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The professional ethical rules govern by the American Bar Association ("ABA") and California ("CA") are very similar, especially after the adoption/revision of the CA rules in November 2018. Where there is a distinction between the two, it will be made by stating ABA or CA.

**1. May Larry ("L") ethically follow Peter's ("P") instructions to file the motion?**

**Diligence**

CA: A lawyer shall not recklessly, intentionally, with gross negligence, or repeatedly fail to provide diligent representation

ABA: A lawyer shall provide diligent representation.

It could be argued that by filing a claim that may give rise to sanctions, that L has gone too far past providing diligent representation. If L files the discovery motion, knowing that the document is really concerning trade secrets, he will be stepping out line likely intentionally and perhaps negligently.

If L files the discovery motion, he would be violating his duty of diligence.

**Meritorious Claims**

CA: A lawyer shall not file a claim that lacks probable cause

ABA: A lawyer shall not file a claim that lacks basis in law or is frivolous

P asked L to file the discovery motion, after L did some research he genuinely thought it would be rise to sanctions, because the document in question is a trade secret. His motion though perhaps not lacking in probable cause, knowing the trade secret would be helpful in knowing how Smith manufactured the tools, it would frivolous as L knows such documents are protected from privilege and the motion would be denied.

If L files the discovery motion, he may be filing a meritorious claim that lacks probable cause and is frivolous, due to the document being protected.

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### **Responsibilities of a managerial partner or supervising lawyer**

A managing partner or supervising lawyer shall have the responsibilities to ensure all lawyers in the firm as well as nonlegal staff follow the professional rules. Should the managing partner or supervising lawyer find out that rules are not followed, managing partner or supervising lawyer shall not ratify that conduct and shall take remedial measures on violations of the professional rules.

P asked L to file the discovery motion even after L told P the motion would likely be denied and raise sanctions. It is P's job, as the supervising partner over L at ABC firm to ensure subordinate lawyers are following the professional rules. If it is found that filing the motion is a violation of the rules and P demanded that L do it anyway, P will be violating his ethical duties for ratifying and directing L's actions.

P would likely be violating his ethical duties for L's ethical violations.

### **Responsibilities of a subordinate lawyer**

A subordinate lawyer shall follow the directions of a supervising lawyer, however, not when the directions would violate any of the professional rules.

Even though a superior told L to file the motion, if doing so is in violation of the professional rules, L shall not file the motion. L's duty to the professional rules come before his loyalty to P the supervising partner at ABC. If L files the motion and it is found doing so is a violation of the ethical rules, then L would be liable for violating the rules even though he was directed too by a superior.

L would likely be violating his ethical duties.

## **2. What are L's obligation in relation to the damaging document?**

### **Client as an Organization**

A lawyer representing a client, owes his/her duties to the organization. If a lawyer reasonably believes that there is information or conduct that harm the organization, the lawyer must report the information to the organizations higher authorities. If the higher authorities fail to take action, under CA, lawyer may urge compliance, but has no obligation to reveal the information/conduct any further. Whereas under ABA, if the higher authorities fail to take action, a lawyer shall

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reveal the information/conduct even to outside sources so as to protect the client, the organization.

L found the damaging document and it would be his responsibility to report to a higher authority in Jones regarding the information. If Jones takes no action, then L really has no choice under CA, but to urge compliance. Under ABA, L could take the action further by revealing the information to outside sources if he reasonably believes it would protect Jones.

L has a duty to the organization to report that information learned, not doing so would be a violation of his ethical duties.

### **Fairness to 3rd Parties**

A lawyer has a duty to 3rd parties, including opposing counsel.

L's discovery of the damaging document would have to be released in discovery to XYZ firm, if there is genuinely no way to claim privilege, trade secrets, over breadth, etc. Claiming those other contentions not to produce the damaging document would be unfair to opposing counsel.

If L does not produce the damaging document to XYZ firm and misrepresents or lies on why, L will violate his ethical duties.

### **3. What ethical obligations must Larry respect with regard to XYZ's job offer?**

#### **Conflict of interest**

A lawyer shall not represent a client whose interest would be directly adverse to that another client, or if representation would be materially limiting on lawyers obligation to former clients, current clients, third parties, or lawyers own interest, unless all clients give informed written consent. CA additionally requires written disclosures if lawyer knows a lawyer in the firm who has a financial, business, professional, personal, or legal relationship with a member or witness to the party. A lawyer may still represent even when there is a conflict of interest where clients have given written informed consent and lawyer believes can still represent with (1) competence and diligence; (2) not prohibited under law; and (3) the clients are not asserting a claim against each other.

If L accepted the offer from XYZ there would a conflict of interest as L personally and substantially participated in representing Jones while at ABC firm and XYZ firm is representing

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Smith. Both Smith and Jones have a claim against each other. L could accept the job offer from XYZ, but he could not represent Smith, even with Jones' informed written consent as both parties have a claim against each other.

L would violate his ethical duties if he accepted XYZ's offer and represented Smith.

### **Former Clients**

A lawyer shall not represent a client whose claim is materially adverse to that of a former client, unless the former gives informed written consent (ABA, informed consent). Also, a lawyer shall not use any information of a former client to the former clients disadvantage.

Smith has a claim directly against Jones for failure to properly manufacture tools ordered by Smith. What L learned from representing Jones would be materially adverse to Jones, his former client.

L would violate his ethical duties if he accepted XYZ's offer and represented Smith.

### **Imputation to Firm**

A lawyer associated in a firm, shall not represent a client where any lawyer working in a solo practice would be prohibited (CA)/disqualified (ABA) from representing. Unless, the prohibition/disqualification is based on a personal interest of the lawyer. If the prohibition/disqualification is based on a former duty to a client, then shall (1) timely screened prohibited/disqualified lawyer and that lawyer shall not be given any part of the legal fees earned; (2) promptly notify former client. Additionally CA requires that the prohibited lawyer did not substantially and personally participate in the matter. And additionally, ABA requires that a certificate of compliance be given to the former client by the disqualified lawyer and a partner of the firm at regular intervals if requested by the former client.

If L accepted XYZ offer, XYZ would be imputed to L's substantial and personal participation in the matter of representing Jones. XYZ would have to timely screen L and L could not be given any legal fee earned from Smith. XYZ would also have to inform Smith.

L would violate his ethical duties if he accepted XYZ's offer and represented Smith.

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**END OF EXAM**