

QUESTION 1

Mary is a lawyer and represents Peg in a lawsuit alleging sexual harassment against Doug. Doug's lawyer is Len and the case is set for trial in Superior Court. Mary and Len dated and were intimate in the 1990s while in law school. They remain good friends, but are no longer romantically involved. Mary has not told Peg anything about her relationship, past or present, with Len.

Mary has determined that Doug will have to pay Peg damages after trial and that the primary issue in the litigation is the amount of damages. Mary estimates that, at trial, a court could award as little as \$50,000 or as much as \$150,000.

Doug testified in a deposition a month ago that he had never been unfaithful to his wife. Peg confided to Mary that she has solid evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. Peg instructed Mary to use the information about the affair as leverage in settlement discussions to get the maximum amount in damages.

Mary agrees that, if she uses the fact of the affair in her negotiations with Len, the case will likely settle for a larger amount to Peg than if she doesn't mention the affair. Mary, however, strongly dislikes the idea of using that information. She is especially uncomfortable using this tactic in a case involving her good friend, Len.

1. What ethical violations, if any, has Mary committed by not telling Peg about her past and present relationship with Len? Discuss.
2. Should Mary use the fact of Doug's affair in settlement negotiations? Discuss.
3. If Peg persists, can Mary ethically withdraw from representing Peg? Discuss.

Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

I. Mary's Past and Present Relationship with Len

Duty of Loyalty

Under both the ABA rules and the California rules, an attorney has a duty of loyalty to her client. This duty includes an obligation to avoid conflicts of interest between current clients, current and former clients, clients and third parties, clients and the attorney herself, and organizational conflicts when representing an entity such as a corporation. There are two duties relevant to Mary's past relationship with opposing counsel. First, an attorney cannot represent a client when one of her personal interests materially conflicts with an interest of the client in a way that could impair the attorney's representation of the client. However, if the attorney reasonably believes -- that is, subjectively believes in an objectively reasonable way -- that she can diligently and competently represent the interests of the client, she can still represent the client as long as she discloses the issue and receives informed consent. Under the ABA, informed consent may be oral and confirmed in writing, while under the California rules there must be written informed consent. Second, there is a specific duty with respect to relationships involving opposing counsel. If the attorney has a close personal relationship with opposing counsel such as a familial relationship or close friendship, the attorney must disclose that potential conflict to the client. As with the general rule, in order to press forward with the representation, the attorney must reasonably believe that she can adequately represent the interests of the client. Under the ABA, the attorney must receive informed consent, while under the California rules the attorney

must provide the client with a written disclosure of her relationship to opposing counsel. Here, Mary previously dated Len and was intimate with him during law school. She also considers him a "good friend." Under both the ABA and California rules, this arguably qualifies as a close personal relationship with opposing counsel akin to a familiar relationship or close friendship. As a result, out of an abundance of caution in attempting to comply with the "close relationship with opposing counsel" rule, Mary should provide Peg with written disclosure of this potential conflict under the California rules and receive informed consent under the ABA rules. Further, even if her former relationship with Len does not constitute a close relationship with opposing counsel (say, because it is less close than a best friend or parent), Mary must still receive informed consent under the broader and more general personal interest rule. Under the broader rule, she must receive informed consent confirmed in writing for the ABA rules, or informed written consent for the California rules.

Another problem worth mentioning is that Mary may not be permitted to represent Peg in this matter whatsoever, as it appears she may not be able to competently and diligently represent Peg. The problem states that Mary is deeply uncomfortable with mentioning Doug's affair even though this maneuver would likely lead to a better settlement award for her client. Specifically, it says she doesn't want to use this tactic against her good friend, Len. This suggests that even if Mary does believe that she can adequately represent Peg, that belief may be objectively unreasonable. Unless she is able to overcome her personal misgivings and zealously represent Peg, then Mary should withdraw from the representation. Further, given that litigation is ongoing, Mary would need to seek approval from the court in order to withdraw from the

representation.

II. Using Doug's Affair In Settlement Negotiations

Candor to the Tribunal

Under both the ABA rules and the California rules, an attorney owes a duty of candor to the tribunal. This means that an attorney may not knowingly offer false evidence and must correct any material misstatements or misrepresentations on the record. While an attorney may offer evidence to the tribunal if they worry, but are not certain, that the evidence may be false, in general an attorney should strive to represent their clients with candor and honesty to the court. That said, an attorney must balance this obligation against a duty to zealously represent the interests of their client within the ethical bounds of the law.

Here, it is possible that Peg's claim about the affair is true. It does not appear that Mary has investigated the truth of this claim. This means that Mary does not know for certain that the evidence is false, and she likely can offer the evidence to the tribunal without violating her duty of candor to the tribunal. That said, some courts interpret the duty of candor to the tribunal to include properly investigating the factual basis for any assertions. If so, Mary would need to look into the validity of Peg's assertion before bringing it up in court in order to comply with her duty of candor to the tribunal.

Duty of Fairness

Under both the ABA rules and the California rules, an attorney owes a duty of fairness to opposing counsel. This means that the attorney may not suppress evidence she is required to disclose, and ought not to lie to opposing counsel or make dishonest

representations to opposing counsel with the goal of misleading opposing counsel.

Here, as mentioned, there is no reason to think that Peg's discussion of Doug's affair is false. As a result, it would not violate the duty of fairness to bring up the affair during settlement negotiations. Thus, discussing the affair during settlement negotiations would not violate the duty of fairness to opposing counsel (unless there is reason to think Peg is lying, or Mary investigates the claim and discovers it is false).

Duty of Honesty

Under both the ABA rules and the California rules, an attorney owes a general duty of honesty to those they interact with in their role as an attorney. This means the attorney must not make material misrepresentations or state falsehoods within the scope of their role as an attorney.

Here, Mary needs to investigate the foundation of Peg's claim that Doug has had an affair. Once she investigates the claim and determines whether it is certainly false or may be true, she can rely on the evidence during settlement negotiations without violating the duty of honesty. But if it turns out that Doug is not having an affair, then Mary could not rely on this assertion without violating the duty of honesty.

Duty to Avoid Frivolous Claims

Under the ABA rules, an attorney ought not press a claim or argument unless there is a good faith basis in the law (or a good faith argument for extending or changing the law) in support of the claim or argument. In contrast, under the California rules an attorney must not press a claim when she lacks probable cause for the claim and has a purpose of harassment for pressing the claim. Part of this duty is investigating claims to ensure

that they have a proper foundation under the law.

As mentioned above, Mary needs to investigate the foundation of Peg's claim about Doug having an affair. If it turns out that the alleged affair is not real and Peg's allegation is false, then pressing this claim in order to increase a potential settlement award would be a frivolous claim or an argument without a good faith basis. That would violate the ABA rules. It may also violate the California rules, if the court believes that Mary lacks probable cause (given that she did not investigate the claim or she did or that she did and it turned out to be false or highly unlikely) and that she had a purpose of harassing opposing counsel in order to raise the settlement award. Thus, Mary needs to investigate the claim and ensure she has a good faith basis and probable cause to support bringing up the alleged affair during settlement negotiations.

Duty of Competence

Under both the ABA rules and California rules, all attorneys have a duty of competence to their clients. This includes having the relevant skills, knowledge, and preparation to adequately represent the client. In California, this also includes having the relevant mental and physical capacity, and an attorney must not recklessly, intentionally, grossly negligent, or repeatedly violate this duty.

Here, the idea that Mary must investigate Peg's claims goes in two directions. If she fails to investigate the claim, then she is not competently representing the client under the ABA rules and she is arguably reckless or grossly negligent with regard to her duty to investigate, and is thereby failing to adequately represent Peg under the California rules as well. On the other hand, if she investigates the claim and it does have a factual foundation in the truth, then Mary would arguably be incompetent if she did not raise

this claim during settlement negotiations as she would be failing to zealously represent the interests of her client within the bounds of the ethical rules. Thus, Mary must investigate Peg's claim and if it is true, she must press the claim in order to avoid violating the duty of competence.

Scope of Representation

Under both the ABA rules and California rules, an attorney must follow the bounds of the scope of representation. Some issues are solely up to the discretion of the client, including whether to accept a settlement offer, whether to testify, and whether to waive a jury trial right. The client also has full control over the goals and ends of the representation. However, the attorney has control over the means of representation, subject to a duty to consult with the client and communicate with the client about the means of the representation.

Here, whether to bring up the affair during settlement negotiations is arguably a "scope of representation" issue that falls within the means of representation, much like what questions to ask during a deposition and what witnesses to call during a case. However, Mary must consult with Peg and must communicate with Peg about this strategic issue. Thus, in order to comply with her ethical duties, Mary must discuss and consult with Peg regarding this issue.

Duty of Communication

Under both the ABA rules and the California rules, an attorney has a duty to communicate with the client. This includes keeping the client apprised of any

developments in the case, letting them know about written settlement offers or other major settlement offers, and generally consulting with the client and keeping in regular contact.

Here, Mary must communicate with Peg regarding whether to disclose the affair during settlement negotiations, as this is a strategy that she must discuss with Peg and consult with Peg given her duty of communication.

Duty Involving Leverage in a Civil Case

Under the California rules, an attorney must not threaten criminal or disciplinary action in order to obtain an advantage or leverage in a civil case. Here, if it is possible that Doug's affair could subject him to disciplinary or criminal risk, then Mary must not leverage that risk in order to obtain a larger settlement award for Peg. On the other hand, if the affair would not subject Doug to criminal or disciplinary risk, then Mary must leverage these facts in order to fulfill her duty to zealously represent her client.

Duty to "Tattle" On Opposing Counsel

Under the ABA rules, if an attorney has actual knowledge that another attorney has violated the ethical rules or has taken some action that materially reflects poorly on their fitness as an attorney, they must disclose these facts to the state bar association or other ethical authority. In contrast, the California rules do not have a similar provision except that an attorney must disclose certain issues related to their own ethical standing. For example, an attorney must disclose if three or more malpractice suits have been filed against them within one year, or if they have been convicted of fraud or a felony involving moral turpitude.

Here, Mary has not violated the California rule, but she may violate the ABA rule if she thinks that Len allowed his client to knowingly lie during his deposition testimony when he said that he had never been unfaithful to his wife. If Mary knows that Len was aware of Doug's affair, then she also knows that Len violated his duty of candor to the tribunal and his duty of fairness and honesty, and she must disclose that fact to comply with her duty to "snitch" or "tattle" on other attorneys.

III. Withdrawal From Representation

Mandatory Withdrawal

Under the ABA and California rules, an attorney must withdraw from representation in a few circumstances. First, an attorney must withdraw from representation if their health impairs their ability to represent the client. Under the California rules, that impairment must make the representation "unreasonably difficult," while under the ABA rules it must materially impair the attorney's ability to represent the client. Second, an attorney must withdraw from representation if the representation would necessarily lead to or facilitate a crime or fraud. Third, an attorney must withdraw from representation if the representation would violate an ethical rule (in California) or would violate an ethical rule, a civil law, or a criminal law (under the ABA). Fourth, an attorney must withdraw if they are fired by the client. Finally, an attorney must withdraw if the client is asking them to press a frivolous claim, under the definitions provided above (e.g., probable cause and harassment in California, or lack of good faith under the ABA).

Here, none of the mandatory bases for withdrawal have arisen as of yet unless Mary cannot competently represent Peg given her prior relationship with Len, in which case she must withdraw from representation. Additionally, if Mary investigates Peg's claim

about the affair and it turns out to be false, but Peg insists on raising it during settlement negotiations, then Mary must withdraw if continuing would lead to fraud. She must also withdraw if continuing would violate the duty to avoid frivolous claims, or any other ethical duty (under California rules) or ethical duty, criminal law, or civil law (under the ABA rules). If any of those scenarios occur, then Mary must withdraw from representation.

Permissive Withdrawal

Additionally, there are circumstances where an attorney may withdraw from representation permissively. These include when the client materially violates the retainer agreement and the attorney provides a warning that they will withdraw if the client does not cease their violation, lesser forms of crime or fraud such as if the client is seeking to commit a crime or fraud in the future or if the client is trying to force the attorney to engage in a crime or fraud, if the attorney's health impairs the representation to a lesser degree, if there is good cause shown, if representing the client has become unreasonably difficult (including under the ABA if the client and attorney have a fundamental disagreement), and for a variety of other reasons. Under the ABA, an attorney can withdraw for financial reasons or for any reason that won't materially harm the client, and under the California rules an attorney can withdraw if they have a serious disagreement with co-counsel such that withdrawing is in the best interest of the client, or if the client wants to press an unwarranted claim or argument.

Here, even if the mandatory withdrawal criteria outlined above are not met, Mary could withdraw from representation if she feels too morally conflicted about raising the affair during settlement negotiations, assuming this is a fundamental disagreement (under the

ABA) or means that the client has made representation unreasonably difficult (California rules). She can also withdraw if she investigates the affair claim and believes it does not have a strong basis in the truth and may therefore represent a crime or fraud. If she is so overwhelmed with her own guilt, she might also be able to withdraw permissively if she feels her personal mental health is so affected that her ability to represent Peg has been impaired. She also might be able to withdraw from representation if the court believes that a disagreement on this point with the client represents "good cause." And under the ABA, if she can show that withdrawal would not harm Peg, then she can also permissively withdraw on that basis alone.

Steps After Withdrawal

After withdrawing from representation, an attorney must take four steps under both the ABA rules and the California rules. First, an attorney must return any unearned fees, although in California they may retain any true retainer fees or referral fees. Second, an attorney must return all of the client's personal property and papers, which they must have carefully safeguarded in the meantime. Third, an attorney must mitigate any potential harm to the client. Finally, an attorney must give the client proper notice and a reasonable amount of time to find new counsel.

Further, during ongoing litigation, an attorney must seek leave from the court before withdrawing. If the court denies the request, then the attorney must continue to zealously represent the client.

Here, if Mary does withdraw from representation, then she must comply with these requirements.

QUESTION 1: SELECTED ANSWER B

1. Mary and Len's Relationship

Duty of loyalty--conflict of interest in accordance with both the ABA and CA rules

A lawyer owes their client an undivided duty of loyalty. This includes the duty to avoid conflicts of interest. A conflict of interest can be actual or potential, and arises when the representation is directly adverse to the interest of another client whom the lawyer represents in the same or substantially similar matter, or when there is a significant risk that the representation will be materially limited by the lawyer's own personal interests, the interests of a former client, or a third person.

Significant risk of material limitation--Mary and Len's Past relationship

Here, the case does not involve a situation where Mary is representing one who has an interest directly adverse to another client of hers, but rather there is a situation where there could be a significant risk of material limitation in Mary's ability to represent Peg due to Mary's own personal interests with having previously been romantically involved with Len.

Because Mary could be inhibited by her prior romance with Len by not representing Peg with the utmost loyalty, and because it could potentially cause issues with Mary's ability to effectively represent Peg, Mary had a duty to disclose the conflict to Peg.

Significant risk of material limitation--Mary and Len's current relationship

In addition to the prior romance, there is also likely an actual conflict of interest here and

thus likely an actual significant risk of material limitation in her ability to represent Peg as the facts tell us that despite not being romantically involved anymore, Mary and Len remain "good friends". The facts further evidence this later on by Mary's discomfort in using the facts and tactic that Peg is suggesting (to be discussed further below) due to the case involving her "good friend Len."

Once again, because Mary's relationship with Len is likely impacting her ability to zealously represent Peg and causes her to not have her sole focus and attention on loyally and faithfully representing Peg, Mary had a duty to disclose the conflict to Peg.

Waiving the conflict--ABA rules and CA rules

Even though a conflict persists, a lawyer still may be able to represent the client if they take the proper measures in addressing the conflict and waiving it. The lawyer may only continue the representation if: (1) they reasonably believe they can diligently and competently represent both clients; (2) the representation is not prohibited by law; (3) the claims do not involve a direct assertion by one client against the other; and (4) the client gives informed consent, confirmed in writing. The California rules are the same, except that it requires both the disclosure and the consent to be in writing, as opposed to just 'confirmed' in writing like the ABA.

Here, Mary may argue that she was able to diligently represent both clients since she was still assessing the case, determining that Doug would have to pay Peg damages after trial, and that the primary issue was the amount to be given, and was making estimates etc. Although, there is also a counter to this in the sense that Mary was considering how Len would feel when considering tactics to use in settlement negotiations (to be discussed more below.)

Although there are no facts that the representation is prohibited by law, regardless, Mary had a duty to disclose the actual and potential conflicts to Peg and to get her informed consent, confirmed in writing (ABA) or to disclose in writing and get Peg's consent in writing. Mary failed to do this.

Conclusion

Mary violated the ABA rules and committed an ethical violation when she did not disclose her past and current relationship with Len and did not get Peg's informed consent, confirmed in writing, to continue the representation.

Mary violated the CA rules for not disclosing the same issues, as well as not disclosing in writing and getting Peg's consent in writing.

California duty to disclose despite no significant risk of material limitation

California has a specific rule that despite when there is no significant risk of material limitation in the representation, the lawyer still must disclose, in writing, to the client, when they or someone at their firm, has a personal, professional, financial or business relationship with another party or witness, or the lawyer of the other party or witness is a family member, spouse, or lives with the lawyer, or the lawyer has an intimate or sexual relationship with the other party or lawyer.

Here, even if Mary wanted to argue that her past or current relationship with Len did not raise any significant risk of material limitation in her representation of Peg, under the CA rules, because Mary has a past and current relationship with Len, this constitutes a 'personal relationship' with the other party, specifically the other party's lawyer, and in addition she had a prior intimate relationship with him.

Thus, regardless of what Mary felt about the risk, she still had a duty to disclose her relationship with Len, in writing, to Peg.

Conclusion

Because Mary did not disclose her relationship with Len in writing to Peg, she committed an ethical violation of the CA rules.

2. Mary's use or non-use of the facts of Doug's affair in settlement negotiations

Duty of care/diligence in accordance with both ABA and CA rules

A lawyer has a duty to pursue a case with the care and diligence that one would bring to their own personal matters. This includes the duty to: (1) research facts; (2) investigate matters; and (3) put in the time needed to present an adequate representation of their client's case.

Here, Mary would have a duty to investigate the facts of the evidence that Peg is presenting to her. Mary should not ignore what Peg is saying to her, as discussed below. Mary has a duty to pursue all legally available avenues in the representation, and because Mary has a duty not to present dishonest or frivolous or lies to opposing parties, Mary should look into what Peg is disclosing to her in order to make sure she is doing her due diligence.

Mary agrees that the fact of the affair would help Peg in settlement negotiations, and further, as discussed below, Doug alleged under oath that he has not been unfaithful to his wife which goes directly to the claim of his sexual harassment of Peg because that could be construed as the same thing as him saying he did not sexually harass Peg.

Mary had a duty to research the facts that Peg is presenting to her and investigate it, and take the time needed to adequately prepare the case for Peg.

Conclusion

Mary should take the care and diligence to pursue the use of the facts of the settlement negotiations, and as long as she has no reason to believe it is something made up by Peg in order to just humiliate and embarrass Doug (something which would be in violation of the professional rules), Mary should use the facts in settlement negotiations.

Scope of representation

A lawyer has a duty to pursue all legally available avenues in representing the client and defending their case. The client has authority to decide whether or not to accept a settlement, whether or not to take a plea deal in a case, etc. The client controls the objectives of the case, while the lawyer decides the tactics and the strategic moves of the case.

Here, Peg is telling Mary that she has 'solid' evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. The facts tell us that this is a claim about sexual harassment by Peg against Doug, and in addition, the facts tell us that Doug testified in a deposition (thus under oath) that he has never been unfaithful to his wife. This statement by Doug goes directly to Peg's allegation because if Doug had never been unfaithful, that means he would have never sexually harassed Peg. Thus, the fact regarding whether or not Doug has been unfaithful to his wife is relevant. Mary has determined that Doug is going to owe Peg damages, but it is just a matter of how much, and agrees that using the facts of the affair in her negotiations with Len will likely result in a larger amount, which as the

lawyer for Peg, should be what Mary wants to pursue.

Further, because the facts are actually relevant to the litigation, it would not be unethical for Mary to use the facts. Doug put it at issue by stating under oath he has not been unfaithful to his wife. Although Mary has the authority to control the tactics for litigation, Peg as the client determines the objectives and the theory of the case and Mary should be pursuing all legally available matters, and it is not a violation to use the facts.

Conclusion

Mary should use the facts (subject to the above conclusion that she reasonably believes there is some merit to them) since it is a legally available avenue that would help defend her client's case and provide her with the best results in a way that does not violate the rules.

3. Mary's ability to withdraw if Peg persists

Withdrawal

One only needs to mandatorily withdraw from representation, in accordance with both ABA and CA rules, if the representation will result in a violation of the ABA or CA rules or statute, if the lawyer's physical or mental ability will impair the representation, or if the lawyer is discharged. In addition, in CA, a lawyer must withdraw if they know the client does not have probable cause for their case and it is solely malicious.

Here, none of those facts are present so we must look to permissive withdrawal.

Permissive withdrawal

Under the ABA, a lawyer may withdraw if they reasonably believe the representation will result in an ethical violation, if the client has already used their services to commit a

crime or fraud, if the client has failed to substantially fulfill an obligation to the lawyer, such as pay their fee, if the client is insisting on pursuing a matter in a way the lawyer finds morally repugnant or fundamentally disagrees with, or if they can do so without material adverse effect on the client, or any other good cause.

California is similar except it does not allow withdrawal solely because the lawyer fundamentally disagrees with the way the client wants to pursue the case, or even if they can do so without causing material adverse effect on the client. However, it does allow the lawyer to withdraw for good cause.

Here, Mary agrees the facts would help the settlement negotiations, but she strongly dislikes the idea of using that information, and especially feels uncomfortable because of her relationship with Len. "Strongly disliking" is likely not sufficient under the ABA rules as it has to be a fundamental disagreement or something she finds morally repugnant, and it is certainly not sufficient for withdrawal under CA rules. Further, the fact that she is especially uncomfortable because of her friendship with Len is not grounds under either rule.

There are not a lot of facts about whether Mary can withdraw without causing Peg material adverse effect, which is only allowed under ABA, however, it seems they are already well into litigation and have already taken depositions and Mary has already determined what is needed for the case, it would likely be difficult for Peg to find effective new and efficient representation.

Further there is ultimately no good cause to withdraw at all.

Conclusion

Mary likely cannot ethically withdraw under either ABA or CA rules as there is no good cause to withdraw under either rule, and Mary disliking a course of representation is not sufficient under the ABA rules.