

Scott Pearce's
Master Essay Method

Professional Responsibility

PROFESSIONAL RESPONSIBILITY APPROACH

- I. Basics of the Legal Profession
 - A. Becoming a lawyer
 - B. Disciplining a lawyer

- II. Attorney-Client Relations
 - A. Getting a Client
 - 1. Advertising
 - 2. Solicitation
 - B. Keeping a Client
 - 1. Competence
 - 2. Fees
 - 3. Conflict of Interest
 - 4. Withdrawal
 - C. Representing a Client
 - 1. Duty of Zealousness
 - 2. Duty to Maintain Confidences
 - 3. Duty of Loyalty
 - 4. Duty of Care
 - 5. Duty of Candor

- III. Duties to the Profession
 - A. Prevent the unauthorized practice of law.
 - B. Report misconduct.
 - C. Duties of Judges

Professional Responsibility
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Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of \$5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a “paralegal” at a wage of \$250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale’s involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale \$1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

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

Answer according to California and ABA authorities.

Professional Responsibility – Outline of Issues
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- I. Duty of Competence
- II. Duty of Loyalty
- III. Employment of Disbarred Dale
 - A. ABA Standard
 - B. California Standard
- IV. Fees must be reasonable.
- V. Conclusion

PROFESSIONAL RESPONSIBILITY
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Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward, Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingent fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. The Fee Agreement
 - A. The Written Agreement
 - B. The Oral Agreement
 - C. Conclusion

- II. Lawyer's Work On Client's Case

- III. Lawyer's Seduction of Client

- IV. Lawyer's Breach of Contract With Physician

- V. Conclusion

PROFESSIONAL RESPONSIBILITY
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Answer

I. The Fee Agreement

Client hired Lawyer to represent her in an action to recover damages for personal injuries Client suffered when she was hit by a truck driven by Driver. Although this contract was valid, it falls short of what is required under principles of professional responsibility. The agreement includes ethical violations that could subject Lawyer to discipline under either California or ABA standards.

A. The Written Agreement

The ABA authorities require that a written fee agreement, signed by the client, be used in contingent fee cases. Furthermore, the ABA requires that this written agreement contain the method of fee calculation, the percentage going to the lawyer, expenses to be deducted from the recovery, and whether the contingent fee is calculated before or after expenses are deducted. This rule is designed to help protect clients from being taken advantage of by their lawyers.

Lawyer's agreement with Client was in writing, but this document did not specifically explain the method of calculation, the expenses to be deducted (here, litigation costs and Physician's fees), or whether the contingent fee is calculated before or after expenses are deducted. Accordingly, the written fee agreement does not satisfy the comparatively strict ABA standards

California authorities do not require these terms to be in writing, but this technical distinction will not protect Lawyer from being disciplined by the California Bar. Lawyer should have told Client that he had promised Physician payment out of the eventual recovery. Lawyer was not candid with his Client about their deal from the very start of the representation, and this is enough by itself to subject Lawyer to discipline.

B. The Oral Agreement

Because Client was indigent, Lawyer orally agreed to advance litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Both California and ABA authorities permit attorneys to advance litigation expenses, though the ABA requires this to be disclosed in a written fee agreement. Loaning Client money for living expenses is forbidden under both California and ABA standards, and Lawyer will be subject to discipline for this part of his deal with Client.

C. Conclusion

The written fee agreement omits material terms about Client's liability for litigation expenses and the payment of Physician for Client's medical expenses. This contract constitutes a serious breach of the duty of candor Lawyer owes Client.

Lawyer's promise to loan Client \$1,000 a month for living expenses violates express provisions of both ABA and California rules which prohibit the practice.

II. Lawyer's Work On Client's Case

Much of Lawyer's conduct during the litigation appears to have been competent. Although Driver had strong defenses to defeat Client's claim, there is no reason to suspect that Lawyer filed the case in bad faith or acted unethically in his dealings with opposing counsel.

Counsel for Driver refused to concede liability, but did offer \$15,000 to settle the case. Lawyer had an ethical duty to communicate this offer to Client, which he did. It is apparent that Lawyer felt this was about as good an outcome as was possible under the circumstances, and that failing to accept the offer would result in a long and expensive delay with little chance of a substantial recovery. Perhaps this is a correct legal judgment, but Lawyer's promise to loan Client \$1,000 a month makes any delay far more expensive to Lawyer than it would have been otherwise.

The fact that the prohibited oral agreement to advance living expenses to Client has resulted in an economic incentive for Lawyer to settle the case illustrates why this arrangement is forbidden. This conflict of interest constitutes a violation of Lawyer's duties of competence and loyalty, and it will subject Lawyer to discipline.

III. Lawyer's Seduction of Client

Client was reluctant to accept the \$15,000 offer. Lawyer already had spent \$5,000 on the litigation and on Client's living expenses, and Client had incurred \$5,000 in medical expenses. There is nothing inherently wrong with an attorney using his or her persuasive skills to entice a client to accept an unpalatable deal, but in this case Lawyer's outrageous conduct would subject him to discipline under either ABA or California standards.

The ABA authorities hold that it is a *per se* ethical violation for an attorney to have sex with a client, in the absence of a previously-existing sexual relationship. The California rules do not contain a blanket prohibition, but they do indicate that a lawyer can be subject to discipline for sexual behavior that results in harm to a Client.

It is hard to imagine a more clear-cut ethical violation. Here, Lawyer took every possible advantage

of the trust and vulnerability of his indigent, seriously injured client. Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Although the sexual relations that followed are described as consensual, Lawyer's conduct appears to be little better than date rape.

The circumstances strongly suggest that Lawyer seduced Client in order to get her to agree to a settlement of her case that she was unhappy with. This conduct violates every fiduciary duty, and would subject Lawyer to discipline under California or ABA standards.

IV. Lawyer's Breach of Contract With Physician

At the start of the case, Lawyer wrote a letter to Physician, promising payment in full for Client's treatment. As discussed above, Lawyer's failure to disclose this to Client constitutes a breach of Lawyer's duty of candor.

After seducing Client, Lawyer persuaded Client to accept the offer by agreeing to give her \$5,000, to take \$5,000 in fees, and to recoup his \$5,000 in litigation expenses and living expense loans to Client. Physician would be paid nothing. The next week, Lawyer distributed the net proceeds to Client as agreed. Thus, it is apparent that Lawyer intends simply to breach his agreement with Physician. This conduct is as foolish as it is unethical. Physician will be able to sue Lawyer for breach of a contract that can be proven by Lawyer's letter to Physician. Even worse, Physician also will have a legal claim against Client, which means that Lawyer's conduct could cause Client to be sued. This is another stark violation of both California and ABA standards of professional responsibility.

V. Conclusion

Lawyer's written agreement with Client violated the duty of candor because of material omissions. Lawyer's loans to client for living expenses violate express provisions of both California and ABA rules. Lawyer's seduction of Client violates both the strict ABA standard and its more liberal California counterpart. Lawyer's breach of his agreement with Physician appears to be in bad faith, thus violating Lawyer's duty of honesty. It also violates Lawyer's duty of competence, because breaching the contract with Physician leaves Client vulnerable to a lawsuit that she should not have to worry about.

PROFESSIONAL RESPONSIBILITY
Copyright February 2005 State Bar of California

Ann represents Officer Patty in an employment discrimination case against City Police Department (“Department”) in which Patty alleges that Department refused to promote her and other female police officers to positions that supervise male police officers. Bob represents Department.

At Patty’s request, Ann privately interviewed a male police captain, Carl, who had heard the Chief of Police (Chief) make disparaging comments about women in Department. Carl told Ann that Chief has repeatedly said that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise any male officer. Carl met with Ann voluntarily during his non-work hours at home. Ann did not seek Bob’s consent to meet with Carl or invite Bob to be present at Carl’s interview.

When Bob saw Carl’s name as a trial witness on the pretrial statement, he asked Chief to prepare a memo to him summarizing Carl’s personnel history and any information that could be used to discredit him. Chief produced a lengthy memo containing details of Carl’s youthful indiscretions. In the memo, however, were several damaging statements by Chief reflecting his negative views about female police officers.

In the course of discovery, Bob’s paralegal inadvertently delivered a copy of Chief’s memo to Ann. Immediately upon opening the envelope in which the memo was delivered, Ann realized that it had been sent by mistake. At the same time, Bob’s paralegal discovered and advised Bob what had happened. Bob promptly demanded the memo’s return, but Ann refused, intending to use it at trial.

1. Did Ann commit any ethical violation by interviewing Carl? Discuss.
2. What are Ann’s ethical obligations with respect to Chief’s memo? Discuss.
3. At trial, how should the court rule on objections by Bob to the admission of Chief’s memo on the grounds of attorney-client privilege and hearsay? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Did Ann commit any ethical violation by interviewing Carl?
 - A. Duty to exercise Independent Legal Judgment
 - B. Duty of Candor owed to opposing counsel
 - C. Duty of Zealousness
 - D. Carl was not a party to the case between Officer Patty and Department
 - E. Conclusion: Ann did not commit any ethical violation by interviewing Carl.

- II. What are Ann's ethical obligations with respect to Chief's memo?
 - A. Chief's memo was disclosed inadvertently.
 - B. Chief's memo is protected by the Attorney-Client Privilege.
 - C. Bob demanded the return of Chief's memo.
 - D. Conclusion

- III. How should the court rule on the admissibility of Chief's memo at trial?
 - A. Relevance
 - B. Attorney-Client Privilege
 - C. Hearsay
 - D. Conclusion

PROFESSIONAL RESPONSIBILITY
Copyright July 2002 State Bar of California

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved “as quickly and quietly as possible.” Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her “associate.” Todd denied possessing, selling, or even using drugs. Todd said he was “set up” by undercover officers. After Todd left the office, Zelda told Alice that if Todd’s story was true, the prosecution’s case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could “take it from here” and gave her a check marked “Consultation Fee, Betty’s Case.”

Alice entered an appearance on Todd’s behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: “Look, I’m innocent. Don’t I have any other choice?” Alice, cognizant of Betty’s wish to get the matter resolved, told Todd she thought it was Todd’s best chance. Based on Alice’s advice, Todd accepted the prosecution’s offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

I. Alice's Conduct and Professional Responsibility

A. Duty of Competence

1. This is Alice's first criminal case.
2. Alice consults Zelda.
 - a. Zelda send Alice her standard discovery motions.
 - b. Zelda was not associated into the case.
 - c. Zelda attended client interview; saw potential good defense.
3. Alice completes the representation without further contact with Zelda.
4. Conclusion: Alice was incompetent.

B. Duty to Exercise Independent Legal Judgment

1. Betty hired Alice and paid her.
2. Betty wanted the case resolved "as quickly and quietly as possible."
3. Alice, mindful of Betty's wish, advised Todd to plead guilty to a lesser charge.
4. Betty told Alice to recommend in-patient drug treatment to Todd.
5. Conclusion: Alice failed to exercise independent legal judgment.

C. Duty of Loyalty

1. Alice owes this duty to Todd, the client, not to Betty, who hired and paid her.
2. The same conduct described in B above qualifies as a breach of Alice's duty of loyalty.
3. Conclusion: Alice breached her duty of loyalty.

D. Duty of Zealousness

1. Todd, the Defendant, maintained he was innocent of the charges.
2. Zelda advised Alice that, if true, Todd's story was a strong defense.
3. Alice did not investigate the facts.
4. The plea bargain
5. Conclusion: Alice breached her duty of zealousness.

II. Conclusion

Alice was incompetent, disloyal, non-zealous, and Alice failed to exercise independent legal judgment. She will be subject do discipline.

PROFESSIONAL RESPONSIBILITY
Copyright July 1997 - State Bar of California

Attorney Ann is a member of the State Bar of California and represents primarily low-income tenants.

Frank, a friend of Ann, told her about an apartment complex that appeared to be very run down and to have many elderly tenants. Ann visited the building and was shocked at its dilapidated and unsafe conditions.

Ann sent a letter to each of the tenants in the building, which stated:

It has come to my attention that there may be ILLEGAL and UNSAFE conditions at your apartment building!

I am an attorney experienced in this type of case, and I am willing to represent you in a lawsuit against your landlord regarding these conditions. CALL TODAY!

Tom, a tenant, called Ann in response to the letter and told her he wanted to hire her to sue Landlord. He said that another tenant named Barbara, who is 82 years old and speaks only Spanish, also wanted to hire Ann.

Ann met with Tom and Barbara. Since Ann speaks very little Spanish, and Tom is bilingual, he acted as translator. It became clear that Tom's interest was in obtaining a money judgment and that Barbara's interest was in obtaining an injunction requiring the landlord to make repairs. Ann, Tom, and Barbara signed a contingency fee agreement for Ann to represent Tom and Barbara in a lawsuit against Landlord. Under the agreement, Ann would receive 40% of any recovery in the case. Ann also separately agreed with Frank that she would pay him 10% of any fees she recovers in return for his having told her about the apartment complex.

Ann filed a lawsuit against Landlord. The suit had a sound legal basis, and she handled it in a professionally competent manner.

Ann and Tom worked together closely on the case, and before the case was resolved, he asked Ann to date him. He also gave her a free airline ticket to accompany him on a trip to Hawaii, which she accepted.

Eventually, Landlord made a written settlement offer to pay money damages only, which Ann conveyed to Tom. Tom, without consulting Barbara, told Ann that he and Barbara accepted the offer. Ann concluded the settlement.

What professional responsibility issues are raised by Ann's conduct? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Ann's solicitation letter
 - A. Advertising
 - B. Targeted Direct Mail

- II. Ann's joint representation of Tom and Barbara
 - A. Duties of Loyalty and Competence
 - B. Conflict of Interest
 - 1. Waiver
 - 2. Tom's Translation Services

- III. The Fee Agreement
 - A. Contingency Fee
 - B. Costs Omitted

- IV. Ann and Frank's Fee Splitting Agreement

- V. Ann's lawsuit against Landlord

- VI. Ann and Tom's Relationship

- VII. The Settlement Agreement

PROFESSIONAL RESPONSIBILITY
Copyright February 1997 - State Bar of California

David has been arrested for and charged with murder and robbery. David made a telephone call to Attorney, a member of the California Bar. Attorney came to see David in the small rural jail in which David is being held and agreed to represent him.

In an interview in the jail, David told Attorney that he killed the victim and stole the victim's shirt, shoes, and ring, and was wearing them when he was arrested. David also told Attorney that he had hidden the shirt and shoes as best he could in his cell, and that he had thrown the ring out of the cell window into a trash can behind the jail. David is now bare-chested, bare-fingered, and bare-footed.

Attorney told David to do nothing else to hide or destroy evidence and David reluctantly agreed. Attorney then left, went behind the jail and looked into the trash can. The trash was empty except for a ring. At this point, Attorney heard a noise, looked up, and saw David throw a pair of shoes out of the cell window. The noise also attracted a police officer, who discovered the shoes and ring. The police officer asked Attorney what he knew about the ring and shoes. Attorney refused to tell the police officer anything about them.

Attorney returned to the jail and spoke to David again. David told him that he had torn the shirt into strips, which he plans to burn. Attorney told David not to burn the strips, but David insisted that he will burn them.

Attorney is called before the Grand Jury investigating the murder and robbery. Consistent with his ethical obligations:

1. Should Attorney have told the police officer anything about the shoes or the ring? Discuss.
2. Should Attorney tell the Grand Jury that David is threatening to burn the scraps of the shirt? Discuss.
3. May Attorney tell the Grand Jury anything about the other events described above? Discuss.
4. Should Attorney continue to represent David? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Should Attorney have told the police officer anything about the shoes or the ring?
 - A. Duty of Confidentiality
 - B. Duty of Candor
 - C. Conclusion

- II. Should Attorney tell the Grand Jury that David is threatening to burn the scraps of the shirt?
 - A. Duty of Confidentiality
 - B. Duty of Candor
 - C. Conclusion

- III. May Attorney tell the Grand Jury anything about the other events described above?
 - A. The Initial Meeting
 - B. Attorney's Encounter with the Police Officer
 - C. Conclusion

- IV. Should Attorney Continue to Represent David?

PROFESSIONAL RESPONSIBILITY
Copyright February 1995 - State Bar of California

May has represented the International Bakers Union (IBU) as its attorney for several years. Last Year, while IBU was on strike against Bakery, a car belonging to the owner of Bakery was firebombed outside his home. Walter, the vice president of IBU, and Frank, an apprentice member of the union, were charged with arson to property, a felony carrying a penalty of up to three years in prison.

IBU retained May to represent Walter and Frank in the criminal case. Shortly after entering her appearance, May was approached by Pete, the prosecutor, who told her that an unidentified member of IBU's Executive Board would testify that Walter and other members of IBU leadership planned the firebombing and got Frank to go along only after they threatened to revoke his apprentice union card. Pete said that if Frank would testify for the prosecution against Walter, Pete would allow Frank to plead guilty to a misdemeanor and would recommend that he be placed on probation. May immediately refused, telling Pete that she knows he is just a "union buster," and that IBU's interests would suffer if she agreed to his proposal.

The case proceeded to trial, and the Secretary of IBU testified for the prosecution as Pete had indicated. Both Walter and Frank were convicted. The judge denied May's pleas that her clients be placed on probation and sentenced each defendant to three years in prison.

What standards of professional responsibility, if any, has May violated? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. May's Conflicts of Interest
 - A. May's Representation of Both IBU and Defendants
 - 1. The Conflict of Interest
 - 2. Conclusion
 - B. IBU's Payment of May's Fees Re: Walter and Frank
 - 1. The Conflict of Interest
 - 2. Conclusion
 - C. The Conflict Between Walter and Frank
 - 1. Walter and Frank had Adverse Interests
 - 2. Conclusion
 - D. Mary's duty of competence
 - E. Conclusion
- II. Did May tell Walter and Frank about her conversation with Pete, the Prosecutor?
 - A. Mary's Duty of Zealousness
 - B. Conclusion

PROFESSIONAL RESPONSIBILITY
Copyright February 1994 - State Bar of California

Knowles was retained to represent Baker on a federal bank robbery charge. The indictment charged that Baker robbed Freedom Bank on Third Street. The prosecutor's case depends on, among other things, photographic evidence from hidden cameras in the bank. None of the photographs clearly depicts the robber's face.

At their first meeting, Baker told Knowles that at the time of the robbery he was watching television at the home of his friend Peterson.

Knowles noticed that one of the bank photographs shows the robber wearing a ring on the fourth finger of his right hand. At one of the trial preparation sessions, Knowles saw that Baker had a ring on the same finger. Knowles mentioned this to Baker, and the following conversation occurred:

Baker: "So what? There must be lots of rings that look like this one."

Knowles: "Yours has a 'B' on it."

Baker: "You can't see the one in the bank photo clearly enough to see if there's a 'B'."

Knowles: "You might if they blow it up."

Thereafter, Baker removed the ring and Knowles never saw it again. Knowles later suggested that Baker get a new ring to cover a mark left by the old ring.

During the trial, but before Baker testified, he asked Knowles what might happen if the prosecutor asked him if he had a ring with a "B" on it.

"Because you insist on testifying, you have to tell the truth," Knowles said.

On the evening before the day of closing arguments, Baker gave Knowles the balance of his legal fee in \$100 dollar bills. Knowles noticed that the serial numbers on fourteen of the \$100 bills were the same as the serial numbers on some of the stolen bills, which numbers had been revealed during the course of the trial.

Knowles returned the fourteen \$100 bills to Baker and told him to bring an equivalent sum in other denominations. The following morning, Baker came to court with twenty-eight \$50 bills, which Knowles accepted.

In his closing argument, Knowles argued that the prosecutor was going after the wrong man and urged the jury to believe Peterson's alibi testimony.

What standards of professional responsibility, if any, has Knowles violated by his conduct in representing Baker? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Knowles owed Baker duties of zealousness, competence, and confidentiality.
- II. Knowles owed the court and the prosecutor duties of candor and honesty.
 - A. Knowles caused Baker to remove and replace his ring.
 - B. Knowles told Baker to testify truthfully about the ring.
 - C. Knowles returned fourteen \$100 bills.
 - D. Knowles urged the jury to believe Peterson's alibi testimony.
 - 1. Knowles' direct examination of Peterson did not violate ethical standards.
 - 2. Knowles' closing argument was unethical.
 - E. Conclusion

PROFESSIONAL RESPONSIBILITY
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Attorney represented Wife in an action for divorce by Wife against Husband. During the course of representation, Attorney submitted bills totaling \$11,000 for his legal services to Wife. After credit for payments by Wife, the amount due on Wife's obligation was \$5,000. Attorney wrote Wife a letter informing her that he would perform no further services in connection with her case until she paid the outstanding balance of her account.

In response to Attorney's letter, Wife called Attorney and informed him that because of financial problems she could not then pay past due or additional legal fees. She asked Attorney if there was any arrangement under which he would be willing to continue to represent her. Attorney stated that he would continue to represent her if she would agree to pay him for his services, in addition to the \$5,000, 25% of any property award she would receive in the divorce proceedings. Wife told Attorney she would think about it and call him back.

Several days later, Wife called Attorney and informed him that she had decided to retain another lawyer. She asked Attorney to give her the file in her case. Attorney informed Wife that it was her right to obtain another lawyer, but that if she wanted the case file, it would be necessary for her to pay the outstanding balance of her account and sign a general release of liability. Wife said she would try to raise the money and would call Attorney back in a few days.

The next day, Husband's lawyer called Attorney to ask Attorney to withdraw from his representation of Wife. Husband's lawyer reminded Attorney that several years ago Attorney represented a now-dissolved partnership, of which Husband was a limited partner, in an unsuccessful effort by the partnership to acquire an apartment building for investment purposes. Attorney refused to withdraw.

Discuss all ethical considerations raised by Attorney's conduct.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Attorney's letter to Wife suspending his performance until she paid \$5,000:
 - A. Attorney owes a duty to perform services.
 - B. Attorney may not withdraw if Wife's case might be unreasonably damaged.
 - C. Conclusion

- II. Attorney's proposal to continue representation for 25% of any property award:
 - A. California law allows contingent fees in family law cases.
 - B. The ABA prohibits contingent fees in family law cases.
 - C. Conclusion

- III. Attorney's insistence on payment and a general release before giving up the file.
 - A. Attorney may not condition the return of the file on payment.
 - B. Attorney may not insist on a general release.
 - C. Conclusion

- IV. Attorney's refusal to withdraw from the representation of Wife.

TORTS / PROFESSIONAL RESPONSIBILITY
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Owen has a backyard swimming pool meeting all statutory requirements for pool installation and maintenance. Recently, ten-year-old Petey attended a birthday party for Owen's ten-year-old son. After the swimming phase of the party was over, Owen emphatically announced to all that the pool was closed and that the hired lifeguard had left.

While other children and their parents were inside Owen's house eating cake, Petey sneaked out and opened an unlocked door leading to the pool. Petey saw Teen, a nineteen-year-old, reading a book near the pool. Petey did not know that Teen was Owen's older son. He wore a sweatshirt which had displayed on it in large print, "City Pool Lifeguard."

Teen observed that Petey, now in the pool, was a good swimmer. Though Teen had been given no responsibility by Owen, Teen told Petey to get out of the pool. Petey noticed the words on Teen's sweatshirt, but he refused to get out. Teen then left to go to his city lifeguard job. Petey saw him leave but remained in the pool.

From an upstairs window in the house, Owen saw Petey come out of the pool, balance on the edge with his back to the pool as if he intended to make a backward dive, lose his balance, hit his head on the edge of the pool, and then sink below the surface of the water. Owen pulled Petey out of the pool and directed that an emergency squad be called. Petey suffered some permanent brain damage.

Petey, through a duly appointed guardian, has sued Owen and Teen. Lawyer has been employed by Owen's insurance carrier, Insko, to represent the defendants. Owen says he is overcome by grief and cannot recall what Petey was doing immediately before he hit his head. Lawyer believes Owen is lying because Owen wants Petey to prevail in the lawsuit. Lawyer privately advises Insko of his beliefs, continues to investigate factual matters, and prepares to defend. However, he intends to advise Insko that if Owen continues to have a memory lapse, Insko will not be liable under the policy for the failure of Owen to cooperate as required by the terms of the policy.

1. What legal claims and defenses should be asserted in the suit by Petey against (a) Owen and (b) Teen, and how should they be resolved? Discuss.
2. What breaches of professional responsibility, if any, have been committed by Lawyer? Discuss.

TORTS / PROFESSIONAL RESPONSIBILITY
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Outline

- I. Petey v. Owen: Negligence
 - A. Duty
 - B. Breach
 - C. Causation
 - D. Damages
 - E. Owen's Defenses
 - F. Conclusion

- II. Petey v. Teen: Negligence
 - A. Duty
 - B. Breach
 - C. Causation
 - D. Damages
 - E. Defenses
 - F. Conclusion

- III. Lawyer's liability for professional misconduct:
 - A. Lawyer's apparent dual representation: conflict of interest
 - B. Attorney-Client Privilege
 - C. Owen's Testimony
 - D. Conclusion

PROFESSIONAL RESPONSIBILITY
Copyright July 1991 - State Bar of California

An old bus owned by Bankco, Inc., a small town bank, was returning from an all-day trip to a distant amusement park. On board were fifty minor children of Bankco employees. The bus, driven by a Bankco employee, collided with a pickup truck under conditions which left it unclear which driver was at fault. Twenty children died when the bus exploded fifteen seconds after the collision. The remaining thirty children and the bus driver escaped with injuries.

Five days after the accident, all the parents of the dead and injured children met with Bankco's board chairman and majority stockholder, Smith. Smith is also a general practitioner in a local three-person law firm, but neither he nor his firm performs legal services for Bankco. All parents asked Smith to represent the minor survivors and the heirs of the minor decedents of the accident.

After investigation and analysis of factual matters by Smith, he agreed to represent all minors and heirs of minors who sought representation in a possible lawsuit against the bus manufacturer, Busco. Each heir of a decedent and each parent of a survivor signed a contingent fee contract which entitled Smith to one-third of any recovery in each case. Without discussion, but at Smith's suggestion, each parent and heir also signed a document waiving all claims against Bankco. Smith knew Bankco carried no liability insurance.

Smith did not file a lawsuit and conducted no significant legal research. After only six weeks of negotiations between Smith and attorneys for Busco, all parents and executors agreed to large cash settlements. Busco agreed to the settlements only after Smith threatened to bring in Attorney Jones, a national expert in product liability litigation, as co-counsel. As a condition of each settlement, Smith agreed to waive his one-third contingent fee. Instead, Busco agreed to pay Smith a fee equal to ten percent of the combined settlements. The amount of Smith's fee was \$4,000,000.

1. Did Smith properly resolve all possible conflicts of interest? Discuss.
2. Did Smith properly accept the \$4,000,000 fee? Discuss.

PROFESSIONAL RESPONSIBILITY
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Outline

- I. Did Smith properly resolve all possible conflicts of interest?
 - A. Smith was Bankco's board chairman and majority shareholder.
 - B. Smith did not properly inform his clients.
 - 1. Smith did not disclose his interest in Bankco.
 - 2. Smith did not discuss the implicit complications of his representing the whole group.
 - 3. Smith did not get written consent.
 - C. Smith got his clients to waive their claims against Bankco.
 - 1. Smith's interest in Bankco is a conflict of interest.
 - 2. Smith knew that Bankco had no liability insurance.
 - D. Smith quickly settled his clients' claims against Busco.
 - 1. The clients got large cash settlements.
 - 2. Smith's threat to bring in attorney Jones:
 - E. Conclusion

- II. Did Smith properly accept the \$4,000,000 fee?
 - A. The size of the fee may have been reasonable.
 - B. Smith was paid by the defendant.
 - 1. The clients each appear to have agreed to this.
 - 2. Smith has been successful.
 - C. Smith's acceptance of the fee is tainted by his earlier failures to disclose.
 - D. Conclusion