

QUESTION 4

Larry is an associate lawyer at the ABC Firm (ABC). Larry has been defending Jones Manufacturing, Inc. (Jones) in a suit brought by Smith Tools, Inc. (Smith) for failure to properly manufacture tools ordered by Smith. XYZ Firm (XYZ) represents Smith. Larry has prepared Jones' responses to Smith's discovery requests.

Peter is the partner supervising Larry at ABC in the Smith v. Jones case. Peter has instructed Larry to file a motion to compel discovery of documents that Smith claimed contains its trade secrets. Larry researched the matter and told Peter that he thought that the motion would be denied and may give rise to sanctions. Peter, who had more experience with trade secrets, told Larry to file the motion.

Larry also told Peter about a damaging document that Larry found in the Jones file that would be very helpful to Smith's case. Larry knows that the document has not been produced in discovery. The document falls into a class of papers that have been requested by Smith. Larry knows of no basis to refuse the production of the document. Peter told Larry to interpose hearsay, trade secrets, and overbreadth objections and not to produce the document.

Larry recently received an attractive job offer from XYZ.

1. May Larry ethically follow Peter's instructions to file the motion? Discuss.
2. What are Larry's obligations in relation to the damaging document? Discuss.
3. What ethical obligations must Larry respect with regard to XYZ's job offer? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

An attorney owes his clients the duty of loyalty, confidentiality, competence, and financial responsibility. A lawyer also owes third parties, the public, and the court the duties of fairness, dignity, and candor.

I. FOLLOWING PETER'S INSTRUCTIONS TO FILE THE MOTION

FILING THE MOTION

The issue here is whether Larry, who is an associate lawyer at ABC, must follow the supervising partner Peter's instructions to file a motion to compel discovery of documents that Smith claims contains trade secrets. The second issue is whether there is a questionable issue of law as to whether it is proper to file the motion to compel.

A lawyer owes the duty to supervise attorneys and staff that work under the lawyer and ensure they do not commit any ethical violations. A lawyer who is being supervised still must follow the ethical rules despite being told otherwise from supervising attorneys. If there is an arguable question of law/duty regarding the ethical violation, then the lawyer may rely on supervising attorneys for advice and instruction. If there is no questionable issue of law or duty, the attorney must adhere to the ethical rules of the ABA and California, even if it goes against what the partner says. If the attorney violates the rules, both the associate lawyer and the partner will have committed ethical violations. Here, Peter has instructed Larry to file a motion to compel discovery of documents that Smith believes contains trade secrets. Larry believes that the motion would be denied and may give rise to sanctions. It appears that Larry is less experienced in trade secrets than Peter, who is a partner and has likely been a practicing attorney longer

than Larry. Thus, there appears to be a questionable issue of law; therefore, Larry can rely on Peter's advice as a supervising attorney and file the motion to compel.

If Larry does further research and discovers that there are no grounds to file the motion, and therefore no questionable issue of law, then Larry must not file the motion to compel despite Peter's instructions. If Larry does further research and learns that there are no grounds to file the motion to compel, he will be violating the duty of competence to Jones. The duty of competence requires an attorney to act with the legal knowledge and skill necessary to perform for the client. In California, the duty of competence is looked at under a reckless standard; a lawyer will not violate the rules for a single issue that breaches the duty of competence. Here, if Larry knows the motion to compel should not be filed, and files it anyway because of Peter's instructions, he is violating his duty of competence to Jones. He is also violating the duty of fairness to Smith, the opposing party, and the duty of candor and dignity to the court.

Because there likely is a questionable issue of law, Larry may rely on Peter as the supervising attorney and file the motion. However, if Larry further learns that the motion to compel discovery is unwarranted and may give rise to sanctions, then he cannot rely on Peter's instructions and must not file the motion; if he does, he will have committed an ethical violation.

RESEARCHING TRADE SECRETS

There is a possibility that Larry has violated the duty of competence for failing to familiarize himself with trade secret law adequate enough to represent Jones. The duty of loyalty requires an attorney to act with the legal skill and knowledge necessary to

represent the client. If the area of law is unfamiliar to the attorney, they have a duty to familiarize themselves with the area of law in order to adequately represent the client. Though Larry is an associate, he still must familiarize himself with trade secret law in order to competently represent Jones, or must associate with a lawyer who has sufficient experience in trade secret law. Here, Peter appears to have adequate knowledge of trade secret law to assist Larry. However, Larry may need to speak with someone else at the firm or conduct further research to ensure that the trade secret law is properly followed in relation to filing the motion to compel. Under California rules, Larry likely has not violated the duty of competency since California follows a reckless standard and does not punish for a single isolated event of incompetency.

Additionally, there is a possibility that Larry will violate his duty of competency if he files the motion, knowing that sanctions are likely, and the court imposes trade secrets, thus hurting his client Jones. This may give rise to reckless behavior. As such, Larry could violate the duty of competency under both ABA and California rules for filing a motion he thinks will bring sanctions.

II. LARRY'S OBLIGATIONS IN RELATION TO DAMAGING DOCUMENTS:

PRODUCING DAMAGING DOCUMENTS

Here, the issue is whether Larry will commit an ethical violation if he fails to produce the damaging document he has discovered.

A lawyer owes a duty of fairness, dignity, and candor to the court and opposing party. Simultaneously, a lawyer owes the duty of confidentiality and loyalty to their client. A lawyer has a duty to follow court orders, including discovery request, and to not assert frivolous litigation claims or defenses. Here, Larry has found a damaging document that

has not been produced in discovery. The document is damaging to Larry's client, Jones. However, the document falls into a class of papers that have been requested by Smith. Larry has a duty to turn over the document to Smith because it has been requested by Smith. This does not violate the duty of loyalty to Jones because the duty of loyalty does not ask an attorney to withhold evidence from a proper discovery request. Additionally, while the duty of competency requires attorneys to fight zealously for their clients, it does not allow an attorney to assert false, misleading or frivolous defenses. Here, there does not seem to be a reason for Larry to claim hearsay, trade secrets, or any other defense to keep the document from being produced to Smith. Thus, Larry has a duty to turn over the document to Smith. If Larry were to assert these frivolous claims to try and avoid turning over the document, Larry will be violating his duties of candor, fairness and dignity to the court and Smith. Additionally, asserting a false claim is likely considered reckless, as it could lead to sanctions on Larry, Peter, ABC, and Jones. As such, Larry will likely be violating his duty of competence to Jones if he asserts a frivolous and false defense to try and protect the document. Therefore, Larry must turn over the document.

As explained above, if there is a questionable issue of law, an attorney may rely on a supervising partner to determine how to proceed. Here, Larry knows of no basis to refuse the production of the damaging document. Even though his supervising attorney, Peter, is ordering Larry to refuse to produce the document, Larry must go against Peter's wishes and produce the document in order to avoid committing an ethical violation.

DUTY REPORT VIOLATIONS OF OTHER LAWYERS

The issue here is whether Larry must report Peter's ethical violation to the bar.

The ABA rules require that an attorney report any ethical violations of another attorney or judge to the bar. Here Peter has committed an ethical violation by refusing to produce the document and making up frivolous and meritless defenses to avoid producing the document. Therefore, Peter has breached his duties of fairness, candor, and dignity to the court and to Smith. Thus, Larry must report Peter's actions to the bar. California does not follow the same rule, so Larry will not need to report Peter's violations to the California bar. However California has a duty to self-report violations, malpractice claims, or other ethical violations/cases that may arise. Larry may need to self-report if he commits any ethical violations under California rules.

III. XYZ'S JOB OFFER

At issue here is whether Larry must disclose his job offer from XYZ to Jones in order to avoid committing any ethical violations.

CONFLICT OF INTEREST - DUTY OF LOYALTY

A lawyer owes their current clients the duty of loyalty. A conflict of interest may give rise to breaching the duty of loyalty. A conflict of interest exists when a lawyer represents two clients in the same suit as adverse parties or when there is a significant risk that the lawyer's personal life, duties to current clients, or duties to former clients may materially limit the attorney's ability to act in the best interests of his client. If there is a conflict of interest, an attorney may still represent the client if the attorney reasonably believes he can still represent the client without breaching any duties and acting in the client's best

interests and the client is aware of the conflict and gives informed, written consent. The attorney cannot represent the adverse clients in the same case in a tribunal, and the representation cannot be prohibited by law. In California, the client's consent must be in writing.

Here, Larry is representing Jones in a suit against Smith. Larry works for ABC, who is representing Jones, and Smith is represented by the firm XYZ. Larry has received a job offer from the law firm XYZ, which is directly adverse to his client Jones in a current case. This creates a conflict of interest for Larry. Even if Larry decides not to take the job from XYZ, he still must disclose the job offer to Jones, as it gives rise to a conflict of interest. Here, a conflict of interest has occurred because there is a significant risk that Larry's personal life will impact his duty of loyalty to Jones. (Additionally, there is the potential that, should Larry accept the job with XYZ, it could impact his duty of confidentiality to Jones.) Larry may reasonably believe that he can still represent Jones competently and diligently without violating his duties of loyalty and confidentiality despite the job offer from XYZ. Even if he reasonably believes this to be the case, Larry must still disclose the conflict of interest to Jones. He must get Jones' informed, written consent before proceeding with the representation. Additionally, in California, the disclosure must be in writing and the client must confirm in writing that they are consenting to the representation. It is unlikely this conflict of interest would be prohibited by law. If Larry does not reasonably believe that he can continue representing Jones due to the job offer, even if he does not take the job offer, then he must cease representing Jones and allow another attorney at his firm to take over the case. He will likely need to be screened off from the case, and not share in a portion of fees earned

from the Jones v Smith case.

In California, an attorney must disclose, in writing, to his client any personal relationship the attorney may have with another party, witness or lawyer in the case. Here, Larry has created a personal relationship with XYZ because of the job offer. Because of this personal relationship, he must disclose, in writing, the relationship to Jones.

CONFLICT OF INTEREST - DUTIES TO FORMER CLIENTS

At issue here is what duties Larry will breach if he accepts the job offer from XYZ. If Larry leaves ABC and goes to XYZ, he will now be adverse to former client Jones and ABC. This gives rise to a conflict of interest. A lawyer owes the continuing duty of confidentiality to former clients. A lawyer's conflict may be imputed to the firm if it is not personal in interest. Here, if Larry took the job, Larry's conflict with Jones at his new firm XYZ would not be personal and would therefore be imputed to the firm since he worked significantly and substantially on the case Jones v. Smith. Larry has learned significant confidential information from Jones about the case. If Larry were to go to XYZ, then he must be screened off from the case, not share in any fees earned from the case, and XYZ must give notice to ABC. Under the ABA rules, Larry may be allowed to take the job if he is properly screened, shares no fees from the Jones v Smith case, and does not give any confidential information about Jones to XYZ or Smith; additionally, notice must be given to Jones. In California, if an attorney has worked on the same matter in a substantial way, the conflict cannot be cured from screening off the client. Therefore, in California, Larry would likely not be able to take the job because XYZ would have to stop representing Smith, since Larry's conflict would be imputed to the firm.

QUESTION 4: SELECTED ANSWER B

May Larry Ethically Follow Peter's instructions to file the motion

Associate attorney's duties with regard to following a supervising attorney's instructions

Under both the ABA Model Rules (MR) and the California Rules of Professional Conduct (RPC), an attorney that is working under the supervision of a partner or other attorney has a duty to abide by the instructions that the supervising attorney gives, while still maintaining her duty to maintain independent professional judgment and to avoid committing a clear ethical violation.

Here, it could be argued that, by filing this motion to compel, L is bringing a frivolous claim in violation of the MR and RPC.

Duty to avoid frivolous claims

Under both the MR and the RPC, an attorney must not bring a cause of action or claim that has no basis in law or fact, or where the attorney has no good faith argument for an extension of existing law or a change in existing law.

Here, Peter (P) is instructing Larry (L) to file a motion to compel discovery documents that Smith (S) claimed contain trade secrets. It could be argued that if L files this motion after doing the research and believing that the motion will be denied, filing that motion

would constitute a frivolous claim and would thus violate both the MR and the RPC.

However, on the other hand, L could argue that he only "thought" that the motion would be denied and "may give rise to sanctions," not that it absolutely would be denied. He could note that, because it wasn't absolutely clear that this would be denied, there is a basis in law for obtaining the discovery and that the claim is therefore not frivolous. He can further note that P is much more experienced with trade secrets, and he told L to file the motion. Note that the efficacy of following P's instructions in this instance is discussed in more detail below.

On balance, a court is likely to find that this is not a frivolous claim because there is some basis in law for making the request.

Duty with regard to following P's instructions

This balance between following the instructions of the supervising attorney and maintaining that independent professional judgment turns on whether the action sought by the supervising attorney is clearly an ethical violation or whether it is a reasonable question of law or fact. If the reasonable minds of attorneys would differ as to whether the action ordered by the supervising attorney would constitute a violation of an ethical duty, then the attorney must abide by the supervising attorney's instructions and will not be liable for an ethics violation. If no reasonable minds would differ as to the propriety of an action, or if it is clearly a request for a violation of an ethical rule or law, then the associate attorney must refuse to take the action.

Here, Larry (L) has been instructed to follow through with filing this motion to compel. As noted above, this may constitute a violation of the duty to avoid frivolous claims.

However, L has an argument that reasonable minds could differ as to whether this is a frivolous claim, as well as whether this request could lead to sanctions. Furthermore, he could note that, because reasonable minds could differ, in this instance, he was under a duty to follow his supervising attorney's instructions.

Conclusion

On balance, a court is likely to agree that this is an arguable question of law in which reasonable minds could differ, and L therefore did not violate any ethical duties by following P's instructions and filing the motion to compel.

Duty to report ethical violations

Under the MR, an attorney has a duty to report any ethical violations that they know another attorney has committed. The RPC does not have a corresponding duty to report ethical violations of others, but it does impose a duty on attorneys to self-report when they know that they have committed ethical violations.

Duty to report others under MR

Here, it could be argued that L violated MR's duty to report by not reporting P for ordering him to file this motion to compel, a possible frivolous claim. However, as discussed above, this is likely not a frivolous claim, and if it is, he did not know it with a certainty, so he is not under a duty to report.

Duty to self-report under RPC

Furthermore, under the RPC, it could be argued that L has a duty to self-report after filing the possibly frivolous claim. However, again, this is a close call, and likely not a

frivolous claim, so L was not under a duty to report.

As such, L has not violated his duty to report ethical violations under the MR or under CA.

Larry's obligations in relation to the damaging document

Duty of Confidentiality

Generally speaking, under both the MR and the CA, an attorney must not disclose any information relating to the representation of a client unless authorized by the express written consent (informed written consent in CA, informed consent confirmed in writing under the MR), or unless impliedly authorized in order to carry out the representation.

Here, L has discovered a document that contains information relating to the representation of Jones. However, this information has likely been legitimately requested in discovery, and one situation in which an attorney is impliedly authorized to disclose such information in order to carry out the representation is in response to a discovery request.

Therefore, L would not be violating his duty of confidentiality to Jones by turning this document over in disclosure.

Duty of Diligence

Under both the MR and CA RPC, an attorney owes a client a duty to provide reasonably diligent and prompt representation. Under the RPC, an attorney must be committed and dedicated to their client's cause. However, this duty does not require an attorney to

press for every available advantage. And as discussed below, an attorney must not violate the duty of fairness in an effort to zealously advocate for their client.

Here, L may need to balance the need to protect his client's interests against disclosing this information. He must be dedicated to protecting his client's interests. However, this duty may give way to the duty of fairness to opposing counsel, as discussed more below.

Duty of Fairness

The duty of fairness requires that an attorney act with fairness to opposing counsel during the courts of litigation. This requires that an attorney not knowingly obstruct another party's access to evidence, nor alter, conceal, or destroy evidence, or counsel or instruct another to obstruct access to evidence, or conceal, alter, or destroy evidence in the course of litigation.

Here, L has discovered a damaging document in the Jones file. He knows that the document has not been produced in discovery, but he also knows that it falls into the class of papers that have been requested by Smith, and he knows of no basis for refusing to produce the document. It could therefore be argued that, by failing to disclose this document, and by "interposing hearsay, trade secrets, and overbreadth objections" in order to not produce the document, he is intentionally and knowingly obstructing Smith's access to evidence. Although L could argue that P told him to do this and that he should trust P's judgment on this issue, it should also be noted that L himself "knows of no basis to refuse the production of the document."

A court is therefore likely to find that L has violated his duty of fairness by obstructing Smith's access to the evidence.

Duties following a supervising attorney's instructions

See rule above.

Here, claiming hearsay, trade secrets, and overbreadth with regard to this document could be a frivolous claim. L can only avoid liability for violating an ethical duty if this is a question of law in which reasonable minds would differ. If they would not, then L has a duty to avoid committing the ethical violation.

Duty to avoid frivolous claims

See rule above.

Here, L clearly "knows of no basis to refuse the production of the document." When P instructed L to "interpose hearsay, trade secrets, and overbreadth," L likely should have executed some research to determine whether this would be an adequate basis for claiming that they should not be required to turn over the document. If not, then no reasonable minds could differ as to whether or not they had an obligation to do so. Following P's instructions in this instance would constitute making a frivolous claim, and therefore violating both the MR and CA RPC.

For this reason, L must either turn over the document or refuse to offer those objections.

Duty of candor

Under both the CA RPC and MR, an attorney owes a duty of candor to the court, and must not knowingly make a false statement of law or fact to the court. If such a false statement is made and the attorney learns of it, an attorney must promptly correct such false statements.

Here, if L files these objections, or raises them in opposition of a motion to compel, then it is possible that he is violating his duty of candor to the court. This would be the case if the documents do not legitimately contain hearsay, trade secrets, or if the request for the document is not overbroad. In such a case, making those claims would be false statements of law and fact, and L will have violated his duty of candor to the court.

For this reason, L should exercise great caution in ensuring that he does not violate his duty of candor.

Duty to report

See MR and RPC rules above.

MR duty to report

Under the MR, L may have a duty to report P if L refuses to file those objections and P follows through with them, because they may constitute a violation of the duty of candor and the duty of fairness.

CA duty to self- report

Under the RPC, L will not be under a duty to report P if P files such objections, but L would be under a duty to self- report if he does so.

Larry's ethical obligations with regard to XYZ's job offer

Duty of loyalty

Under both the MR and the RPC, an attorney owes all clients, past and present, a duty of loyalty and independent professional judgment. When there is a substantial risk that the attorney's representation will be materially limited due to their own interests, or the interests of past or present clients, then a conflict of interest may exist that could hinder the attorney's ability to provide competent and diligent representation. If a conflict of interest exists, then the attorney may be in breach of their duty of loyalty.

Duties of loyalty and confidentiality of past clients

An attorney owes continuing duties of both loyalty and confidentiality to past clients, even after the representation of those clients has ceased. The duty of confidentiality to past clients means that an attorney may not reveal information relating to the representation of that client, regardless of the source, unless authorized by the express written consent of the client. The duty of loyalty to past clients means that the attorney may not participate in an action against that client, or use information relating to the representation of the client, unless under the MR, the client provides informed consent confirmed in writing, or under the CA RPC, the client provides informed written consent.

Here, L has been in the process of representing Jones in a suit between Jones and

Smith. L is now entertaining an offer to join XYZ, the firm that is currently representing Smith in the same suit against Jones. Regardless of whether L takes on the case or works on it personally, L is under an absolute duty not to use or disclose any information relating to his representation of Jones.

Conflict of Interest - When moving to new firms Past and Present Client Conflicts

Under both the MR and the RPC, where an attorney has worked on the same or substantially similar matter for one client, and then moves to a new firm that is working on the same or substantially similar matter for the adverse party of that representation, a conflict of interest exists. That conflict of interest is imputed onto the other attorneys in the firm, and the firm must not take on the case, regardless of who works on it, unless (1) the former client gives informed written consent (under CA) or informed consent confirmed in writing (under the MR), or (2) the new attorney is properly screened.

Informed Written Consent/Informed Consent Confirmed in Writing

Note while informed consent confirmed in writing only requires an attorney give full disclosure orally before the client provides written notice of consent, informed written consent requires that the disclosure of the conflict is in writing, and the client's consent is also in writing.

Screening procedure

An alternative for the firm exists where the new attorney is properly screened. This requires that the new attorney with the conflict does not work on the case in any way, does not have access to the case files nor discuss the case with any of the parties working on the case, and is not apportioned any fee for that case. Additionally, the firm

must provide notice of the decision to screen and the screening procedures put in place to the former client, and must certify compliance with those screening procedures if requested by the former client.

Here, if L wants to take the job at XYZ, he should let them know that this is a likely consequence of taking the new work. The firm will either need to inform Jones of the new conflict or implement appropriate screening procedures. However, as discussed in more detail below, this will not work under the CA RPC.

California exception for personal and substantial work

Under the CA RPC, a new lawyer's conflict is imputed into the entire firm, and the entire firm may not take on or continue a case, even with appropriate screening procedures or informed written consent, if the new and conflicted attorney worked substantially and personally on the same matter for the other client.

Here, it could be argued that L worked personally and substantially on the Jones v. Smith case. Although just an associate, "he has been defendant Jones" and prepared Jones's responses to Smith's discovery requests. He has consulted significantly with P, the partner, on issues involving sensitive materials.

It is therefore likely that L's conflict will be imputed to XYZ, and he should inform XYZ that this could cause problems with their representation. The best course of action would be to seek a delay in hiring until after the conclusion of the case.

Duty of confidentiality

See rule above. The duty of confidentiality applies to past clients as well as present ones.

Therefore, L will have a continuing duty to maintain confidentiality to Jones, even if he is able to take on the new work at XYZ.