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Institution **University of New Mexico School of Law**
Course **S12 Ethics - Slease**

Instructor **NA**

Exam Mode **Closed**

Exam ID **484**

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	5156	25712	31007
Total	5156	25712	31007

Q1 18
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88

Question 1

Smith will be charged with several rules relating to competence (1.1), diligence (1.3), communication (1.4), conflicts (1.7), fees (1.5), and trust accounts (1.15).

First, Smith has a competence problem under 1.1. Rule 1.1 requires lawyers to use the necessary skill, knowledge, thoroughness, and preparation in practicing. Lawyers are allowed to proceed with cases outside their practice area, but if they do so, they need to familiarize themselves with the applicable area of law by doing extra research and possibly consulting with a expert. Here, Smith had not done much civil work, and he failed to do the necessary research to file a civil rights case in federal court. The facts don't indicate where he normally practices, but lawyers who are not familiar with federal court procedure also need to familiarize themselves with that to satisfy 1.1. This is similar to Strickland v. WA, an ineffective assistance case, because in both cases the attorneys failed to complete the basic preparation required to proceed with the case. In addition, Smith did not even name the officers in the suit. Plaintiffs lawyers know that it's important to name as many defendants as possible to ensure that each person is responsible and the client can recover fully for their injuries, and the fact that Smith didn't do this shows that he doesn't have the knowledge or skill to go forward with a civil suit, particularly

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+ 1 bonus

something as complex as civil rights litigation. As a result of his 1.1 violations, Smith missed key deadlines, and he therefore should be sanctioned.

Smith also violated rule 1.3 because he was not diligence. Part of the reason he missed key deadlines was because he procrastinated. As a practical matter, 1.3 violations are one of the biggest complaints that clients have and can be avoided by keeping up with deadlines, checking statutes of limitations, and making sure the ball is rolling on the case. + 3

Smith also violates rule 1.15, which relates to trust accounts and client property. Rule 1.15(a) requires attorneys to keep trust account funds separate from their own in a trust account. Under 1.15(b), they must deposit advance fees in a trust account and only move it into their operating account when they've actually earned the money. Here, Smith deposited the \$5,000 retainer - which qualifies as an advance fee because he hadn't done anything on the case - into his operating account. + 3
The money was supposed to be used to hire an expert, so it should have stayed in trust until the expert was hired. In addition, it's possible that he could have violating 1.15(e), which requires an attorney to keep a disputed amount in trust, because Axe may want his money back. (Smith wouldn't know whether this is true because he violated 1.4. See below analysis). Because Smith commingled funds with his own, he is in clear violation of 1.15.

Smith also violates rule 1.5, which relates to fees, and

particularly rule 1.5(c), which relates to contingency fees. Rule 1.5(a) requires all fees to be reasonable. First, the contingency fee did not meet the requirements of 1.15©, which requires the fees to be in writing, signed by the client, the lawyer needs to state the method for determining the fee, including percentages, he needs to state expenses and fees, and he needs to tell the client about expenses that the client will have to pay regardless. Here, Smith sent a representation letter but no other paperwork. He didn't comply with any of the requirements for setting up a contingency fee at all. In addition, his refusal to communicate with Axe and his associated 1.4 violations caused him to violate 1.15© as well, because a contingency fee requires a closing letter describing the total amount recovered and the amount taken out for experts, fees, taxes, etc. Second, Smith may have violated 1.5(a). Here, the \$5,000 charge may have been unreasonable because Smith didn't actually end up doing anything on the case and because the amount of money was meant to go to an expert that was never hired. Going through the factors associated with 1.5(a), (1) the case didn't take very long, wasn't novel, and although civil rights cases take a lot of skill and expertise, Smith didn't have these things; (2) the case didn't preclude other employment because he procrastinated until the deadline; (3) \$5,000 may have been the customary fee for a retainer in this type of case; (4) the amount involved would have been high, but the results were bad; (5) there wasn't a time rush; (6) there wasn't a prior attorney-

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client relationship; (7) the lawyer was not experienced in this area of law, and (8) it was contingent. All things considered, including the fact that he didn't end up hiring an expert or returning the money, the fee was likely unreasonable. In addition, Smith clearly violated rule 1.5© because he did not send any paperwork related to the contingency fee.

Smith also violated Rule 1.4, which relates to communication. Rule 1.4 requires attorneys to keep their clients updated about the matter, discuss objectives, and inform them of any timelines or situations that could affect their substantive rights. Here, Smith violated 1.4(a)(2) because he didn't consult with Axe about his objectives. In doing so, he likely also violated rule 1.2, which deals with attorney authority and scope of representation. Axe came in wanting criminal defense, and instead Smith convinced him to proceed with a civil rights case. Instead of receiving services related to criminal defense, Axe ended up in jail. In addition, Smith violated 1.4(a)(3) because he did not keep Axe informed about the status of the matter. Smith did not tell him that the statute of limitations was about to run, he did not tell him that the suit got dismissed, he did not tell him that there wouldn't be an expert after all, and he didn't tell Axe about the dismissal even though he asked about the lawsuit on several occasions. The last fact probably also pushes Smith into a violation of 8.4©, which requires lawyers to be truthful. In addition, Smith likely violated 1.4(b), which requires attorneys to explain the situation so that clients can make an informed

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+ 1 bonus

decision. Here, Smith really didn't explain that the civil suit could take jeopardize his ability to offer services related to the criminal charge, and as a result, Axe may have ended up in jail. Smith is in clear violation of rule 1.4, and he also likely violated Rule 1.2 and Rule 8.4©.

Finally, Smith also likely violated rule 1.7, which deals with concurrent conflicts. There may a conflict between Smith and Axe under 1.7(a). Here, Smith indicated that he heard civil rights suits were "gold mines," and that leads to some suspicion that he's placing his financial interests before the interests of the client, who came to him for representation in connection with the disappearance of some relatives. Under 1.7(a)(2), which deals with indirect conflicts, there is likely a significant risk of material limitation on Smith's ability to represent Axe because his focus is on the lucrative civil suit instead of the criminal suit. Under 1.7(b), Smith could proceed with consent if he knew that he could provide competent and diligent representation to Axe. Confidences will likely not be a big issue, but Smith's loyalty may be divided. He clearly didn't provide competent representation because he dropped the ball in federal court and Axe is still in jail. Even if Smith was able to provide representation, he would still need to provide Axe with informed consent and obtain a waiver. He did not do either of these things, and Smith is therefore guilty under 1.7.

Q1 18/15

Question 2

Samuels will have to look at several rules when deciding what he can tell the prosecutor, particularly 1.6 (confidentiality), attorney client privilege, and possibly 3.4 (fairness to opposing parties).

First, Samuel will have to determine whether the information from Axe is confidential. Under 1.6(a), anything relating to representation is confidential, regardless of where it came from. In addition, under the A-C privilege, any communication from a client made in confidence for the purposes of obtaining legal services is confidential. 1.6 is broader than the A-C privilege, but here the information Axe provided is confidential under both. That includes the location of the body, the information about the child's death, and the information about the insurance information.

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Having determined that the information is confidential, Samuels needs to determine whether he can reveal it. He can only reveal it if: (1) the clients gives informed consent; (2) he is impliedly authorized to do so; or (3) it fits the exceptions under 1.6(b). The client may give consent if he gets a plea, but as of right now, Samuels can only talk to prosecutor if he finds an exception under 1.6(b).

good

1.6(b)(1), which provides that an attorney may reveal confidences to prevent death or substantial bodily injury, might work. Here, the father says that he will kill himself if he

doesn't find his daughter. He is also driven crazy with grief. The problem with using 1.6(b)(1) to disclose the location of the body is that the death or bodily harm occur immediately, not at some point in the future. The policy behind the rule is to protect communications between attorneys and clients, and if attorneys were able to reveal confidences even time someone threatened to harm themselves, parents with missing children could threaten to commit suicide all the time. The father has made these threats several times before, and it's not sure a done deal. Since 1.6(b)(1) is permissive, meaning that Samuels has the option of revealing, best practice would require him not to reveal because of the ambiguity. In addition, even if he revealed the information under 1.6(B)(1), it would still be subject to A-C privilege and would likely not come into evidence if Axe was later tried.

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good

Samuels may be able to reveal the information under 1.6(b)(6), which allows attorneys to break confidentiality if another law or court order compels it. For example, if there were a law requiring people to report the location of dead bodies, Samuels may be able to report the location of the child to the prosecutor. The problem with this exception is that Axe indicated he was willing to reveal the location, and it doesn't look like he actually told Samuel the location. Samuel, therefore, would only be reporting general information about a past crime, which is expressly prohibited by the rules. Like the above the example, the information would still be protected by A-

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C prililege and would not come in at trial.

Samuels may also be able to reveal the information based on the past or future crime fraud exceptions. Under 1.6(b)(3), an attorney can reveal information relating to crime or fraud by the client if it caused to cause serious financial injury AND if the client uses the attorney to commit the fraud and the attorney wants to remedy it. Here, there is no indication that Axe used the attorney to commit the crime. He found the paperwork in the house and forged it without Samuel's help. Since Axe said that he wants to keep the money and not worry about any charges later, Samuels may advise Samuel about the consequences of the crime, but under 1.2(d), he cannot assist him in any way or try to help him "keep the dough." Because Samuel's services weren't used, he cannot reveal the past crime under 1.6(b)(3). Although A-C privilege also has a fraud exception, it doesn't apply here because the crime is not a future crime.

Although Samuel wasn't able (or willing, because the rule says "may") to get around any of the exceptions to 1.6, he should still be careful when approaching the prosecutor. If the prosecutor offers a deal for "any and all" crimes without knowing that Axe is getting away with insurance fraud, Samuel may also be violating other rules. First, Rule 4.1, which governs truthfulness in statements to others, requires Samuels to refrain from making false statements of material facts to others. In addition, 4.1(b) requires attorneys to disclose a material fact to the opposing party when it's necessary to avoid assisting in

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Nice thought + 1 bonus

fraud. Under 4.1(b), if the attorney knows about fraud, he can't disclose, but he must disclose if he assists with the fraud. Here, since Samuel knows about the fraud, he likely can't tell the prosecutor about the fraud. However, if the prosecutor asks why he insists on "any and all" crimes being included in the plea deal, Samuels will have to keep quiet or risk lying.

In addition, if Samuel chooses not to disclose the information and just creates a plea deal for "any and all crimes," he may run into some problems with 3.5, which governs fairness to opposing parties. 3.4 requires attorneys to refrain from offering false evidence, obstructing access to evidence, and interfering with discovery. If Samuels was negotiating with the prosecutor, he would not be able to imply that the body was the only evidence related to the child's death. Essentially, misleading the prosecutor into inadvertently cutting a deal for insurance fraud when he thinks he's cutting a deal for the child's death likely violates 3.4, 4.1, and 8.4©. In addition, it impacts Samuel's professionalism because as a criminal defense attorney, he'll need to deal with prosecutors in the future. If he gets a reputation for pulling the wool over their eyes, it will impact his practice and his clients down the road.

This problem illustrates the tension between the confidentiality rules and the rules governing the duties to others and the duties to courts. There is also tension here between 1.2 and 4.1, because 1.2 provides that a client gets to

f / bonus

determine whether to plead. Here, Samuel gets to determine he can make a plea deal, but the attorney has an obligation not to be dishonest to the prosecutor under 4.1 and more generally under 8.3©.

Essentially, because Samuels just knows about the fraud, he cannot tell the prosecutor very much information. If the case goes before a judge, however, to confirm the plea deal, the rules relating to candor (3.3) will complicate the matter. The best practice, then, when a client insists on committing fraud, is to: (1) counsel the client and encourage them to do the right thing; (2) withdraw if they want to proceed with the fraud, which should be allowed under 1.16(a)(1) if it will violate the rules and 1.16(b)(7) if it wont; and (3) disclose the fraud if the case goes to a tribunal. In addition, under 1.4(a)(5), Samuel has on obligation to explain to Axe that he cannot provide representation in a way that would violate the Rules of Professional Conduct.

Q2 17/15

Question 3

Representing both Axe and Live is a terrible idea and will likely violate the rules relating to conflicts.

In order to determine whether an attorney can represent two current clients, they need to look at rule 1.7(concurrent conflicts). Under 1.7(a), an attorney cannot represent 2 current

clients unless the exceptions are met under 1.7(b). First, Samuels needs to look at whether there's a direct adversity under 1.7(a)(1) or a significant risk of material limitation under 1.7(a)(2). Here, there is the potential for direct adversity. Although the clients are not suing one another, Samuels will likely have to cross examine Live on behalf of Axe and vice versa. In addition, there is a significant risk of material limitation on Samuel's ability to represent both Live and Axe. First, there are several issues in play. It's likely that one of the defendants will have to answer for the death of the child, and Samuels cannot get one off with hanging the other out to dry. Here, he cannot do the best for both because they have different interests. They are both facing charges based on the failure to properly bury a body and notify authorities of the death, and it's possible that they won't become adverse on these charges. However, the fact that Axe is engaging in insurance fraud and attempting to swindle Live out of her insurance proceeds means that Samuel will be materially limited in representation by his responsibilities to both. In addition, limitations imposed by 1.6 are relevant to the analysis of whether there is a significant risk of material limitation. Since 2 criminal defendants are virtually certain to become adverse, the lawyer will not be able to disclose/withhold confidences without violating the rules.

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Good
+ 2 Bonus

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Next, Samuel must look at whether he can continue with representation since there's a conflict under 1.7(a)(1) and (2).

Under 1.7(b), he can continue if he reasonably believes that he can provide competent and diligent representation to both Live and Axe. To determine whether Samuel can do this, he needs to look at loyalty and confidentiality. Some of the factors to determine whether he can proceed under 1.7(b) are how divergent the interests are, whether it's 2 current or 2 former clients, how sophisticated the parties are, and how closely the matters are related. Here, their interests are vastly divergent because one of them has to answer for the crime. Although the criminal charges are exactly the same for both defendants, they will have to go into details such as who actually buried the body and who/where they found the child. In addition, their interests are divergent because Axe is planning to defraud the insurance company out of money that is supposed to go to Live. Next, the conflict consists of 2 current clients and the clients are not terribly sophisticated, and these factors place a greater strain on Samuel's ability to represent both competently and diligently. Finally, the matters are the same, if not closely related. Both clients want representation in connection with the disappearance of the same child and they each want to collect on the same insurance policy.

Samuel also has a problem under 1.7(b) because of confidences. Although it would theoretically be possible for an attorney to sit both clients down at the outset and explain that the lawyer will share all information that either party tells them, this is not possible here. Axe was an existing client, and

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he has already shared confidential information that is directly adverse to Live's position, particularly the information relating to the insurance fraud. If Samuel takes Live on as a client and does not tell her, he will violate 1.1, 1.3, and 1.4. If he takes Live on as a client and does tell her, he will violate Rule 1.6.

Because Live and Axe are virtually certain to become adverse, Samuels cannot get past 1.7(b) and cannot obtain informed consent. As a general matter, it's nearly impossible to represent two criminal defendants in a case.

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+ 1 bonus

It's also important to note that because Samuel accepted a consultation with Live, he may run into some problems under 1.18, which deals with prospective clients. Even if Samuel doesn't take Live on as a client, he has a duty to maintain confidences and avoid a conflict, which could mean avoiding a new client in the same/substantially similar matter whose interests are adverse to Live. Because Axe was an existing problem and because Live didn't reveal confidences that Samuel will need to use against Axe, this is likely not a big problem.

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Question 4

Geizer's acts

First, Geizer likely violated Rule 3.1, which provides that an attorney must have a non-frivolous good faith basis in fact and law for any claims asserted. Here, there is no good faith basis in facts because the attorney falsified evidence, particularly the affidavit which they submitted to the court. To comply with 3.1, Geizer would have needed to do the proper investigation and submit facts that actually relate to the case.

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Next, Geizer violated Rule 3.3, which requires candor to courts. Under 3.3(a)(a), a lawyer can't knowingly make a false statement of fact. Because the rule applies to briefs, Geizer violated the rule by submitting the summary judgment motion to the court when it contained false evidence and outright lies. Geizer also violated Rule 3.3(a)(3), which provides that a lawyer can't knowingly offer false evidence. This rule also places an affirmative duty on Geizer to fix the record. She would need to disclose the information to the court and attempt to remedy the effect of the fake evidence. She must comply with this duty until the resolution of the last appeal, so if the court granted summary judgment, Geizer would still need to fix the record under 3.3©.

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Geizer also violated Rule 3.4, which governs fairness to opposing parties. Under 3.4(a), Geizer owes duties to the City and cannot obstruct access to evidence or alter an item with potential evidentiary value. Here, Geizer doctored the photos and medical reports with whiteout, which is a direct violation of the rule. In addition, assuming Geizer presented the doctored

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photos and records to the City during the discovery phase, which comes before summary judgment, Geizer is also in violation of Rule 3.4(d), which deals with discovery abuse.

Geizer also violated rule 4.1, which governs truthfulness in statements to others. Over there may be some overlap between 3.3 and 4.1, both prevent a lawyer from making false statements of material fact. Here, Geizer is submitting a brief with assertions that (among other things) the witness is an impartial observer and that Freed suffered a number of injuries.

Geizer also violated Rules 8.4© and 8.4(d), which require that lawyers refrain from participating in dishonest conduct and/or conduct that prejudices the administration of justice. Here, Geizer is engaging in conduct that falls squarely within those rules. In addition, because Geizer is committing fraud on the court and the opposing party, she is also violating Rule 8.4(b), which states that it's a violation for an attorney to commit a crime that reflects on honesty, truthfulness, or fitness to practice. Fraud obviously reflects on all of those things.

+ 1 bonus

Geizer also violated Rules 5.1(a) and 5.1(b), which provide that partners and supervising attorneys have a duty to make sure that all the lawyers at the firm, particularly those they are supervising, are in compliance with the rules. Here, Geizer is instructing associates to commit fraud. At the very least, she is ratifying/ordering the conduct and has specific knowledge of what is going on, so she is therefore responsible for any rule violations of the associates under 5.3©.

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Finally, Geizer may have violated Rule 1.7, assuming Freed is a real client. Geizer initiated the suit and lied about the evidence in order to serve her own business interests, and that places her squarely within a concurrent conflict under 1.7. There is a significant risk of material limitation under 1.7(a) (2) because her representation of Freed - who presumably does want to recover for his minor accident - is limited by her own desire to exaggerate his injuries and get a greater recovery. Under 1.7(b), it's unlikely she can provide competent and diligent representation because she is committing outright fraud, which will prejudice his case altogether. Even if she could, she likely failed to get consent from Freed, which is a violation of Rule 1.7

+ 1 b.m.s

Duties of associate

The associate has several duties under the rules. First, under Rule 8.3, an attorney is required to report professional misconduct relating to themselves, other lawyers, and judges. Under this rule, the associate needs to have: (1) objective knowledge that a violation took place (ie: would a reasonable person under the circumstances believe there was a violation) and (2) reason to believe that the violation poses a substantial question as to the attorney's honesty, trustworthiness, and fitness to practice. Here, the associate has objective knowledge that the violations took place. She saw the doctored photos and

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records and learned that the witness absolutely was not in town on the day of accident. In addition, Geizer as much as admitted that she lied, so the knowledge element is met. The associate also has reason to believe the violation poses a substantial question as to the attorney's honesty, trustworthiness, and fitness to practice. An attorney who is willing to submit fake evidence to a court in order to shake down an unsuspecting, overworked defendant is about as dishonest as you can get, so the second prong under 8.3 is met. None of the exceptions relating to 1.6 or AA meetings apply, so the associate must therefore report Geizer. If she doesn't report Geizer, *In re Himmel* provides that she will be liable for misconduct as well.

Beyond just reporting Geizer, the associate may have duty to fix the record under 3.3(a)(3). Rule 3.3(a)(3) is broad and provides that if someone associated with the case such as a lawyer, client, or witness provides false evidence, a lawyer must fix the record and remedy the effect of the false evidence. Here, the associate was actively working on teh case with Geizer. Even if the associate didn't sign the summary judgment motion, an inclusive reading of the rule would require the associate to fix the record. Although fixing the record raises some confidentiality confidentiality concerns under 1.6, the duty of candor to the courts under 3.3 trumps client confidences. The best practice in this situation, in terms of both complying with the rules and the standards of professionalism would be for the associate to: (1) counsel the partner and try to convince her to

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do the right thing and (2) disclose the false evidence and try to remedy any consequences.

Finally, the associate will need to worry about being on the line for the partner's violations. Under 5.2(a), an associate attorney is responsible for conduct their supervisor order if it's a clear violation of the rules. If the issue is a close call and could go either way, the associate has a defense under 5.2(b). Here, there was a clear violation of the rules, so if the associate continues to work on this case under Geizer's orders, she will be responsible for anything and everything Geizer directs her to do, if that conduct violates the rules.

Q4 17/15

Question 5

Rules Violated

Rees violated a number of rules relating to truthfulness to others, speaking to represented parties, and sending investigators to violate the rules.

First, Rees violated rule 4.1, which governs truthfulness in statements to others. Rule 4.1 provides that an attorney cannot make a false statement of material fact to a third party or fail to disclose a fact when disclosure is necessary to avoid fraud. Under Rule 4.1, During the first call, Rees called the business and asking for information pertaining to whether they offered

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landscape services. This call was similar to Apple, where an attorney called a business to ask how many stamps they had left. There, the court ruled that the attorney did not violate Rule 4.1 because they were just asking about information pertaining to the ordinary course of business. However, during the first call Rees also promised to call right back for an estimate. In addition, Gatti applied a stricter interpretation of 4.1 when it held that a lawyer who posed as a chiropractor and made a telephone inquiry violated the rules. If Rees did not violate 4.1 under Apple when she asked about the business, she may have violated the rule when she went on to promise a call back. Although this is not a statement of material fact, the rules are meant to be read in a way that is consistent with maintaining the honesty and integrity of the professional. Therefore, Rees likely violated rule 4.1 during the first.

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bonus

Rees also may have violated Rule 4.1 when she attempted to record the conversation. Under 4.1, recording a conversation without a witness knowing is misconduct regardless of whether it violates state or federal law. Here, Rees didn't actually record the conversation, so she may be safe under the rule. If the counsel uses a broad reading and takes into account the purpose of the rules - which is to protect the public - Rees will likely still be on the line regardless of the technical malfunctions.

Rees also violated both 4.1 and 4.2 when she sent her sister to call LeeAnn. Rule 4.2 provides that if someone is represented by counsel, an attorney may not contact them without consent.

+ 4

Here, LeeAnn was represented by attorney Doe, and he did not give consent. Rees violated 4.2 during the first call because she spoke with LeeAnn directly. Even though she didn't know she was speaking to LeeAnn, she would still violate 4.2 during the first call because she was talking to an employee of LeeAnn's business and could assume based on the information from her client that she was speaking to LeeAnne. Rees also violated 4.2 during the third call, and her misconduct was worse then because she absolutely knew she was speaking to LeeAnn. *Even if* Rees called and spoke with someone other than LeeAnn, Rees would still have violated Rule 4.3, which provides that an attorney may not imply they're disinterested if they speak with an unrepresented person.

Rees also violated Rule 4.2 when she sent her sister to call LeeAnn. Under rule 4.2 and the *Blazin Wings* case, a lawyer cannot do something through an investigator that they cannot personally do. In addition, Rule 8.4(a) provides that it is professional misconduct to have a third party violate the rules on an attorney's behalf. Here, having her sister call had the same effect as if Rees called herself, namely that she violated Rules 4.1 and 4.2.

Rees also violated Rule 4.4(a), which provides that an attorney cannot use methods of obtaining evidence that violates an individual's legal rights. Here, LeeAnn was represented and had a legal right to engage in discovery and participate in the case through her attorney, Doe. Rees therefore violated 4.4(a) by tricking LeeAnn into speaking with her without the benefit of

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counsel.

Rees also violated Rule 8.4©, which provides that attorneys cannot engage in dishonesty conduct. Here, Rees lied to LeeAnn by omission, contacted a represented party and misled them, and involved a third party to violate the rules of professional conduct.

7 / bonus

Ability to Testify

___ Rees will not be able to testify about the information she learned. Rule 3.7 provides that a lawyer cannot be material fact witness and counsel in a case. There are limited exceptions, including: (1) when it relates to services or fees in the case; (2) when it relates to an uncontested issue, and (3) when it works a hardship. Here, the testimony is related to substantive issues that go the heart of the case, the matter of whether LeeAnn sold her business is disputed, and Greg can likely not prove that it works a hardship. He would need to prove that it was the eve of trial or that Rees was the only attorney available in a small town or something like that, and here the facts don't indicate any of those things. Rees will therefore not be able to testify and will likely get sanctioned for her conduct.

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Qs 12/15

Outstanding!
This was a remarkable exam.
Very well done; very thorough - very concise.
Congrats!