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**Part II****1. Able's Fee Agreement with Dan**

The fee agreement with Dan may be improper. It provides for a minimum fee of \$25,000, even if the firm is discharged. Agreements that are "true retainer" agreements are proper, however, agreements in which a retainer is more like a penalty are generally not proper. It appears that the \$25,000 fee appears to be a penalty which will be charged to Dan if he fires the firm. This would probably be the basis for discipline. The firm is entitled to payment for work they have completed if they are fired, however, this is on a quantum meruit basis, not a flat fee.

The mortgage lien is proper. Both the ABA and California rules allow for a lien against property to secure fees, although it is not proper for a lawyer to have any other kind of financial interest in the litigation. The fact that Dan did not sign the agreement without signing it is not significant, since the sophistication of the client can be considered. Dan is a sophisticated businessperson who is a real estate investor and a business owner. It is possible that his consent to the fee agreement is valid, although Able certainly should have pointed out the differences between this agreement and their firm's boilerplate agreement to be on the safe side.

Fee agreements must be reasonable in both the California and ABA rules. The reasonableness of a fee agreement may depend on many factors, such as the skill and learning required of the lawyer to competently handle the matter, the time and work required in the matter, the custom and practice concerning this type of legal matter, and the complexity of the litigation. In this case, it appears that a fee agreement for \$25,000 (separate from the fact that it is a "penalty" and not a true retainer agreement) may be reasonable. The divorce is acrimonious, almost every issue is contested, and Dan apparently has a lot of assets that will probably be the subject of dispute in the divorce. Additionally, because the fee agreement does not appear to be a contingent fee agreement, which would be both improper in the ABA rules and by California decisional law, the fee agreement in that respect is proper. Able may also be liable to an individual action for malpractice.

When Dan discharged the firm and demanded his files, Able had no right to hold those files hostage under the Rules. Certainly this act will subject him to discipline, if not disqualification. Able should not have demanded the fee with threats or coercion.

## 2. Baker's Conflict with Earl and Little Corp./Dan

A law firm must have appropriate checks in place to discover conflicts of interest among clients and lawyers. It appears that Able, Baker, and Charlie (ABC) law firm did have a system in place, because Baker ran the corporation's name through the firm's computerized conflict check system and nothing was flagged. However, it appears that the system didn't work too well. A conflict between an existing client and a prospective

client should have been discovered, since certainly Dan's company, of which he is the sole shareholder, should have been in the conflict system. And certainly the firm should have done a check to search for pending litigation or judgments against Little Corp. to see if there were any parties out there with judgments that would affect Dan's assets in the divorce litigation. This failure to have an appropriate conflict checking system will likely be the basis for discipline.

When there is a conflict between two clients, the lawyers must tell them about it and both clients must agree to the representation. In this case, it appears unlikely that Dan and Earl would agree. Baker and Able, the parties' lawyers, are in the same law firm and the interests of their clients are clearly very very adverse to one another. Dan probably will not want a judgment enforced against Little Corp., and Earl will want this. Additionally, the lawyers are disqualified from representation now and must withdraw if the clients don't agree, if withdrawal won't substantially affect the clients. It appears that because the representation has just begun for Earl, withdrawal would not substantially prejudice him. However, because Able has been representing Dan for some time, the divorce is complex and every issue hotly contested, it would probably be detrimental for his lawyer to withdraw now, since it would take a long time to acquaint another lawyer with the issues, he has substantial assets at stake, and he is now also being sued for a judgment against his corporation.

Furthermore, Baker's evaluation of the conflict is faulty. There certainly is a conflict between Earl and Dan. Dan is the sole shareholder of Little Corp. Although it may be technically correct that the firm's client is Dan, not the corporation, since Dan is the sole

shareholder, it is likely that Dan's and Little Corp's identities and interests are not entirely separate, especially since it appears to be merely a vehicle through which his real estate deals are made (alter ego). Baker is subject to discipline for this act. The fact that he told Grunt not to tell Able and Charlie about the conflict may constitute an act of moral turpitude, for which he could be disqualified. It appears that the sole reason he would not want to lose the work is for pecuniary gain, and also because he may have realized that neither Dan nor Earl would agree to the representation, and that is improper. Baker should have called the conflicts hotline. He also may be liable for malpractice from both Earl and Dan for breach of fiduciary duty and negligence for failure to discover the conflict, and then when discovered, for failure to notify them and for prejudicing their representation.

Baker, as the supervisor of Grunt, has a responsibility to supervise appropriately those lawyers in his charge both under the ABA and under the California general competence rule, which is interpreted to include the meaning of competence in supervision. Baker will be liable not only for Grunt's screwups, but his own failure to supervise correctly. He is therefore in trouble for Grunt keeping the secret of the conflict, and the complaint against Little Corp. Able, for the same reason, is responsible for Grunt's complaint against Dan for the \$19,000 "owing" on the improper fee agreement. This complaint was improper because the fee agreement was contrary to law; the firm was entitled only to a quantum meruit recovery, which would have been the \$6,000 they were already paid.

### 3. What Grunt Should Have Done

When lawyers bring problems or conflicts to the attention of their supervisor, they are entitled to rely on their supervisor's orders if the issue is one about which reasonable minds could disagree. However, in this case, there is virtually no way that Grunt could have thought that the conflict among clients and the fee agreement were areas of unsettled law. Thus, he is liable for discipline because of the complaints he drafted against Little Corp. and Dan, and also for malpractice for breach of fiduciary duty, since although Grunt wasn't directly representing Dan or Earl, he has an imputed fiduciary duty to all the clients.