

## QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

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

Answer according to California and ABA authorities.

## QUESTION 5: SELECTED ANSWER A

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his or her clients to zealously advocate on their behalf and be free of conflicts of interest that have a significant chance of materially affecting their ability to do so. That duty begins, at the very least, at the execution of a retainer agreement. Claire and Len executed a retainer agreement, and thus the attorney-client relationship was formed and Len owed Claire all of the duties under the ABA and CA rules.

### 1. Duty of Loyalty

Moreover, under both, a lawyer is deemed to have a conflict if they represent a party who is adverse to another party that is represented by one of the attorney's immediate family members. In such an instance, the lawyer is required to get the informed written consent of their client before pursuing the representation. (Such personal conflicts would not be imputed on other attorneys in a law firm, however.) Ignorance of a conflict is not an excuse for failing to obtain consent or notify about the conflict. An attorney can still represent a client, notwithstanding such a conflict of interest, so long as the client consents and the lawyer reasonably believes that the conflict will not infringe on his or her ability to zealously and competently advocate on behalf of her client. While the ABA would require written consent for such a conflict, California requires only written notification by the attorney because the conflict is only personal.

The issue, though, is whether a former fiancée of two years representing the other party is a conflict of interest at all that need be reported to the client for her consent. Under a strict framework, a former fiancée would not qualify as a family member. It is true that a current fiancée qualifies as a family member, but this rule is unlikely to apply to former fiancées from over two years ago. The rationale for the current fiancée rule is that they are engaged to be members of the family; a former fiancée has, on the other hand, specifically decided *not* to be a part of the family. Therefore, for purposes of this rule, Hannah was not a member of the family and thus this did not trigger an ethical situation

under this rule.

Nonetheless, a lawyer has a general duty to remain loyal to a client, and being close friends with the attorneys on the other side could warrant notification and consent. Here, Len and Hannah "amicably" decided to go their separate ways and Hannah seemed to "call" up Len as more of a friendly notice than as an opposing party counsel. Therefore, it seems that Len and Hannah were quite close. Indeed, in response to the notification, there is no indication that Len looked into the truthfulness of the representation, but rather accepted it at face value, showing that he still trusted Claire quite a bit. This goes to show that Len was not, in fact, able to maintain a fiduciary relationship with Claire notwithstanding the personal connection with Hannah. As a result, Len violated an ethical rule by not disclosing this conflict as it came to pass to Claire.

## 2. Duty to Represent a Client

A lawyer is free to (more or less without restriction) take or not take clients and causes of action (although is encouraged to do pro bono). But once they decide to do take a client, many ethical rules apply. CA and the ABA allow an attorney to withdraw from representation under certain circumstances and require an attorney to do so under others. For example, if an attorney is not receiving their fees or other obligations pursuant to the attorney-client relationship and they have notified the client and given the client a reasonable time to remedy the situation, then the attorney is permitted to withdraw. Additionally, attorneys may withdraw if the clients are using their legal services for illegal purposes. Moreover, if the attorney finds the representation of the individual repugnant to their sensibilities, they may withdraw so long as they do not materially harm the client's interests. If representing the client would require the attorney to violate other ethical rules or laws, then the attorney must withdraw. Thus, for example, if representing a client would require the attorney to file a frivolous lawsuit, then the attorney must withdraw.

a. *Frivolous lawsuits*

Here, Len will argue that he had to withdraw from representing Claire because failing to do so would violate the rule that attorneys are not allowed to file frivolous lawsuits. He will point to Hannah's representation--whom he had been engaged to and amicably decided not to marry, and thus trusted--that Claire was a serial litigant that had filed fourteen other lawsuits against the Hotel and that Hannah intended to move the court to declare Claire a vexatious litigant. But having been a vexatious litigant does not, in and of itself, show that *this* lawsuit was frivolous. In fact, Claire showed Len scars on her leg and clothes that were stained by the supposed cleaning solution that caused the scars. Opposing counsel's representation that Claire was a vexatious litigant did not even include any allegation that *this* lawsuit was frivolous. Instead, it was merely that other lawsuits filed by her might have been. And indeed, only that they *might* have been because Claire did not even represent that these lawsuits were frivolous or that a court had yet deemed her a vexatious litigant. A reasonable lawyer would not have relied solely on these representations in determining to no longer represent Claire. Instead, a reasonable attorney would have looked into whether these allegations by Claire were true by searching court documents or, at the very least, asking Claire about these cases. And Claire's later response saying "what 'thirteen prior lawsuits'" indicate that doing so might well have revealed that Claire did not actually file those, or that they were not frivolous. In sum, Len did not take reasonable precautions to ensure that the lawsuit that he was attempting to withdraw from representing Claire was, in fact, frivolous, and as such cannot rely on this rationale for withdrawing from representing her.

b. *Costs of representation*

Len might also argue that because Claire was a vexatious litigant, representing her would unreasonably financially burden him. Indeed, California allows the unreasonable financial burden on the attorney as a justification for discontinuing representation of a client. Len appears to be a solo practitioner, this making this claim more reasonable.

However, Len has not shown any financial burden that would necessarily result in trying to defend a claim that Claire was a vexatious litigant (or even that he would have to defend that claim in court). Therefore, it is unclear what financial burdens this revelation would reveal. Moreover, as discussed above, Len did not make any effort at all to determine if there was any basis for determining that Claire actually was vexatious.

*c. Lack of communication*

Len's best argument is that Claire's failure to respond to his numerous requests constitute a permissible reason for him not to continue representing her. Indeed, the rules allow a lawyer to withdraw from representing a client when the client fails to communicate with the lawyer. Much like a lawyer has a duty to communicate with the client (as Len effectively did here once he learned of the potential vexatious litigant problem), a client must fulfill their side of the bargain and communicate back. Len left a voicemail saying that he had an "important update" and asking to be called back. He sent her one e-mail a week with the same request, and received confirmation that Claire had read the e-mails. He then decided to send her a registered letter asking her to contact him. Notwithstanding the three forms of communication asking for a reply because of an "important" update and the *registered* letter, Claire did not respond at all. Importantly, though, Len failed to mention the reason for why he wanted her to contact him. He might respond that he could not have provided details in e-mail, voicemail, or letter because it might have violated his duty of confidentiality to keep all information he learned about her secret absent her consent (which we have no evidence of here). This will likely be sufficient, especially considering the read receipts and the registered letter confirm that Claire actually received the communications.

Even more importantly, though, is the fact that Len never made clear the ramifications of failing to respond. Much as in failures to pay attorney fees, the attorney must reasonably notify the client of the consequences of failure to and give them a chance to respond before withdrawing from representation. Here, Len violated that duty by never telling Claire that he would withdraw from representing her unless she responded.

Instead, he simply repeated the same content in different methods asking for a response. This, in conjunction with the fact that he waited what seems like no more than a little over two weeks before withdrawing from representation. If this speed were justified in light of approaching deadlines, that might be reasonable. But there is no indication here that such a rapid action was necessary or, more importantly, that Claire had any reason to believe that such a rapid action was necessary. Len did not tell Claire that he would withdraw if she didn't respond (and he cannot rely on Hannah's representation that she was a vexatious litigant without actually looking into that at all, as a reasonable attorney would, to augment the implication of her nonresponse). Taken together, Len violated his duty of continued representation by withdrawing for this reason.

*d. Court's approval*

Moreover, in California after a lawsuit has been filed, an attorney cannot withdraw from representing a client without attaining the judge's permission to do so. While he likely would have gotten it here, because of the failure to communicate because the case had just been filed and there is no indication that allowing withdrawal would otherwise prejudice Claire, that does not excuse his not following this rule. Therefore, regardless of the merits of any justification for withdrawal, Len breaches this rule.

3. Duty to the Court to Investigate Positions

Even if Len were correct that Claire's lawsuit was entirely without merit, he would have still likely violated ABA and CA ethics rules by filing the lawsuit in the first place. An attorney is required to investigate legal positions and pleadings taken and represented to a court before doing so. The standard for this is what a reasonable attorney would do in similar circumstances. Thus, if the lawsuit was entirely without Merit, Len likely violated his ethical rules in filing it in the first place. Len will argue that the scars and stained clothing were sufficient to file the suit, but the record does not indicate that Len provided *any* additional investigation or research into the merits of the claim. Whether

that is reasonable depends on how a qualified attorney in like circumstances would have acted.

#### 4. Returning Property

A lawyer has the obligation to keep any property of the client's that is in his possession in a safe and secure location. Moreover, the lawyer certainly cannot destroy evidence that the client entrusts to him. The lawyer must take reasonable protective measures to safeguard such evidence, if the lawyer chooses to accept responsibility for possessing it. Here, Len accepted responsibility for maintaining Claire's clothes and those clothes were relevant to the legal claim that Claire was pursuing. As such, he had a duty to his client to implement effective measures for ensuring the safeguarding of the property entrusted in his care. However, he "sent her clothes along with his to be dry-cleaned." Thus, it seems that he did not put her property in a separate location or otherwise implement methods to ensure that the inadvertent destruction or disclosure of the evidence would not occur. Len, therefore, violated this duty to Claire.

If Len received any money following the "properly executed retainer agreement," he violated his duty by not attempting to give it back to her when he sent her the letter saying that he would send her the clothing. However, since there is no evidence that he had any property but for the clothing, he likely did not violate this duty.

## **QUESTION 5: SELECTED ANSWER B**

### **Attorney-Client Relationship**

Len formed an attorney-client relationship with Claire. An attorney-client relationship is formed when the client reasonably believes the relationship formed. The attorney's beliefs are irrelevant. Within the scope of the representation, an attorney determines the means, including which claims to present and which witnesses to call, and a client determines the ends, including whether to accept a settlement offer and other duties.

### **Retainer**

L and C executed a valid retainer agreement. In California, an agreement to represent that is worth more than \$1,000 must be in writing. In ABA, it is strongly encouraged. Additionally, the fees must not be unreasonable under the ABA authorities, or unconscionable in California. Here, there is no indication that the fees were unreasonable/unconscionable. The retainer must describe the nature of the relationship, the responsibilities of the parties, and the method of determining fee. Here the facts tell us there was a properly executed retainer agreement.

### **Duty of Loyalty**

An attorney owes a duty of loyalty to his clients, and cannot accept representation if it would result in a conflict of interest that would materially impair his representation of client. A conflict of interest may occur between an attorney and his client; between two clients, whether former and current or two or more current clients; between a third party and client; or between the members of an organization and the organization itself. A conflict of interest may occur between the attorney and his client when the attorney has a close relationship with opposing counsel in a case. Here, L has a close relationship with H, the Hotel's attorney. They were engaged for two years before amicably deciding to go their separate ways. L should have informed C of his relationship with H. In California, L needs to inform C in a written disclosure of his relationship with H. In the ABA authorities, L needs to obtain written consent from C with respect to his relationship with H. Because L did not inform C of his relationship with H or obtain



written consent, L violated his duty of loyalty to C by not disclosing his relationship with H.

### **Duty of Communication**

An attorney must promptly and diligently communicate with his client. This duty includes a duty to inform the client of their responsibilities and obligations with respect to the representation. Here, L owed C a duty to tell her about the scope of her responsibilities, including communicating with him regarding material facts. When L met with C, he should have informed her about her duty to respond to his inquiries so that he could competently represent her. C's statement that "I didn't think calling you back was such a big deal" indicates that L neglected to tell her that she should promptly return his calls and inquiries because failure to do so may hurt her case. C has a responsibility to make decisions with respect to her representation. If L had received a settlement offer with a deadline, he could not have accepted it without C's permission. Because L failed to communicate her own responsibilities to C, L violated his duty of communication with C.

L also owed C a duty to communicate all of the material facts so that she could make an informed decision. L should have communicated with H regarding the "thirteen prior lawsuits" before attempting to withdraw from the representation. L called C and left her a message, and sent many emails and a registered letter. But none of the communications informed C that he was concerned about prior litigations or that he was considering withdrawing until he did attempt to withdraw. L owed a duty to C to communicate all of the material facts before he attempted to withdraw. Because L did not inform C of the material facts, L breached his duty of communication with C.

### **Duty of Competence**

An attorney owes a client a duty of reasonable knowledge, skill, and ability in the scope of the representation. Here, L did not inquire into the prior lawsuits that C may have filed against Hotel. Instead, he relied on the word of opposing counsel and did not do his own research. Because L did not do his own inquiry, he violated the duty of

competence he owed to C.

### **Duty to Safeguard**

L owed C a duty to safeguard the evidence she gave him. An attorney owes a duty to the client to safeguard possessions of the client, including money given as a retainer and any possessions or evidence entrusted to the attorney. Here, C gave L evidence related to her litigation, the clothes that were stained by the cleaning solution. L had a duty to diligently safeguard this possessions with reasonable competence. L placed the evidence in a closet and negligently sent them to the dry-cleaners, where they were cleaned. Placing material evidence in a closet is not a reasonable way to diligently safeguard important items. L should have placed them in a safe deposit box or other manner of safekeeping. Material evidence with respect to C's case was destroyed. L violated his duty to safeguard C's evidence and possessions entrusted to him.

### **Mandatory Withdrawal**

An attorney may withdraw if representation will necessarily cause a violation of an ethical rule. Under the ABA, this extends to any law. An attorney must also withdraw if, because of his physical or mental condition, continued representation would materially impact the client. In California, an attorney must withdraw if the client insists on pursuing a claim without probable cause and with the purpose of harassing or maliciously injuring another person. Under the ABA authorities, an attorney must withdraw if he is fired. None of these events have occurred and L does not have a reason that would support mandatory withdrawal.

### **Permissive Withdrawal**

An attorney is permitted to withdraw if a client insists on pursuing an illegal course of conduct. An attorney is also permitted to withdraw if they insist the attorney take actions against the attorney's judgment, violating the scope of the relationship so that the attorney is no longer dictating the means of the litigation. An attorney may also permissively withdraw if the client does not pay her fees or for any other "good cause shown." An attorney is also permitted to withdraw if the client makes representation

unreasonably difficult.

Here, L may argue that C has made the representation unreasonably difficult. He attempted on numerous occasions to contact C in order to inquire about the prior litigations and discuss the case with her. He called her and left a message, sent at least 7 emails that he knows she read but did not respond to, and sent a registered letter with a return receipt requested. A reasonable client would likely have understood that L had a matter of some urgency to discuss with L and would have returned his call. But a week is too short of a time for L to say that this behavior made the representation unreasonably difficult. C could have been on vacation or with limited access to email and phones, and she did not want to take the time to respond to L. A week or two is not an unreasonable amount of time for a client not to respond. He at least should have waited to withdraw until he had discussed with her the importance of returning his calls and communicating with him. It was perhaps L's failure to communicate the responsibilities of the client to C, to inform her of her responsibility to also communicate with him so that he could adequately represent her, that caused the breakdown in communication in the first place. Therefore, C's lack of communication for two weeks does not make L's representation of her unreasonably difficult.

There is no indication that C did not pay her fees. Her statement to L that "Hotel's got more money than I do" may suggest an inability to pay her fees in the future, but this is not a reason to permissively withdraw. Additionally, there does not appear to be any other "good cause shown" to permissively withdraw. L did not have any reason to permissively withdraw from the representation and therefore violated the ethics rules.

Additionally, in California, an attorney may not permissively withdraw if the matter is currently pending before a tribunal. Because L filed the lawsuit in state court, the matter is currently pending before a tribunal and L must seek court permission to withdraw. Because L did not seek court permission to withdraw, he violated the California ethics rules.

### **Withdrawal from Representation**

When an attorney withdraws, either permissively or because the withdrawal is mandatory, he owes a duty to the client to mitigate the harm from the withdrawal. An attorney must timely inform the client of the withdrawal and give the client time to seek new representation. Here, L simply told C he was withdrawing. He did not give her adequate time to find new representation and she may therefore be prejudiced in her case if there are upcoming deadlines or other issues in the case and she is not adequately represented.

Additionally, an attorney must mitigate the harm by returning all papers or possessions to the client. Here, because he did not competently and diligently safeguard C's evidence, it was destroyed when he negligently sent it to the dry-cleaners.

An attorney may collect fees for reasonable compensation, but must return any remainder of fees to the client. In California, an attorney may retain a true retainer, meant to ensure the attorney's availability. Here there is no indication that L retained any unearned fees or was paid a true retainer.

Because L did not give C adequate notice and time to find new counsel, and failed to return C's possessions, his withdrawal from representation violated the ethics rules.