

QUESTION 5

Attorney Anne shared a law practice with Kelly representing professional athletes. In the past Kelly represented professional athlete Player, but Kelly was disbarred several months ago. Kelly immediately resigned from the firm, and was re-hired by Anne as a litigation support clerk. Anne now represents Player.

Player is currently involved in a dispute with the professional team that employs him. Despite a valid and enforceable contract, Player refused to play because he wanted to re-negotiate his salary. The team obtained a preliminary injunction requiring Player to play under the terms of his current contract. Player sent Kelly an email asking for advice as to his next move.

Kelly referred Player to Anne who told Player to ignore the court order and to continue to refuse to play. To put pressure on the team to re-negotiate Player's contract, Anne also called the team owner, and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne and Kelly agreed that there wasn't really a basis to file this complaint.

After the team refused to re-negotiate Player's contract, Anne filed a counterclaim drafted primarily by Kelly so as to "get the team owner's attention" for "tortious interference with contractual relations."

As part of the civil lawsuit, the team owner (Owner) was deposed. Before the deposition, Kelly drafted questions for Anne to ask Owner. During the deposition, Kelly sat next to Anne and passed her notes with further suggested questions for Owner.

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

Answer according to California and ABA authorities.

QUESTION 5: SELECTED ANSWER A

The issue is whether Anne committed any ethical violations. Based on the facts, Anne has in fact committed several violations.

Hiring and Use of Kelly's Services

Under both the ABA and California rules, a lawyer may not assist another in the unauthorized practice of law. This rule extends to the hiring and employment of disbarred attorneys. Here, Anne engaged in several activities involving Kelly, who was disbarred several months ago. Thus, these actions must be examined to determine whether Anne violated any ethical obligations.

Hiring of Kelly.

A lawyer may employ a disbarred lawyer as a clerk or paralegal to assist in certain activities that do not involve the practice of law. However, the lawyer must take care to prevent the disbarred attorney from conducting activities that constitute the unauthorized practice of law. For example, a disbarred attorney can conduct research, draft documents reviewed and supervised by the lawyer, and conduct other administrative tasks such as communicating with the client concerning billing. The disbarred lawyer may not engage in counseling of the client, appear before any tribunal, or communicate with the client or adversaries concerning substantive matters that constitute the practice of law.

Here, Kelly previously shared a law practice with Anne but, after being disbarred, Kelly resigned from the firm (as required). Anne hired Kelly as a litigation support clerk. There is nothing inherently improper about Anne's hiring of Kelly. However, under the California rules, where a lawyer retains a disbarred attorney as an employee, the lawyer must notify the state bar of the employment, as well as the client. Here, there are no facts indicating that Anne notified the bar that Kelly was employed by Anne, or disclosed to Player that Anne had retained a disbarred attorney to perform clerical duties. To the contrary, Player appears to have believed that Kelly was still a lawyer because he emailed Kelly for advice regarding the preliminary injunction. Anne should not have

permitted Kelly to communicate with Player directly about substantive legal advice, although it appears that Kelly properly referred Player to Anne to answer his question. Nevertheless, Anne should have made it clear to Player that Kelly was disbarred and that all substantive communications should be directed to Anne.

Therefore, although Anne's retention of Kelly did not itself constitute an ethical violation, Anne failed to notify the bar and the client of Kelly's involvement. This constituted an ethical violation under California law.

Filing of Counterclaim Drafted by Kelly

After the team refused to renegotiate Player's contract, Anne filed a counterclaim that was drafted primarily by Kelly. As a disbarred attorney, Kelly cannot engage in activities that constitute the unauthorized practice of law.

As stated above, a lawyer may allow a disbarred attorney to draft documents so long as the attorney properly reviews, supervises, and takes ownership of the activity. Here, it appears that Kelly primarily drafted the counterclaim, but it is not clear whether Anne provided appropriate supervision and review of Kelly's work. If Kelly was the sole drafter and Anne did not review or supervise her work, which is possible given that they were formerly partners and/or co-workers, then Anne will have committed an ethical violation by allowing Kelly to engage in the unauthorized practice of law. If, however, Anne closely reviewed, edited, and supervised Kelly's work, and had the ultimate authority over the filing of the counterclaim, she will not likely have committed any ethical violations by permitting Kelly to engage in the drafting.

Based on the facts, it appears that Anne may have also committed an ethical violation if Kelly was primarily responsible for the filing.

Kelly's presence at deposition

As part of the civil lawsuit between Player and the professional team that employs him, the team owner (Owner) was deposed. Kelly assisted Anne in preparing for the deposition by preparing draft questions for Anne to ask Owner during the deposition. Here, Kelly's assistance in drafting deposition questions may have violated the ABA and

California rules depending on the level of supervision and management by Anne, similar to the drafting of the counterclaim. A lawyer may use a non-lawyer (including a disbarred lawyer) to draft documents and conduct research. However, the disbarred lawyer may not engage in activities that constitute the practice of law. Drafting deposition questions requires legal skill and judgment and would likely constitute the unauthorized practice of law unless Anne merely used Kelly's work for reference and supervised and edited her work. However, it is not clear from the facts the extent to which Anne played a part.

Kelly also attended the deposition, and sat next to Anne and passed her notes with further suggested questions for Owner. This likely constituted an ethical violation under the ABA and California rules because Kelly was participating in the deposition, even though she was not directly asking questions. Depositions are typically limited to counsel, the witness, and the court reporter; the parties also typically make their appearance on the record, and the opposing side would have understood Kelly to be second-chairing the deposition on the facts. Therefore, Kelly's appearance at - and passing of notes to Anne during - the deposition likely constituted an ethical violation. Even though she was not directly asking questions, Kelly's feeding of questions to Anne and serving as the second chair would likely be deemed to be the unauthorized practice of law.

In short, it is likely that Anne did not violate any ethical duties in using Kelly to prepare for the deposition, but her presence and assistance at the deposition likely constituted an ethical violation.

Filing of Counterclaim

A lawyer may not assert a legal claim for the purpose of harassing another party or gaining an unfair litigation advantage. Here, after the team refused to re-negotiate her client's contract, Anne filed a counterclaim with the purpose of "get[ting] the team owner's attention" for "tortious interference with contractual relations."

Accordingly, because the purpose of the claim was solely to get the team's attention, Anne likely committed a violation when she filed the counterclaim for tortious interference with contractual relations.

Advising Player to Ignore the Court Order

Here, after the team obtained a preliminary injunction requiring Player to play under the terms of his current contract, Anne told Player to ignore the court order and to continue to refuse to play. This likely constituted a violation of both the ABA and California rules.

A lawyer must not counsel a client to violate a court order. Although Anne could have counseled Player to push back on his contractual obligations if she had a good faith basis for doing so, here the court had imposed a preliminary injunction requiring Player to perform under the contract. Thus, Anne directly advised her client to violate the court order without any good faith basis for doing so.

In addition to breaching her duty to the tribunal, this likely constituted a breach of her duty of competence owed to Player because a reasonably prudent lawyer would not counsel their client to disregard a court order that is likely to subject them to contempt charges.

Accordingly, Anne likely committed an ethical violation when she advised Player to ignore the court order.

Threatening to file a discrimination complaint

In order to put pressure on the team to re-negotiate Player's contract, Anne called Owner and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne knew that there was not a legal basis to file the complaint but made the threat in order to put pressure on the team.

Under California rules, a lawyer may not threaten to report another person for disciplinary purposes in order to gain an advantage in a litigation. Where the lawyer has a good faith belief that a violation has occurred, the lawyer may advise the party that they might file a complaint. But the lawyer must not do so in order to gain a litigation advantage.

Here, Anne knew that there was no basis to file a discrimination complaint, yet made the complaint in order to put pressure on the team. This constituted a violation of the California rules because Anne lacked any good faith basis for making the complaint and did so solely in order to advance her client's position in the contractual negotiations.

QUESTION 5: SELECTED ANSWER B

Anne (A) has committed several ethical violations, as discussed below.

Disbarred Attorney/Resigning

A disbarred attorney must resign from their law firm and cannot associate with that firm as an attorney.

Here, A and K shared a law practice. Thereafter, K was disbarred and immediately resigned from the firm. Assuming that the firm name was changed to recognize that K was no longer associated with the firm then A did violate the ABA or CA RPC.

Employing Disbarred Attorney

The issue is whether it is permissible to hire a disbarred attorney to work in one's law firm. In CA, a disbarred attorney can be hired to work as a litigation support clerk or in a similar support. The disbarred attorney can only work in this limited capacity; moreover, the CA State Bar must be notified if an attorney seeks to hire a disbarred attorney. Additionally, the disbarred attorney is prohibited from interacting with clients in a manner that would reasonably lead the client to believe the disbarred attorney was an attorney. Therefore, their client contact must be minimal.

Here, A hired K to work as a litigation support clerk. A did not notify the CA bar that she had hired K, who was a disbarred attorney. A was required to notify the CA State Bar, but failed to do so. Therefore, she violated her duties under the Cal RPC.

Also, the facts indicate that K's former clients may have still been contacting her for legal advice. As a disbarred attorney, K is prohibited from providing legal advice and can only interact with clients in an administrative capacity. Because K referred Player to A after he emailed her, this conduct would likely not create separate grounds for an ethical violation.

Telling Client to Ignore Court Order

A lawyer has a duty to the court and the profession to act with integrity, in good-faith, and ethically. Failure to do is a violation of both the CA and ABA RPC.

Here, A told Player that he should ignore the court order that required him to play under the terms of his current contract. This advice by A was in direct contravention to a legitimate court order. There are no facts - such as a stay of the court's order - that indicate that Player was bound by the court order and obligated to comply with. The fact that he disagreed with what it required, or that A may have believed that his noncompliance would create leverage in the negotiation of his contract are not sufficient bases for not complying with a lawful court order. Moreover, a litigant is liable to be held in contempt for failing to comply with a preliminary injunction. Therefore, A's legal advice to Player was to ignore a court order, the consequences of which could result in her client being ordered to jail or to pay a fine until he begins to comply with the order. Consequently, A did not act with integrity because she told her client to ignore the court's order without a legitimate basis for doing so.

This conduct by A violated both the ABA and CA RPC.

A lawyer also has a duty of competence. A lawyer must act with the knowledge and skill reasonably necessary to provide competent and diligent legal services. Under the ABA, the standard for a breach of this duty is reasonableness. In CA, a lawyer breaches their duty of competence if they act intentionally, recklessly, or with gross negligence.

Based on the above facts, A acted intentionally when she told Player not to comply with the order. Because failure to comply with a lawful order of a preliminary injunction has the consequences of contempt, it seems grossly negligent by A to give her client legal advice that would result in him violating the law.

As a result, A breached her duty of competence under both the ABA and CA RPC.

Calling and Threatening Team Owner

A lawyer cannot have contact with an opposing party that the lawyer knows is represented by counsel, unless opposing counsel consents.

Here, A called Team Owner and spoke with him without his lawyer present. A likely knew that Team Owner had retained counsel since he was engaged in a contract dispute with Player. There are also no facts that show that Team Owner's counsel consented to this call without him.

A also threatened Team Owner that she would file a civil rights complaint against him. The purpose of this threat was to create leverage in her dispute with Team Owner, as A and K "agreed there wasn't really any basis for the complaint." A lawyer must not threaten to bring an administrative complaint against a lawyer or non-lawyer absent a good-faith basis for filing the complaint. It is unethical to threaten or pursue such a complaint purely for the purposes of harassing the subject of the complaint.

As a result, A violated her ethical duties under both ABA and CA RPC by talking with an opposing party who has counsel and also by threatening someone with filing an administrative complaint against solely as a means of negotiating.

Duty of Good-faith/Candor re Counter Claim

A lawyer must have a reasonable, good-faith basis for pursuing a legal claim. In other words, they must have a reasonable belief in the merits of the claim and they must be pursuing the litigation for a legitimate basis (i.e., remedying a legal right and not to harass)

Here, A filed a counter claim against Team Owner. Presumably, this counter claim was filed as part of strategy by A and K to be in a better position to negotiate Player's contract dispute. Generally, such a counter claim would be permissible and not constitute an ethics violation. However, it is not clear that A believed the claims asserted had merit. The fact that the court ruled in the PI in Team Owner's favor weighs against a finding that this counter claim had merit. Moreover, if the only purpose for bringing the claim was to "get the team owner's attention", then it seems likely that A's

motivation was not to necessarily vindicate Player's contract rights, but to impermissibly harass and create leverage in negotiating a better contract for Player. In sum, it is not clear that A had a good faith basis in prosecuting this action.

Therefore, A may have committed an ethical violation if she filed this counter claim with a good faith based as to the merits of the case. If it was done purely to harass, then A committed an ethical violation under both the ABA and CA RPC.

Duty to Supervise

A lawyer may delegate tasks to their nonlawyer employees. However, the lawyer must closely supervise the nonlawyer's work and the lawyer remains ultimately responsible for the work product.

- Drafting Complaint

Here, K was primarily responsible for drafting the complaint. For the reasons discussed above, the filing of this counter claim could be the basis for a violation of the ABA and CA RPC. If so, then A clearly failed to supervise K. If she had done so, they would have thoroughly discussed the theory of the counter claim and whether the facts support that theory. A should not have filed the counter claim if this was not satisfied. Moreover, because an attorney is ultimately responsible for the work delegated to a nonlawyer, A can argue as a defense that K was "primarily responsible."

Therefore, A may have breached her duty to supervise her nonlawyer employee.

- Drafting deposition questions

Here, A's nonlawyer employee K drafted questions for A to ask during the depositions. The facts do not indicate how closely, or whether at all, A supervised K in this process. It is likely that A provided limited oversight over K in this process since she probably reasoned that this was something that K had experience doing and could be trusted. It is not impermissible for the nonlawyer to provide a draft of deposition questions to the attorney. A likely exercised supervision by using her discretion as to which questions drafted by K she chose to ask. However, if A did not do this and simply followed K's

deposition outline without exercising her own independent judgment and, as a result, she asked impermissible questions, there could be a basis for finding that A breached her duty to supervise. Moreover, although K is a disbarred attorney, this type of conduct is not impermissible for a disbarred attorney. A litigation support clerk, under the supervision of an attorney, can draft deposition questions to help the attorney prepare for a deposition.

Therefore, it was likely permissible for A to allow her non-lawyer employee to draft the deposition questions.

K's participation in the Depo

A lawyer is liable for ethical violations of their employees. Moreover, as discussed above, a disbarred attorney is limited in the type of employment that they may engage in as it relates to working for a law firm.

Here, A and K jointly participated in the deposition of Team Owner. K is carrying on in the capacity as a licensed attorney would during a deposition - actively participating and thinking of additional questions to ask the deponent. This type of conduct would lead a reasonable person to believe that K was an attorney. However, it is not clear that a nonlawyer cannot participate and assist during a deposition.

As a result, this conduct may have violated the CA RPC because the CA state bar was not notified that a disbarred attorney was being employed by A and A allowed her to work in a capacity greater than administrative.