

### Question 3

Alice's and Bob's law firm, AB Law, is a limited liability partnership. The firm represents Sid, a computer manufacturer. Sid sued Renco, his chip supplier, for illegal price-fixing.

Renco's lawyer asked Alice for a brief extension of time to respond to Sid's interrogatories because he was going on a long-planned vacation. Sid told Alice not to grant the extension because Renco had gouged him on chip prices. She denied the request for an extension. Sid also told Alice that he'd had enough of Renco setting the case's pace, so he wasn't going to appear at his deposition scheduled by Renco for the next week, and that he'd pay his physician to write a note excusing him from appearing. Alice did nothing in response.

In the course of representing Sid, Alice learned that Sid planned a tender offer for the publicly-traded shares of chipmaker, Chipco. Alice bought 10,000 Chipco shares. By buying the 10,000 Chipco shares, she drove up the price that Sid had to pay by \$1 million. When Alice sold the 10,000 Chipco shares, she realized a \$200,000 profit.

1. What ethical violations, if any, has Alice committed regarding:
  - a. The discovery extension? Discuss.
  - b. The physician's note? Discuss.
  - c. The Chipco tender offer? Discuss.

Answer according to California and ABA authorities.

2. What claims, if any, does Sid have against Alice, AB Law, and Bob? Discuss.

## QUESTION 3: SELECTED ANSWER A

**Governing Law:** California is governed by the California Rules of Professional Responsibility as well as certain sections of the business code. The ABA has promulgated its Model Code of Professional Responsibility as well.

**(1) What ethical violations, if any, has Alice committed regarding (1) the discovery extension, (2) the physicians' note, or (3) the Chipco tender offer?**

### **Discovery Extension:**

**Duty of Fairness:** An attorney has a duty of fairness to the opposing party to act in good faith. While an attorney has no duty to accept all requests made by opposing counsel if not required, and while an attorney has a competing duty to her client to act in the client's best interests and should advocate for her client's interests zealously, denial of a good faith request for a short extension may be considered a breach of A's duty of fairness to opposing counsel.

Here, Alice ("A") represents Sid ("S") in suing Renco ("R"). R's attorney has requested a brief extension to respond to interrogatories. The reason for R's request is to go on a long-planned vacation. Without a showing that R's counsel has continuously attempted to delay the litigation by asking for continuances and extensions, A's duty of fairness likely requires her to accept such brief extension. Her denial is based on her client's order that it not be granted for no other reason than "because R had gouged him on chip prices". Because if R's counsel requested an extension from the court based on good reason it might well be granted, it is improper for A to require such unnecessary resort to the court. A has likely violated her ethical duties of fairness.

**Duty of Loyalty:** An attorney has a duty of loyalty to always act in her clients' best interests and not to engage in conflicts of interest or compete with the client.

Here, A will likely argue that her duty of loyalty to S requires that A not fail to acquiesce to her client's requests. However, the duty of loyalty does not extend this far. An attorney must not advocate for her client to the point that it causes her to make other ethical violations.

**Scope of Decision-Making:** While the client has the right to state which claims he or she wishes to pursue and make major decisions regarding settlement or whether to plea, etc., it is within the attorney's scope of authority to determine the proper strategy for effectuating these goals.

A should not allow S to "order" her to deny the extension based on no substantive reason. This is within A's scope of authority to decide, and A should not acquiesce to a bad-faith denial of a good-faith request. If A and her client cannot agree on the scope of representation, withdrawal from the case may be appropriate to avoid A being pulled into improper conduct.

**Physician's Note:**

**Duty of Candor/Honesty:** An attorney must not make any false representations to the court or opposing counsel, and must not allow her client to make any false representations to the court.

Here, A has stated that he is going to bribe his doctor to get a note to excuse him from appearing at his deposition. This will constitute a fraud upon the court because it is not true that D is unavailable. Further, there is no valid reason for S to fail to appear at his deposition. An attorney can breach his or her ethical duties by failing to speak when she has a duty to counsel her client against illegal or fraudulent activity and advise him that he or she cannot be a part of such conduct. Here, when A failed to respond to S's statement, she impliedly acquiesced in his proposal. This is an ethical violation because it will cause A to participate in a fraud upon the court and will violate her duty of candor.

**Withdrawal:** An attorney must withdraw from a case when she learns of conduct that will constitute a crime or fraud that will necessarily involve the lawyer's services. If it will not involve the lawyer's services, the attorney may but does not need to withdraw.

Here, paying one's doctor to write a false note excusing him from appearing may constitute such improper behavior that reflects poorly upon the profession. Such conduct is clearly in bad faith and relates directly to the representation, directly involving A. Thus, A should have withdrawn from the representation had she not been able to dissuade S from failing to appear at his deposition for a fraudulent reason because she will necessarily be involved.

**Duty of Confidentiality:** An attorney has a duty of confidentiality not to disclose any information related to the representation of the client. However, there is an exception to this rule which allows disclosure if the attorney learns that the client plans to commit a crime or fraud. Further, California imposes a duty on an attorney who has learned that his client plans to commit a crime or fraud to attempt to dissuade the client from his proposed actions and further, if that fails, to tell the attorney that the attorney plans to disclose the information to the appropriate authorities.

Here, it is unclear the length S plans to go to in order to get him a "note". However, this likely does not constitute an actual crime or fraud, so A likely has no right to breach her duty of confidentiality to her client. Since she has not, she has not violated this rule.

**Duty to Diligently Pursue Completion of the Case:** An attorney has a duty to diligently pursue a case to completion without allowing it to languish in the court system.

Here, by impliedly acquiescing in S's statement that he plans to fail to appear at his deposition, this will require a further scheduling out of a deposition at a time convenient

for the parties and court reporter. This is a bad faith delay of the case that constitutes breach of A's ethical duties.

**Chipco Tender Offer:**

**Duty of Loyalty:** As stated above, an attorney has a duty of loyalty to her client to always act in the best interests of the client. This includes not acquiring an interest adverse to the interest of the client. California allows an attorney to obtain an interest adverse to that of her client in certain circumstances.

Here, when A learned of S's plan to make a tender offer for the publicly traded shares of Chipco, she immediately purchased Chipco shares and then sold them for a \$200,000 profit. A's acquisition of these funds constitutes a breach of A's duty not to obtain an interest adverse to her client's, because the price S had to pay on the shares was raised by one million dollars. A has caused serious financial injury to S by acquiring an adverse interest and essentially taken a profit that should have gone to S. In doing so, A has breached her ethical duties.

**Conflict of Interest:** An attorney has a concurrent conflict of interest when there is a substantial likelihood that her ability to represent her client will be materially limited by her own personal interests, her duties to another client, a former client, or a third party. An attorney may take on the representation despite the concurrent conflict of interest if the attorney can believe that she can competently and adequately represent the interests of the parties, and if she obtains written consent from all involved parties. California has no "reasonable lawyer" standard and does not require written consent, only written notice, when the interest is personal to the lawyer.

Here, in gaining a personal interest in Chipco, A may have created a conflict that will materially limit her representation of S. However, A may argue that this is a deal on the side and is unrelated to the subject of the litigation in which she represents S; and further, A may argue that ownership of the shares has no bearing on her representation of S. If the court determines that she has acquired a conflict of interest, A has breached

her duty by failing to get written consent. In California, she has further breached her duty by failing to give written notice to S.

**Duty of Confidentiality:** See above. In using confidential information S provided to her in telling her about the tender offer for her own benefit, A may have breached her duty.

**(2) What claims, if any, does S have against A, AB Law, and B?**

**Limited Liability Partnership:** A limited liability partnership is a special type of partnership that affords limited liability to all its partners, created by filing a Statement of Qualification with the Secretary of State. In a limited liability partnership, the individual partners are not personally liable for any damages sustained by the partnership itself.

**A:** See above.

A will be personally liable for her own torts.

**B:** See above.

Because B is a partner in an LLP, he has limited liability. Thus, S will have no claim against Bob ("B") A's partner.

**AB Law:**

**Authority:** A partnership is liable for its partner's actions if the partners have authority to act for the partnership. Authority may be actual (express or implied), apparent, or ratified. Actual authority exists where a reasonable person in the agent's position would believe he had the right to act on behalf of the business. This may be express, through an agreement, or implied, through actions or conduct. Apparent authority exists where a reasonable person in the shoes of the third party believed that the person had authority to act. Ratification occurs where no authority exists but the business has

adopted the contract through action such as accepting its benefits. A partner in a partnership has both apparent and implied authority to act on behalf of the partnership.

Here, as a partner of AB law, A has actual authority to act on behalf of the partnership. Her acts taken in the scope of her law practice will thus subject the partnership to liability. Thus, A will both be personally liable for her own torts, and S will further be able to collect against AB Law for her actions.

**Unjust Enrichment:**

Here, S will sue A personally and AB Law for likely malpractice for losses caused by her breaches of her duties. Her misconduct has led to a loss by S of 1 million dollars, and has resulted in a gain to A of \$200,000. In equity, a court may under unjust enrichment theory disgorge profits made by someone and impose a constructive trust. A constructive trust is not truly a trust but is an equitable remedy imposed by the court which forces the wrongdoer to hold unjustly realized profits in trust for the benefit of the rightful owner. Because she has been unjustly enriched by action taken in breach of her duties to S, the court will likely impose a constructive trust on the profit realized by A and will thus force A as trustee of these funds to distribute them to their proper owner, S.

**Intentional Interference with a Business Expectancy:** Intentional interference with business expectancy occurs where a person knows of a business expectancy of another party and knowingly interferes with that expectancy, resulting in damages. Here, S had planned a tender offer with C. Her actions in purchasing Chipco shares may constitute an interference with this expectancy with S, although A will argue that this expectancy is not yet an enforceable contract and that she has a valid defense of fair competition. This will be balanced by the court.

## QUESTION 3: SELECTED ANSWER B

### Discovery Extension

#### Scope of Representation

A client usually determines the ends (goals) of a representation, whereas the lawyer generally determines the means (legal strategies). If a client is insisting upon actions that the lawyer does not wish to take, the lawyer may limit the scope of employment through informed written consent by the client. Here, it appears that Alice let Sid influence her legal decision-making by telling her to deny the request for an extension to respond to Sid's interrogatories. This type of decision should normally be decided by the lawyer because it falls into legal strategy. Although it is permissible for the lawyer to seek the client's input, the final decision should ultimately be left up to the lawyer. Alice let Sid control the litigation means.

#### Fairness to Opposing Counsel/Adverse Parties

A lawyer should treat opposing counsel and adverse parties fairly during the representation. A lawyer should not engage in certain actions if it is known to be for the purpose of harassing or making a task unduly burdensome for opposing counsel/adverse party. Here, Sid told Alice to reject the request to extend the time for answering the interrogatories. Renco's lawyer asked for a reasonable "brief extension" to respond since he was going on a long-planned vacation. This seems to be a reasonable request and is not an attempt by Renco's attorney to delay for an improper purpose. Sid's reasons for wanting to deny the extension, however, would be considered improper. He denied the request because Renco had "gouged hi on chip prices," so he was acting out of spite. He told this directly to Alice, so she knew his improper motives. She should have counseled him to allow the extension since it was a reasonable request and made clear that Sid's motives were improper. Because she did not do this, Alice violated her duty of fairness to Renco and its lawyer by furthering her client's improper purpose.



That being said, a lawyer does owe a duty to her client to diligently dispose of the case (work productively and not delay unnecessarily). If for some reason the extension requested was unreasonable, or it had been one of many requests for extensions, then perhaps Alice would be justified in denying the request. She has a duty to her client to make sure that his case is handled efficiently and effectively. The facts do not suggest this was the case, but if it was, then again it is possible she may not be in violation of an ethical duty.

### **Physician's Note**

#### Duty of Candor

A lawyer owes a duty of candor to opposing counsel, adverse parties, and the court. A lawyer must not submit evidence that she knows to be false or make a false statement of fact or law that she knows to be untrue. If she makes such a statement without knowing it is false and later learns of its true nature, the lawyer has a duty to correct the evidence or testimony.

Sid told Alice he was not going to appear at his deposition for Renco the next week because he'd had enough of Renco setting the case's pace. He also told Alice that he was going to pay his physician to write a note excusing him from appearing at the deposition. Alice did nothing in response. Alice knows that Sid is not sick and that he just does not want to attend the deposition. He is going to get a fake doctor's note written to excuse him, so this would be false "evidence" or a false statement of fact being presented to the opposing side. Alice has a duty not to allow such false information to be presented to the other side. That being said, there is a conflict with her duty of confidentiality to Sid not to disclose his statements to her since they were made during and related to the representation.

A lawyer owes a duty of confidentiality to her client for anything related to the representation, even if not made by the client. Under the ABA, a lawyer may reveal confidences if the client persists in engaging in criminal or fraudulent conduct that will

result in death or serious bodily harm, or if the lawyer's services are being used to perpetuate a crime or fraud by client that will result in serious financial harm. California does not have an exception for financial losses. Neither of these exceptions appears to be present. Sid's actions will not cause harm to anyone to the extent of death or serious bodily harm. It may pose a financial burden on Renco because they have to pay the lawyer for time that was spent preparing and now it will be postponed, but the amount spent is not likely to satisfy the requirement of financial harm under the ABA. Therefore, since no exception applies, Alice cannot reveal Sid's confidences.

So Alice cannot reveal the confidences but she must not present false evidence. What she should have done is counseled Sid by trying to get him to show up for the deposition and not pay a doctor to make a false note. If that did not work, then she should have withdrawn from the representation since he was persisting in engaging in fraudulent conduct. If the withdrawal would be harmful to Sid, a court might not let her withdraw and it may request why she is choosing to withdraw. If that is the case, then Alice may reveal Sid's confidences regarding the letter. Because Alice did not take these steps and said nothing when Sid mentioned a fake doctor's note, she breached her duty of candor to Renco and its lawyer.

### Duty of Fairness

Again, as mentioned earlier, Sid has improper motives for wanting to submit the doctor's note and not attend the deposition. He wants to regain control of the pace of the litigation and is acting out of spite toward Renco for the price he was charged for the chips. Alice should know based on the comments Sid has made to her that he only wants to delay the case for improper purposes. Because she is aware of this, Alice is violating her duty of fairness to opposing counsel and adverse party.

### **Chipco Tender Offer**

### Duty of Loyalty

A lawyer owes a duty of loyalty to her client. If the interests of another client, the lawyer, or a third party materially limit the lawyer's ability to effectively represent the client, then she has a conflict of interest. The lawyer must act in the best interest of the client. Tied with the duty of confidentiality mentioned below, a lawyer also cannot use information learned during the course of the representation to the disadvantage of her client.

Alice used the information she learned from Sid during the representation that Sid was going to make a tender offer to her advantage by purchasing shares of the stock and driving up the price. Alice benefitted by realizing a \$200,000 profit while Sid had to pay \$1 million more than he would have before she purchased the shares. Alice was looking out for her interests first and negatively impacted her client's interests in the process. Because she subordinated her client's interests to her own, Alice violated the duty of loyalty she owed to Sid.

#### Duty of Confidentiality

A lawyer owes a duty of confidentiality to her client. She must not reveal any information related to the representation that she learns, and she must not use that information to the disadvantage of her client.

Here, Alice learned while representing Sid that Sid planned to tender offer for the publicly-traded shares of Chipco. She used this information to Sid's disadvantage by purchasing 10,000 Chipco shares, which drove up the price that Sid had to pay. Although this purchase is unrelated to the representation, it involved information learned during the representation. The duty of confidentiality is broad and covers any information related to the representation. Alice may try to argue that this information is unrelated to Sid's illegal price-fixing claim against Renco, but it would likely be found to be covered by the duty of confidentiality. Price-fixing involves the market of that particular industry, and if Sid intends to make a tender offer for a competitor chipmaking company, it would affect the same market involved in the litigation that she is representing Sid for against Renco. Therefore, a court would find that the information is attenuated but still within the realm of the confidences covered by the duty of

confidentiality. Since Alice used the information against Sid to his disadvantage, she violated her duty of confidentiality.

### **Sid v. Alice, AB Law, and Bob**

AB Law is a limited liability partnership (LLP). A limited liability partnership operates almost exactly the same as a general partnership except the partners in an LLP are not personally liable for the debts of the partnership like they are in a general partnership. Therefore, the partnership is liable for the negligent acts (but not intentional torts) of its partners but the other partners are not personally liable for different partner's negligent acts or debts of the partnership. A partner always remains liable for her own actions.

#### **Alice**

Alice obviously violated several of her ethical duties. The breach of the duty of loyalty that she committed against Sid by purchasing Chipco stock caused actual pecuniary harm to her client. This was an intentional act on Alice's part. Under her breach of the duty of loyalty, since she financially benefitted from her actions, realizing a \$200,000 profit from buying and selling her shares of stock, she would be liable to Sid for profits realized as a result of her breach of the duty of loyalty. Therefore, Alice is personally liable for \$200,000. She may also be liable for the harm caused to Sid by the breach. Sid had to pay \$1 million more than he otherwise would have if Alice had not purchased the shares. But for Alice's purchase of the stock, Sid would not have had to pay \$1 million more for the tender offer. It was also foreseeable to Alice that if she purchased the shares, it would drive the price of the stock up for Sid's tender offer. Therefore, she is also liable as the actual and proximate cause of Sid's loss due to her breach. Alice is personally liable for \$1,200,000 to Sid.

As for a specific claim, Sid may be able to claim misappropriation. Alice was in a relationship of trust and confidence with him as a fiduciary. Sid had nonpublic information that most people would find material, meaning it was affect whether someone would purchase a stock or not. Sid did not tell this information to Alice for an

improper purpose and surely did not anticipate she would use the information to purchase stock. Therefore, Sid would not be a tipper and Alice cannot be a tippee. But she can be a misappropriator since she was in this fiduciary relationship with the source of the non-public material information and she purchased stock in reliance on that information. Therefore, she is liable to Sid for the same amount of damages mentioned above because they were profits that would need to be disgorged and harm caused from her misappropriation.

### Bob

Because these actions were taken by Alice, even if the partnership is liable, Bob cannot be personally liable for the harm caused by Alice. It is a limited liability partnership, so partners are not personally liable for the debts of the partnership or torts of other partners. Therefore, Sid does not have any claims against Bob.

### AB Law

A partner is an agent of the partnership and thus can bind the partnership to certain obligations. The partnership is also liable for the negligence or non-intentional torts committed by partners while in the scope of employment for the partnership.

Here, Alice was working as Sid's lawyer when she learned the information that she misappropriated from him. Her actions, however, would likely be considered beyond the scope of her employment as a partner. She took the information and used it for personal reasons. If she had, for example, not filed an important document on time resulting in a dismissal with prejudice, then Sid could sue for malpractice and the LLP would be liable because the claim arose from her duties as a lawyer. This harm caused to Sid was not because of Alice's actions as an attorney for Sid. Therefore, a court would likely find that the LLP is not liable for Alice's actions and Sid has no claim against AB Law. If the court did find her actions were within the scope of her duties as a partner, then AB Law would also be liable for the losses Sid incurred.