

MCLE ON THE WEB

(\$20 PER CREDIT HOUR)

TEST # 64

1 HOUR CREDIT

LEGAL ETHICS

To earn one hour of MCLE credit in the special category of Legal Ethics, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

The Case Of The Bigg Murder

*Investigating a managing partner's killing throws lawyer/detective
Peri Maison into an ethical tangle*

By **ELLEN R. PECK**

© 2007. All rights reserved.

My name is Periwinkle Maison. Everyone calls me Peri. I'm a lawyer. They call me the "ethics detective." Last night, at about 1 a.m., Dick Darcy awakened me from a deep sleep with a telephone call. Dick and I had become friends through service on the Hidden Valley Bar Association ethics committee. "Peri Maison," he whispered hoarsely, "can you come over to the firm right now? Barry Bigg, our managing partner, has been murdered. We need your help!"

I threw on some black clothes that would pass for casual professional. I was clueless about how to dress for a murder. On the road, I reviewed Barry Bigg's career. At 48, Bigg was legendary and was Hidden Valley's most eligible bachelor. He was the founder of Hidden Valley's biggest law firm. He had won almost every award, including county, state and national "Litigator of the Year." Guess he won't be winning any more awards...

Dick met me at the firm's lavish entrance. In the hallway, Bigg, naked from the waist up, was sprawled face down. It looked like he had been stabbed in the back five times. Since there was no pool of blood, I guessed the murder had been committed elsewhere. I also noticed a purplish ligature around his neck. Was the cause of death stabbing or strangulation?

"So why do you need me, Dick?" I queried when we got to Dick's office.

"Help me find out who is responsible and why. What if a client did it? We owe a duty of loyalty to our clients (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284-289). Can we ethically give adverse evidence against our clients? Then again, don't we owe some duties to protect the members of our firm? I suspect that other ethical issues will bubble

up like bones in the La Brea tar pits.” Dick was about to lapse into a catatonic state due to shock. He had been with Bigg since the beginning.

“O.K. I’ll nose around for you,” I promised Dick. “You need to compose yourself and get ready for tomorrow. The press is going to be all over you like runners and cappers at an airline crash (Bus. & Prof. Code, §§ 6150, et seq., Cal.Rls.Prof.Cond. (CRPC) 1-400(C)).” When Dick turned around to stare out into the darkness, I noticed a small round hole in the upholstery on the back of his chair. I thought, “A firm so careful to cultivate its image should not have a hole in its upholstery.”

Walking down the hall, I spied my cousin, a member of Hidden Valley’s finest. Detective Paul Peck was engrossed in an interview with one very pretty associate. I waved. He raised an eyebrow indicating no interruptions. I listened in.

“I’ve been working all night in the library on a motion for summary judgment for Mr. Bigg. About 9 p.m., I heard Carlos Chavez yelling at Mr. Bigg,” Ally Associate reported. “Chavez just learned that he had not been made partner. Everyone was surprised because Chavez was one of the hardest working associates at the firm. He had brought in a number of mid-sized companies as clients, all stolen by Bigg. I heard Chavez say, ‘If you don’t make me partner, I am going to complain to the State Bar and the EEOC about your discrimination against Latinos.’ Then it got quiet for a minute or two and I heard a door slam. I assumed that Chavez left the office.”

CRPC 2-400(B) prohibits unlawful discrimination on the basis of race in the management of a law practice. The State Bar cannot initiate a disciplinary proceeding unless a non-disciplinary tribunal by verdict or judgment has found unlawful discrimination and all appeals are exhausted or dismissed. Justice for Chavez might be slow. His threatening to complain to the State Bar in order to get a partnership was a violation of CRPC 5-100(A). His threat to complain to the EEOC was not, since an EEOC complaint is required in order to sue the firm civilly for discrimination (CRPC 5-100(B); COPRAC Fml.Op. No. 1984-81). Although Bigg would not be around to complain to the State Bar about Chavez, with motive and opportunity, he was a definite suspect. If he was convicted of murder, he would be subjected to automatic disbarment (Bus. & Prof. Code, §6102(c); *In re Kirschke* (1976)16 Cal.3d 902, 903-904 — murder is a crime involving moral turpitude; *In re Alkow* (1976) 64 Cal.2d 838, 840-841 — vehicular manslaughter is a crime involving moral turpitude).

I took a look around. A darkened office door opened. A hairy arm reached out, grabbed my arm, pulled me in and shut the door behind me. “Shhh!” hissed Wally Winner, a litigation lawyer who was listed as “of counsel” to the firm. “I’m in trouble and I need some advice.”

“Wally, the firm is my client. If you say anything to me about the circumstances of Bigg’s murder, I have to share it with the firm through Dick Darcy. I can’t give you personal legal advice, because it may conflict with my duties to protect the interests of the firm,” I warned him.

When a lawyer is working for an organization and encounters a constituent that may become adverse to organization, CRPC 3-600(D) requires a lawyer to explain the identity of the client (the firm) so that the constituent (Wally) won't be misled into communicating confidential information that could be used against his interests to protect the firm's interests.

Wally cleared his throat. He blurted: "I was in the office about 8 p.m. As 'of counsel,' I have a key to the office. I was furious with Bigg. For 15 years, Bigg and I have had a handshake referral fee arrangement. He gives me one-third of whatever fees he gets. Recently he landed a \$3 million fee. Then he told me I could not get a dime because the client had not consented to the referral fee in writing and that it was unethical to pay me anything (*Chambers v. Kay* (2002) 29 Cal.4th 142, 158-159 — division of attorneys' fees prohibited unless there is CRPC 2-200 compliance; LACBA Fml. Op. No. 426 (1984) — "of counsel" is not a member of the firm for fee-splitting purposes)."

Wally had contacted the client and gotten her written consent to the referral fee (*Mink v. Maccabee* (2004) 121 Cal.App.4th 835, — client written consent at any time prior to division of fees constitutes compliance with CRPC 2-200). Wally then went to Bigg's office to deliver a copy of the client's consent and demand his money.

"When I entered Bigg's office, his back was turned and he was facing the window. I told him I had the client's written consent and demanded my share of the settlement. He didn't say anything. I was so mad, I moved to face him. But he was dead!" Wally's face was white at the recollection.

"Dead at eight o'clock!" I gulped. Wally told me that Bigg was wearing a long-sleeved shirt and an undershirt; that he had seen a bullet hole in Bigg's chest, but very little blood. Wally tore out of the office, leaving Bigg's corpse facing the window, his back to the door.

"You passed the library. Did the associate see you"? I asked.

"Hmmm. I think the library lights were off when I passed by," Wally replied. "Peri, please give this original of the client's consent to Dick and request payment. I need some money to stave off a foreclosure on my home."

I told Wally to stay in the office and motioned for Detective Peck to come in and interview him. I went home to catch a few winks and got back to Dick's office later. I had stopped off to talk to Bigg's secretary, Connie Conscientious. She confirmed that Wally had referred Irma D. Sweet, the famous rap singer and movie star, to Bigg. Bigg sued Irma's former business manager, Deel Maker, for embezzlement on Irma's behalf. Maker had settled with Sweet for a cool ten million. The settlement check had come in, had been on deposit in the firm's trust account and just cleared for disbursement (CRPC 4-100(A)). Sweet had signed off on the disbursement sheet. She also told me that Ally Associate had not been assigned to work with Bigg on any summary judgment motion.

Dick was sitting with another senior partner, Shirley Stake. The telephone message slips requesting press interviews were stacked in a neat pile on Dick's desk.

"Peri, we're facing disaster," Dick exclaimed.

"The bank manager called this morning," Ms. Stake reported. "Mr. Bigg withdrew over \$2 million from our clients' trust account and transferred the funds to his personal account. Betty Bookkeeper, who has been handling our trust accounts and other books, is missing."

"Well, I have good news then," I smiled. "The \$2 million withdrawal is not a trust account violation, since that was the amount of Bigg's 'fixed' fee in the *Sweet v. Maker* settlement (See COPRAC Fml. Op. 2006-171). His withdrawal was completely consistent with CRPC 4-100(A)(2). The transfer of the fees to his personal account may be a breach of duty to the firm, but it is not otherwise unethical."

Ms. Stake shot back, "The *Sweet v. Maker* fees were three million."

"One million was disputed by Wally Winner. So Bigg did not take that. Here," I said, taking the consent form out of my purse and handing it to Dick, "is Sweet's original consent form. You can pay the additional one million to Wally."

"We can't keep fixed attorney's fees in the clients' trust account, even if our right to those funds is disputed by another lawyer. Since the disputed attorney's fees are not the client's money, continued retention would be commingling," Ms. Stake argued. "Well, the settlement check just cleared yesterday. The firm has a reasonable amount of time to disburse the funds (COPRAC Fml. Op. No. 2005-169). Since the total amount of the fees is fixed, by reason of Ms. Sweet's signature on the disbursement sheet (COPRAC Fml. Op. No. 2006-171), another alternative is to move the funds into the firm's general account until you settle up with Wally," I grinned. Ms. Stake glowered. "I'm relieved that there was no misappropriation," said Dick, who had been working on his computer, with his back turned to us. His chair now had no hole in the upholstery.

"There's another problem!" he gasped. "I have online access to all of Bigg's bank accounts. At five a.m. this morning, someone accessed Bigg's personal account and transferred the \$2 million somewhere else. I need to get the bank started on tracing the transfer. Can you check with Connie about Bigg's last appointments yesterday?"

Connie was not at her desk. The police "crime scene" tape placed on Bigg's office door had not been disturbed. I found Connie down the hall in the office where I had met with Wally the night before.

Connie was rummaging through the desk. "Shut the door," she whispered. I obeyed. She crept around the desk and held up the end of a fairly new area rug. Beneath it was the outline of a very large, dark maroon stain. It was probably Bigg's blood and this was

probably the scene of the murder. My cousin and his crime scene investigation buddies had not found it yet.

“Connie, we need to get out of here without disturbing anything. Don’t tell anyone about this unless the police come and ask you,” I warned her. We dashed to the women’s restroom. After making sure no one was there but us, I asked, “Whose office was that?” “Nobody’s.” Connie said. “Mr. Bigg routinely used it when he wanted to get away from the phones. Yesterday afternoon, when I was leaving early for a dentist appointment, he was working here. I reminded him that he had a 4:30 appointment with Irma D. Sweet before I left.”

Connie continued: “Mr. Bigg may have had enemies, but in the 15 years I have been here, he always treated me good. He and his client Irma D. Sweet were having a torrid affair during his representation of her against her former manager, Mr. Maker.

“The day before yesterday, it was over. Irma came screaming into Mr. Bigg’s office, madder than a hornet. I could hear every word through the door. She said Deel Maker had called her up and told her she was a fool. Ally Associate had been sleeping with Deel Maker’s lawyer during the entire case. Mr. Bigg never told Irma about it. Deel Maker crowed about the \$35 million he had actually stolen. Mr. Bigg was so besotted with Irma, he delegated all of the discovery to Ally. Ally destroyed all documents showing there was more than \$10 million missing. Bigg didn’t have a clue. Maker’s insurance paid the \$10 million. After Irma signed a complete release, Maker paid Ally and Maker’s lawyer five million each. Irma said, ‘I’m so mad, I could kill you. But I am going to let the lawyers and the State Bar make your life so miserable, you’ll wish you were dead.’”

In having sexual relations with Irma, Bigg violated CRPC 3-120(B)(3) because he lost his independence of judgment and was incompetent in failing to supervise Associate and discover the true amount of embezzlement. Failure to supervise Associate was also a violation of the competence rule (CRPC 3-110(A), Disc., ¶1). Associate failed to inform Irma in writing that she was having an intimate personal relationship with Maker’s lawyer, a violation of CRPC 3-320. Moreover, the destruction of evidence that would prove Maker’s true embezzlement was fraud and conduct involving moral turpitude (Bus. & Prof. C., §6106). Not to mention a gigantic breach of the duty of loyalty. If Maker’s lawyer and Associate were acting in collusion, Maker’s lawyer induced all of Associate’s misconduct (CRPC 1-120). Irma, Ally and Maker’s lawyer were all suspects.

I reported everything to Darcy, who did not seem surprised. I departed for my home office.

I looked in the rear view mirror. The same car had been following me for a while. Then I recognized the car and the driver. Everything fell into place. I tried to calmly dial my cousin’s telephone number on my cell phone.

“I can reveal confidential information,” I said to myself, “if I reasonably believe that disclosure is necessary to prevent a criminal act likely to result in the death of an individual (CRPC 3-100(B)).”

The phone kept ringing. “I don’t think it is practical to try to talk the client out of killing again or to notify the client that I was calling my cousin (CRPC 3-100(C)).

“Come on, Paul! Answer the phone!” I screamed. “I have to tell this to somebody. . .”

■ *Ellen R. Peck, a former State Bar Court judge, is a sole practitioner in Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.*

Test — Legal Ethics
1 hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

- 1.** The duty of loyalty precludes a lawyer from assuming any relationship that would prevent her from devoting her entire energies to her client's interests.
- 2.** Runners and cappers can solicit legal business in person on behalf of lawyers in a public courthouse as long as they are courteous.
- 3.** The State Bar may investigate allegations of unlawful racial discrimination in the management or operation of a law firm.
- 4.** A lawyer may not threaten to file a State Bar complaint against another lawyer to obtain an advantage in a civil dispute.
- 5.** A lawyer may never threaten to file an EEOC complaint to obtain an advantage in a civil dispute, since EEOC proceedings are administrative charges.
- 6.** A lawyer who is convicted of murder is subject to automatic disbarment.
- 7.** A lawyer's conviction of vehicular manslaughter does not necessarily involve moral turpitude.
- 8.** A lawyer who represents an organization can interview all organizational constituents without disclosing that the member represents the organization even if it becomes apparent that the organization's interests are or may become adverse to those of the constituent.
- 9.** A lawyer may not pay a referral fee to another lawyer who is not a partner of, associate of, or shareholder with the first lawyer unless the client has received full written disclosure that a referral fee will be paid and the terms of the referral fee and gives written consent.
- 10.** A lawyer who is "of counsel" to a law firm is not a partner of, associate of, or shareholder with the first lawyer for the purposes of fee-splitting.
- 11.** If two lawyers who have a fee-splitting arrangement do not obtain the client's written consent to their agreement at the outset of the matter, their arrangement is ethically prohibited.
- 12.** Settlement proceeds received or held for the benefit of a client must be deposited by a lawyer in a client's trust account.

13. Once an attorney has withdrawn a fee from a client trust account which is earned and “fixed” those funds cease to have trust account status.

14. An attorney must withdraw earned fees from a clients’ trust account immediately after the fees become “fixed.”

15. A lawyer is prohibited from continuing representation of a client with whom the member is having sexual relations if such sexual relations cause the member to perform legal services incompetently.

16. The duty to perform legal services competently does not include the duty to supervise the work of subordinate attorneys.

17. A lawyer may not represent a client in a matter in which the lawyer is having an intimate personal relationship with another party’s lawyer, unless the lawyer informs the client in writing of the relationship.

18. A lawyer may knowingly assist another lawyer in a different law firm to commit a violation of the Rules of Professional Conduct, since the other lawyer must be responsible for his own conduct.

19. A lawyer may reveal confidential information relating to the representation of a client if the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of an individual, including the lawyer.

20. Before revealing confidential information to prevent a criminal act that is likely to result in death, a lawyer must make a good faith effort to persuade the client not to commit the criminal act.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB

TEST # 64 — The Case of the Bigg Murder

1 HOUR CREDIT
LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB — CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (required)

1. True___ False___
2. True___ False___
3. True___ False___
4. True___ False___
5. True___ False___
6. True___ False___
7. True___ False___
8. True___ False___
9. True___ False___
10. True___ False___

11. True___ False___
12. True___ False___
13. True___ False___
14. True___ False___
15. True___ False___
16. True___ False___
17. True___ False___
18. True___ False___
19. True___ False___
20. True___ False___