawyer's *pecuniary* gain
        1. EXCEPTIONS:
            a. May solicit other lawyers
            b. May solicit relatives
            c. May solicit close friends
            d. *May solicit our current and former clients* (but not non-clients)
    iii. Contact prohibited when:
        1. purpose of contact is coercion, duress, or harassment; OR
        2. lawyer knows or should know that person's physical/emotional/mental state is such that person could not exercise reasonable judgment in deciding to employ lawyer
    iv. Paying Others to Find clients:
        1. prohibited
        2. EXCEPTION:
            a. Lawyers permitted to find and refer clients and gain referral fee, if
            b. Client informed AND total fee not excessive

c. Fees
    i. Cannot be "clearly excessive"; CA: cannot be "unconscionable"
    ii. Factors to determine reasonableness of fee:
        1. time and labor required
        2. skill of lawyer
        3. difficulty of questions
        4. results obtained
        5. precluded lawyer from other requirements

6. fixed or contingent

iii. **contingent fees**

1. must be in writing
    a. plain and simple language
    b. give client 24-hour right to rescind
2. No contingency fees in
    a. Criminal cases
    b. Domestic relations (NB: CA rules silent on this issue)

iv. California requires a written fee agreement if the fees will exceed $1,000, unless:

1. client is a corp
2. client states in writing that he doesn't want a written fee agreement
3. client has received and paid for the same kind of legal services before;
4. lawyer acted in an emergency to protect client's rights; or
5. writing is impractical for another reason

v. Referral fees

1. are unethical under ABA rules, though a fee-splitting agreement is permitted if:
    a. client is informed and signs writing describing the agreement AND the overall fee is reasonable
2. CA permits referral fees if
    a. Client knows all the terms
    b. Consents in writing
    c. Total fee is not unconscionable' and
    d. Is not increased because of referral fee

d. No-contact Rule

i. Communication with represented parties

1. must get permission from adverse attorney
2. to communicate about *subject* of the representation
3. lawyer must know other side is represented

ii. Communication with UNrepresented parties

1. permitted, so long as does not include giving legal advice except to get a lawyer
2. don’t imply that you are disinterested

e. Threatening criminal prosecution

i. Lawyer in civil matter is forbidden from threatening to bring disciplinary, administrative, or criminal proceedings to gain an advantage in a CIVIL dispute

f. Trial witnesses

i. Can’t pay witnesses to testify (even expert)

1. May pay for time or professional service

ii. Lawyers may not advise witness to hide to avoid testifying

g. Trial publicity

i. Lawyer shall not make extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if:

        1. lawyer knows/should know it will have a substantial likelihood of materially prejudicing the jury
    ii. But, lawyer can make statement to protect client from substantial undue prejudicial effect of recent publicity not initiated by the lawyer or her client

h. Unauthorized practice
    i. Two ways a licensed atty may violate:
        1. practice law in jurisdiction where not admitted; AND
        2. assisting a person not a member of state's Bar
    ii. No partnerships with nonlawyers if
        1. any partnership activities consist of practice of law
        2. no sharing legal fees with non-lawyers

i. Supervisory & Subordinate Lawyers
    i. **Subordinate lawyer** does NOT violate RPC if acts in accordance with supervisory lawyer's reasonable resolution of an arguable question of professional duty
    ii. **Supervisory lawyer** is in violation if he orders or ratifies the conduct involved, or is a partner and has supervision and knows of conduct and fails to take reasonable remedial action
    iii. **California**
        1. lawyer can't assist, solicit or induce an ethics violation
        2. firm members can be disciplined if they *approved* ethics violation or knew about it and did nothing to prevent it

j. Termination of Representation
    i. Protect Client and Return Unearned Fees and property
        1. reasonable notice of withdrawal
        2. give client time to find new lawyer
    ii. Mandatory Withdrawal:
        1. if rep would involve a violation of any RPC
        2. if lawyer is fired
        3. if lawyer's physical or mental condition requires it
    iii. Permissive Withdrawal:
        1. may withdrawal for any good cause shown
        2. However, CA forbids permissive withdrawal for:
            a. Claim that no material adverse effect is had on client interests
            b. Client used lawyer's services to perpetrate crime/fraud
            c. Rep will result in an unreasonable financial burden on lawyer

k. Restrictions on right to practice
    i. Lawyer cannot enter into an employment agreement or settlement agreement that restricts a lawyer's right to practice

l. Duty to Report Misconduct
    i. ABA:
        1. Having knowledge that
        2. Another lawyer has violated rule

3. That raises a substantial question as to
4. That lawyer's honesty, trustworthiness, or fitness as a lawyer
5. MUST inform the Bar

ii. CA:

1. no duty to report misconduct by other lawyers, but must report yourself to the bar if:
    a. sued for malpractice 3 times in 12 months
    b. found civilly liable for fraud, breach of fiduciary duty, etc
    c. sanction more than $1,000 (except discovery sanctions)
    d. charged with a felony
    e. convicted of certain serious crimes
    f. disciplined in another jurisdiction

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