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Assuming ABC Firm is located in California, both the ABA and California rules will be discussed below.

1. WHETHER LARRY CAN ETHICALLY FOLLOW PETER'S INSTRUCTION TO FILE THE MOTION

**Duty of Competence**

A lawyer owes a duty of competence to clients. A lawyer must act with the requisite skill, knowledge, thoroughness, and preparation reasonably expected of a licensed attorney. In California, a lawyer has a duty to not knowingly, recklessly, with gross negligence, or repeatedly fail to represent a client competently.

Here, Larry has not violated his duty of competence because he has researched the matter and presented his findings to Peter, his superior, who has more experience with trade secrets than Larry. Larry has acted with the requisite skill, thoroughness, and preparation necessary under the ABA rules because he has taken the time to learn the applicable law and has sought the advice of Peter before filing the motion. It is possible that because of Peter's breadth of experience, he may believe that sanctions are not warranted in the situation, and that could be the reason he told Larry to continue with the motion. Larry has acted competently and is thus not subject to discipline under the ABA rules.

Similarly under the California rules, Larry has not breached his duty of competence. Though Larry knows through his research that filing the motion may cause ABC Firm to incur sanctions, it is possible that his dearth of experience in comparison to Peter's experience is causing him to miss something in his analysis. Assuming this is the case, Larry will not have breached his duty of loyalty if he files the motion under Peter's guidance.

**Duty of Diligence**

Under the ABA and Model Rules, a lawyer has a duty of diligence to clients. A lawyer must reasonably prepare for the representation of a client, including acquiring the knowledge necessary for the representation or associating with a competent lawyer when a lawyer himself is not competent to practice in that area. In California, the duty of diligence is merged with the duty of competence, so a lawyer may not knowingly, recklessly, with gross negligence, or repeatedly fail to represent a client competently.

See analysis supra.

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## **Duties of Supervising Lawyers**

Under the ABA and California Rules, a supervising attorney is liable for all acts of subordinate lawyers he directly supervises and for the acts of all support staff working on legal matters, such as paralegals if the supervising attorney was aware of the material provisions of the issue, ratified the conduct, or was aware of the issue and failed to prevent the act.

Here, Larry presented his findings to Peter and Peter ratified the filing of the motion, thus Peter would be liable for any violation of the ABA or CA rules should filing the motion incur sanctions. Additionally, though it was Larry who worked on the motion and Peter who ratified filing it, ABC Firm would be on the hook for paying any monetary sanctions arising from the filing of the motion.

## **Should/Can Larry Withdraw?**

Under the ABA and California Rules, a lawyer must withdraw if his representation is materially limited by a mental or physical condition, if the client insists on using the lawyer's services for criminal or fraudulent ends, or if the representation would result in violation of the rules of professional conduct. In California, a lawyer may also withdraw if continued representation would lead to harassment of an opposing party.

Here, it does not appear that it would be mandatory for Larry to withdraw because the facts don't indicate a material limitation to his ability to practice or any other issue that would result in mandatory withdrawal. Under CA Rules, he would not be permitted to permissively withdraw.

In sum, should Larry decide to file the motion, he would not be in violation of the ABA or CA rules.

## **2. LARRY'S OBLIGATIONS REGARDING THE DAMAGING DOCUMENT**

### **Duty of Fairness to Opposing Counsel**

Under the ABA and CA rules, Larry has a duty of fairness to clients, opposing counsel, and the court. This includes following proper discovery procedures, such as producing non-privileged documents and information requested by an opposing party. The ABA rules impose a duty to comply with mandatory disclosures and a duty to supplement discovery disclosures without a request. In California, no such duty to supplement exists.

Here, XYZ Firm has indirectly requested the damaging disclosure through its request for a class of papers not yet produced by ABC Firm. Under the ABA Rules, ABC Firm would have to disclose the damaging document so long as it is relevant to the issues in the case and is not

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privileged. Peter's objections to the production of the documents did not raise any applicable privileges, and instead raised hearsay, trade secrets, and overbreadth objections. Assuming these objections are valid, Larry would not be in violation of his duty of fairness to opposing counsel. However, if no privilege applies, and the objections have no merit, Larry would be in violation of the ABA rules and would be subject to discipline.

Though a request for discovery in California typically only has to relate to the subject matter of a case, there is no duty to disclose or supplement disclosures absent a request for production. Here, there is a request for production and no privilege asserted, so Larry has breached his duty of fairness and would be subject to discipline for failing to produce discoverable information.

### **Duty of Loyalty**

Under the CA and ABA rules, a lawyer owes a duty of loyalty to his clients and must put their interests above his own.

Here, Larry is putting his client's interest above opposing party's interest and thus, has not breached his duty of loyalty.

### 3. LARRY'S ETHICAL OBLIGATIONS IN REGARDS TO XYZ'S JOB OFFER

#### **Duty of Loyalty**

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his clients. This includes not engaging in conflicts of interest. A conflict of interest arises when the lawyer seeks to represent an interest adverse to a current client, former client, or adverse to his own interest.

#### *Conflict of Interest - Imputed to the Firm*

Here, if Larry were to accept XYZ's job offer, he would be unable to participate on the *Smith v. Jones* case. Under the ABA Rules, a lawyer's conflicts are imputed to his firm if the lawyer participated personally and substantially on a matter and gained confidential information that could materially disadvantage his former client. A conflict of this nature can be cured by obtaining informed consent confirmed in writing from the client and opposing party or from timely screening the lawyer off the case. In California, this type of conflict could not be cured unless the lawyer obtained informed written consent, meaning both the notice and the consent must be in a signed writing by both parties. If consent was given and Larry is timely screened of the *Smith v. Jones* matter, the conflict would not be imputed to the firm.

#### *Timely Screening*

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Under the ABA and CA rules, to be timely screened from a matter, the lawyer with the conflict of interest is not allowed to participate in the matter or share any profits derived from settlements or trials. Under the CA rules, the lawyer must provide notice to the client and obtain informed written consent. Assuming Larry obtains this and remains screened from the matter, his conflict will not be imputed to the firm.

### **Duty of Confidentiality**

If Larry were to accept XYZ Firm's offer, his acceptance would implicate the duty of confidentiality. Because Larry participated personally and substantially on Jones' behalf in the *Smith v. Jones* case, he likely acquired substantial confidential information that could provide Smith a material advantage if shared with XYZ. As discussed above, because Larry participated personally and substantially on the matter, he would not be able to participate on the case on Smith's behalf and would have to be screened.

Larry might argue that he could represent Smith and his representation would not be materially limited, but because he has gleaned confidential information from Jones, he would need to be screened off for his conflict to not be imputed to the entire firm.

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**END OF EXAM**