

Question 2

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name “ABC Legal Services LLP” (“ABC LLP”). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able’s assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of \$1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at \$500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able’s clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able’s client caused by the disclosure of confidential client information? Discuss.
2. May Able, Baker, and Charlie each be held personally liable for David’s malpractice? Discuss.
3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Question 2

Partnerships and Professional Responsibility

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name “ABC Legal Services LLP” (“ABC LLP”). They agreed to share profits and losses equally. (A partnership is an association of two or more persons to carry on as co-owners of a business for profit. Sharing profits and losses is prima facie evidence of a partnership) Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. (A statement of qualification) Inadvertently and unbeknownst to Able, Baker, and Charlie, Able’s assistant never filed the appropriate documents. (A partnership becomes a registered limited liability partnership at the time of the filing of the initial registration with the Secretary of State. However, ABC LLP may be a de facto partnership)

(This paragraph heads up call 2.) Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. (The three are acting under the mistaken belief that they have formed a limited liability partnership) They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of \$1100 or 10% of his billings. (A member shall not divide a fee for legal services with a lawyer who is not a partner) David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space. (The sharing of gross returns does not by itself establish a partnership. The extent of Able, Baker, and Charlie’s liability does not extend to David’s malpractice as their relationship is more properly characterized as that of landlord and tenant)

Able, Baker, and Charlie hired Jack as head of computer services. (Able, Baker, and Charlie are vicariously liable for the acts of their employees within the course and scope of their relationship) Jack had just graduated from college with a degree in computer science. (A partner shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that Jack’s conduct is compatible with the professional obligations of a lawyer) Jack, in an effort to save ABC LLP the cost of Internet access budgeted at \$500 a month, (The fact that ABC LLP has budgeted this amount means they should have known that there might be something wrong with free service) accessed and used the wireless network of an adjacent law firm for free. (Jack is illegally converting Internet service) Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. (They have a duty to inquire and investigate. The three of them cannot claim ignorance) Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able’s clients, (Part of the duty of confidentiality means that a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure) which caused the client economic loss. (Able, as well as Baker and Charlie will be liable for the loss)

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able’s client caused by the disclosure of confidential client information? Discuss.
2. May Able, Baker, and Charlie each be held personally liable for David’s malpractice? Discuss.
3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

A Deeper Look Inside the Essay

This was the first time California tested “Partnerships.” Thus, if an applicant struggled on this essay, you were not alone. To no surprise it was crossed-over with Professional Responsibility. It is highly likely that if the committee tests agency or partnerships, it will be crossed-over with another subject. It is doubtful to stand on its own. The Professional Responsibility part of this essay was relatively straightforward. Anyhow, it will be interesting to see what the committee was looking for in this answer.

Model Answer by One-Timers ©

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able’s client caused by the disclosure of confidential client information?

The partnership of Able, Baker, and Charlie will be vicariously liable for the client’s loss since they hired Jack.

In order to determine the respective rights and liabilities of Able, Baker, and Charlie, it is necessary to determine the type of legal entity they have entered into.

Formation of a Partnership

A partnership is the association of two or more persons to carry on as co-owners a business for profit. *Revised Uniform Partnership Act* § 202. Here, Able, Baker, and Charlie set up a law firm to share profits and losses equally. This is the exact premise of forming a partnership. Thus, the three of them are partners. But the inquiry needs to be furthered explored to determine what type of partnership they have established.

Limited Liability Partnership

The definition of a “limited liability partnership” makes clear that a partnership may adopt the special liability shield characteristics of a limited liability partnership simply by filing a statement of qualification. A limited liability partnership means a partnership that has filed a statement of qualification in the office of the Secretary of State.

Statement of Qualification

A statement of qualification must contain: the name of the partnership; the street address; and a statement that the partnership elects to be a limited liability partnership. The status of a partnership as a limited liability partnership is effective on the filing of the statement. The filing of a statement of qualification establishes that a partnership has satisfied all conditions to the qualification of the partnership as a limited liability partnership. *Revised Uniform Partnership Act* § 1001. A limited liability partnership shall be recognized if registered. *California Corporations Code* § 16951.

Here, Able, Baker, and Charlie attempted to register the firm as a limited liability partnership. It contained the name of the partnership, “ABC Legal Services LLP”; most likely the street address, and the indication that it elects to be a limited liability partnership, *i.e.*, by putting LLP at the end of its name. In fact, Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. However, Able’s assistant never filed them. The status of the partnership as a limited liability partnership is not effective because it has not been properly filed. Therefore, ABC LLP will not be recognized as a limited liability partnership.

Partnership as Entity

Under the *Revised Uniform Partnership Act* § 201, a limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification. In addition, the law imposes joint and several liability on the partners for all partnership obligations where the partnership is not a limited liability partnership.

Due to never filing a statement of qualification, the partnership will remain the same entity as it began. ABC Legal Services is a partnership whereby each partner shall be jointly and severally liable. This is in contrast to partners of a limited liability partnership which are not personally liable for partnership obligations incurred while the partnership liability shield is in place. Partners remain personally liable only for their personal misconduct.

De Facto Partnership

If a partner has acted in the erroneous belief that a limited liability partnership certificate has been filed, that partner is protected under the Uniform Limited Partnership Acts. A de facto partnership requires a good faith belief that a limited liability partnership has been created. The strongest basis for immunizing partners from personal liability occurs in cases in which the partner honestly and reasonably but erroneously believed the appropriate documents have been filed. *Cranson v. International Business Machines Corp.*, 234 Md. 477, 200 A.2d 33 (1964).

Here, Able, Baker, and Charlie operated under the name “ABC LLP.” Able prepared the documents to register the firm as a limited liability partnership but his assistant never filed them. The three partners seemed to believe that the documents were filed since they leased office space in the name of ABC LLP, and no facts show that any one of them knew about the error. It’s only appropriate to impose liability on persons who act knowing that no limited liability partnership exists. Therefore, a court will likely find that the partners are protected and not subject to unlimited personal liability.

Vicarious Liability

The doctrine of vicarious liability imposes responsibility upon a person, who did not cause a loss, based on the actions of another, with whom the person has a special relationship. A common example is employer to employee.

Here, Able, Baker, and Charlie hired Jack as head of computer services. Jack is an employee of ABC LLP and the partnership will be vicariously liable for the negligent acts of Jack within the course and scope of his employment. On these facts, Jack accessed a wireless network of an adjacent law firm which resulted in the disclosure of confidential client information for one of Able’s clients, that caused the client economic loss. Since Able, Baker, and Charlie hired Jack, they will share responsibility up to the amount of their contribution to ABC LLP.

Partner’s Liability

All partners are liable jointly and severally for all obligations of the partnership, where the partnership is not a limited liability partnership. *Revised Uniform Partnership Act* § 306.

Here, ABC LLP will be jointly and severally liable for the economic loss to Able’s client as Jack had the authority of the partnership to head up their computer department.

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice?

No, Able, Baker, and Charlie will not be held personally liable for David's malpractice as the four of them did not form a partnership.

Formation of Partnership

The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a common right or interest in property from which the returns are derived. A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment of rent. *Revised Uniform Partnership Act § 202.*

Here, in determining whether ABC LLP formed a partnership with David, the receipt of a share of his profits is not presumed to create a partnership. The profit share is a single flat percentage, *i.e.*, 10% of his billings, or a flat rate of \$1,100. ABC LLP receives payment from David for rent of the extra office. At no time does ABC LLP lose money if David fails to turn a profit in a given month. There are no loss-sharing provisions. According to their lease terms, David would still owe \$1,100 for that particular month. In addition, David has no management, control, or voting rights in ABC LLP. No facts show that David is involved in any decision making either.

Therefore, the fact that Able, Baker, and Charlie leased office space to David, a solo attorney, does not amount to forming a partnership with him. The extent of their liability does not extend that far as the relationship is more properly characterized as that of landlord and tenant. For that reason, there is no link to establish personal liability for any partner.

3. Have Able, Baker, and Charlie breached any rules of professional conduct?

Yes, Able, Baker, and Charlie have all breached several rules of professional conduct. Each one will be discussed in turn.

Responsibilities Regarding Nonlawyer Assistants (Law Firms and Associations)

With respect to a nonlawyer employed by a partnership, a partner who possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer. A lawyer shall be responsible for conduct of such person if it would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and the lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. *Model Rules of Professional Conduct, Rule 5.3.*

Here, Able, Baker, and Charlie hired Jack. All three of them possess equal managerial authority as known by the fact they all share profits and losses equally. When lawyers employ paraprofessionals, whether employees or independent contractors, a lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment. Able, Baker, and Charlie failed to do so in this matter. None of them inquired about how they obtained free Internet access when in fact they had budgeted \$500 a month for such use. This should have raised a red flag, especially since Jack has no legal training and is not subject to professional discipline.

Since no one made any reasonable efforts to ensure that Jack acted in a way compatible with the rules of professional conduct, they are subject to discipline.

Confidentiality Of Information - Acting Competently to Preserve Confidentiality

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. *Model Rules of Professional Conduct, Rule 1.6*. A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See Official Comment 16*.

Here, ABC LLP inadvertently revealed confidential client information without the consent of the client. The lawyers did not act competently to safeguard such information. Jack's use of an illegal Internet wireless network caused the client's economic loss. Jack is subject to the lawyers' supervision. Thus, they breached their duty of confidentiality.

Competence (Client-Lawyer Relationship)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *Model Rules of Professional Conduct, Rule 1.1*. Competent handling of a particular matter includes the use of methods and procedures meeting the standards of competent practitioners. The duty to act competently includes the duty to supervise the work of subordinate attorney and non-attorney employees or agents. *California Rules of Professional Conduct, Rule 3-110*.

Here, it doesn't seem that Able, Baker, and Charlie exercised the degree of competence necessary to protect the disclosure of confidential client information. They should have inquired about why their wireless network was free. Therefore, they seem to have lacked competence in this matter and should be subject to discipline.

Financial Arrangements Among Lawyers – Fee Splitting

A member shall not divide a fee for legal services with a lawyer who is not a partner with the member unless the client has consented in writing. *California Rules of Professional Conduct, Rule 2-200*.

Here, Able, Baker, and Charlie have essentially a fee splitting rental agreement with David. They are to receive a monthly rent of the greater of \$1100 or 10% of David's billings. The State Bar may see this as an inappropriate attempt to share legal fees with a non-associate or non-partner. In any event, it is advisable for a member to not enter into such an agreement. Thus, Able, Baker, and Charlie may have breached an ethical duty.

Organization and structure: Following the order of the calls of the question and numbering accordingly. Answering each call of the question specifically and addressing each issue within it. Making logical coherent arguments supported by the law and facts **7%**

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? **50%**

Formation of a Partnership

Limited Liability Partnership

Statement of Qualification

Partnership as Entity

De Facto Partnership

Vicarious Liability

Partner's Liability

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? **15%**

Formation of Partnership

3. Have Able, Baker, and Charlie breached any rules of professional conduct? **28%**

Responsibilities Regarding Nonlawyer Assistants (Law Firms and Associations)

Confidentiality Of Information - Acting Competently to Preserve Confidentiality

Competence (Client-Lawyer Relationship)

Financial Arrangements Among Lawyers – Fee Splitting

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