



by **Thomas E. McCurnin**

THE NUREMBERG DEFENSE

An attorney should expect to answer for ethical misconduct performed at the direction of an employer

IF AN ASSOCIATE acting upon the instructions of a supervising lawyer does something unethical or sanctionable, does California law provide a defense for the associate? If the associate refuses to perform the proposed unethical conduct, should the associate bring the matter to the attention of the law firm or the State Bar? Should the associate inform the client? If the associate resigns or is fired, does he or she have a claim against the firm? California's rules of professional conduct and a recent case offer insight into these questions.¹

The California Rules of Professional Conduct apply to members of the State Bar of California.² The rules define a "lawyer" as a person who is admitted to practice law before any federal or state court³ and an "associate" as an employee who is employed as a lawyer.⁴ Thus, all lawyers who practice law in California are subject to the Rules of Professional Conduct, whether licensed in this state or not. Any attorney, including a new associate member of a firm, is bound by the rules of professional conduct.

Additionally, if the California Rules of

Professional Conduct are silent on a particular issue, the American Bar Association's Model Rules of Professional Conduct can provide guidance. Although they are not legally binding in California, the ABA's rules have been cited in California decisions to justify decisions involving the conduct of California lawyers.⁵

Under the California Rules of Professional Conduct, a supervising lawyer has the duty not to ask the associate to commit an offense that would be a violation of the rules.⁶ Therefore, the partner may not ask an associate to lie or to file frivolous pleadings. Indeed, a supervising lawyer has an affirmative duty to ensure that an associate performs legal services with competence. For this to be achieved, the rules require the associate to apply the diligence, learning, skill, and mental, emotional, and physical ability reasonably necessary for the performance of duties.⁷ The rules also authorize a law firm to hire a lawyer who pos-

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esses that competence.⁸ However, a law firm is required to supervise an associate, and a law firm may be legally responsible for an associate's ethical violations.⁹

The ABA Model Rules take vicarious responsibility a step further and impose responsibility upon any lawyer with either managerial authority or knowledge of the ethical violation who ratifies the conduct of the associate.¹⁰ For example, in a New

to bring an action, conduct a defense, or assert a position in litigation for the purpose of harassing or maliciously injuring a person.¹⁵ Indeed, if an associate makes this determination, the rules require the associate to withdraw from representation.¹⁶

In response to being sued, the associate took the position that she was given specific direction by the supervising lawyer regarding all assignments, including all writing assign-

Attorneys have been held liable for associating into cases containing frivolous claims.²³ The Nuremberg defense was also rejected, and suspensions ordered, in the case of *Matter of Maloney & Virsik*,²⁴ in which a partner and associate worked to structure a phony election in connection with an Indian tribe and to misappropriate the tribe's bank accounts. The partner was in charge of the litigation and the associate was relatively inex-

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Mexico case litigated under the ABA Model Rules, a supervising lawyer would have been sanctioned for an associate's misconduct except there was no evidence before the State Bar as to the level of the supervising lawyer's actual supervision.¹¹

Although the California Rules of Professional Conduct apply equally to partners and associates, and a partner may be liable for an associate's ethical violations, an associate is not liable for a partner's ethical violations, as an agent is not vicariously responsible for the acts of the principal to which the agent has no right of control.¹² In sum, the rules apply to "members" and "lawyers" and provide no exception for associates who are merely following the directions of a partner.¹³

Jay v. Mahaffey

In *Jay v. Mahaffey*,¹⁴ the California Court of Appeal recently addressed the defense of an associate that she was "just following orders." The plaintiff sued a lawyer for malicious prosecution. The claim was based on threatening letters and e-mail messages and a resulting cross-complaint against 12 members of a limited partnership. The names of the law firm partner and the associate appeared on documents served in connection with one of the cross-complaints against the limited partners.

The 12 partners were ultimately dismissed from the suit, but the supervising lawyer attempted to condition the dismissal upon their cooperation in a derivative action, a finder's fee, a buyout of their interests, and disclosure of the personal financial information of the limited partners. Under the California Rules of Professional Conduct, however, a lawyer may not undertake the representation of a client if he or she knows or should know that the objective of the employment is

ments, all contact with clients, and all interactions with opposing counsel. The associate claimed that she was not responsible for the strategy or direction of any case while she worked for the firm, that the supervising lawyer directed the associate's writing assignments, and that the associate would sign documents in the partner's name but did not file or serve any document without its first being reviewed by the partner.¹⁷

The court of appeal specifically rejected the claim that the associate could work on part of the case and disclaim responsibility for other parts, especially when the associate signed questionable pleadings and fielded telephone calls to explain the position taken by her supervising lawyer. The court held that every lawyer is required to comply with the rules of professional conduct, notwithstanding the fact the lawyer may be acting at the direction of someone else.¹⁸ The court was not without some sympathy to the younger associate, stating:

We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices.¹⁹

Notwithstanding that difficult position, the court held to the principle that an associate has ethical duties that are not reduced or eliminated because a superior has directed a course of action.²⁰ This rejection of what may be called the Nuremberg defense is found in the ABA Model Rules of Professional Conduct²¹ and the *Restatement of the Law (3d) of the Law Governing Lawyers*.²²

The review court found that the partner bore more responsibility than the associate, but not much more. The partner was suspended for 90 days, and the associate was suspended for 60 days.

Arguable Questions

One possible safeguard against the penalties meted out in *Matter of Maloney & Virsik* may be found in the ABA Model Rules²⁵ and the *Restatement of the Law (3d) of the Law Governing Lawyers*,²⁶ which hold that an associate may offer as a defense that he or she consulted a supervising lawyer and reached reasonable resolution of an arguable question of professional duty.²⁷

Thus, if an associate consults with a supervising lawyer and they reach an "arguable question of professional duty," the associate may get a pass. If their decision turns out to be wrong, the associate may still get a pass while the supervising lawyer remains responsible.²⁸ It should be noted that this particular ABA Model Rule has no support under any California decision. However, California courts have adopted portions of the ABA Model Rules of Professional Responsibility.²⁹

This mitigation defense found in the ABA rules is not without its detractors. One attorney has opined that the arguable question defense does not go far enough and advises associates to take the extra step of memorializing the reasonable resolution.³⁰ Another commentator criticized the ABA Rule on the grounds that it goes too far in establishing a mitigating defense for a violation of ethics.³¹

On the other hand, a third commentator has argued that the ABA rules recognize the political reality of a law firm, which has lawyers with different levels of experience (and presumably different levels of judgment)

MCLE Test No. 236

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Out-of-state lawyers who practice pro hac vice are not governed by the California Rules of Professional Conduct.
True.
False.
2. Certified paralegals are governed by the Rules of Professional Conduct.
True.
False.
3. California lawyers who participate in unethical conduct outside of California may be held ethically responsible in California.
True.
False.
4. In-house lawyers are not governed by the Rules of Professional Conduct.
True.
False.
5. An ethics violation must be willful.
True.
False.
6. If an associate determines that he or she is doing something unethical or sanctionable, the associate's first step should be to consult his or her supervising lawyer.
True.
False.
7. An associate may undertake to represent a client when the associate knows or should know that the object of the representation is to harass the opposing side without probable cause.
True.
False.
8. The Model Rules of Professional Conduct of the American Bar Association are legally binding upon lawyers in California.
True.
False.
9. A supervising lawyer does not commit an ethical violation if the lawyer asks an associate to do something unethical, so long as the supervising lawyer does not commit the act.
True.
False.
10. A supervising lawyer does not commit an ethical violation if the lawyer is aware of the unethical conduct of an associate and takes no action.
True.
False.
11. All lawyers at a firm who know of an associate's unethical conduct and take no action commit an ethical violation.
True.
False.
12. A supervising lawyer who is aware of an associate's unethical conduct in advance of the conduct but exercises no control over the associate commits an ethical violation.
True.
False.
13. A supervising lawyer commits an ethical violation if the supervising lawyer ascertains that an associate is doing something unethical and consents to the action.
True.
False.
14. If an associate resigns from a law firm rather than take part in an ethical violation:
A. The associate is required to advise the State Bar of the ethical violation.
B. The associate is not required to advise the State Bar of the ethical violation.
C. The associate is required to advise the State Bar only of a serious ethical violation.
15. If an associate resigns from a law firm rather than take part in an ethical violation:
A. The associate is required to advise the client of the ethical violation.
B. The associate is not required to advise the client of the ethical violation.
C. The associate is required to advise the client only of a serious ethical violation.
16. An associate who resigns from a law firm rather than commit an ethical violation is not generally entitled to damages from the law firm.
True.
False.
17. If an associate resigns from a law firm rather than commit an ethical violation, the firm may give a client a false reason for the associate's leaving the firm.
True.
False.
18. The duties of a law firm that terminates an associate as a result of his or her reporting an ethical violation are not covered in the California Rules of Professional Conduct.
True.
False.
19. A lawyer who follows the orders of a client to encumber the client's real property with phony deeds of trust as part of an asset protection plan has committed an ethical violation.
True.
False.
20. The so-called Nuremberg defense is available to in-house lawyers.
True.
False.

MCLE Answer Sheet #236 THE NUREMBERG DEFENSE



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and different job responsibilities.³² This commentator argues that the ABA rule accepts that lawyers in law firms must often act as one and permits an associate to defer to the supervising lawyer's reasonable determination of an arguable issue. Employment lawyers, in turn, may point out that like any other employee an associate owes the partnership duties of good care, skill, loyalty, and obedience.³³

According to a Los Angeles County Bar Association ethics opinion, when an associate is faced with a potential ethical violation, the first step is to bring the ethical violation to the attention of the partner or other partners.³⁴ This view has some support in the ABA Model Rules³⁵ and the *California Practice Guide: Professional Responsibility*.³⁶

At least one commentator has acknowledged that refusing to perform an unethical act at the bequest of a supervising lawyer will place the associate in jeopardy and may subject the associate to retaliation.³⁷ Although the Sarbanes-Oxley Act provides for protection for whistle blowers, corporate culture is widely regarded as viewing whistle blowers as disloyal.³⁸ Nevertheless, if an associate cannot reach an ethical compromise with a supervising attorney, it is quite clear from the California Rules of Professional Conduct that the associate has a duty to withdraw from the representation if the continued representation would result in a violation of the rules.³⁹

Blow the Whistle?

The next question is whether the associate must inform the client. Every California lawyer has a duty to inform the client about significant developments in the client's matter.⁴⁰ According to a Los Angeles County Bar ethics opinion, a course of conduct that impairs the client's interest must be thoroughly disclosed to the client notwithstanding an objection by the partnership.⁴¹ *California Practice Guide: Professional Responsibility* agrees that advising the client may be necessary to preserve the client's interests in the case of severe ethical violations by the partner.⁴²

Nevertheless, no one likes a whistle blower. An associate who brings ethical violations to the attention of his or her law firm and does not obtain a reasonable resolution should probably resign.⁴³ The associate who does not resign may be fired instead and should not expect to claim retaliatory discharge.⁴⁴

A law firm may ask a departing associate working on a matter to stay for a short time to transition the case to qualified lawyers in the firm. However, the rules specifically instruct lawyers that quitting the representation of a client should be done as gracefully as possible so as not to prejudice the client. In other words, simply because there has been an ethical violation does not give a

departing associate carte blanche to implement a scorched-earth policy against a law firm.⁴⁵

While a firm is not required to compensate a resigning associate for damages, if the law firm creates false reasons for the associate's termination, those false statements may be actionable.⁴⁶ Cases such as *Jacobson v. Knepfer & Moga*; *Wallace v. Skadden, Arps, Slate, Meagher & Flom*; and *Bohatch v. Butler & Binion* also indicate that courts are reluctant to create employment rights that did not exist before. Unless the ethical violations in question violate public policy, courts may refuse to grant an associate a right to sue.

Should the associate report the ethical violation to the State Bar? No direct authority from California sources requires the associate to do so. However, the ABA Model Rules do require that an attorney report the ethical violation of another attorney if the violation raises a substantial question regarding the attorney's honesty, trustworthiness, or fitness as a lawyer.⁴⁷ At least one commentator has opined that reporting a colleague is appropriate if the offense is serious.⁴⁸ According to one author, an associate who is still employed at a firm that he or she reports is engaging in unethical conduct will need to make some practical considerations regarding retaliation or ostracization.⁴⁹

Granted, it is extremely unlikely that in the ordinary course of the practice of law an associate would discover serious ethical misconduct, confront a supervising lawyer, resign, advise the client, and report the firm to the State Bar. On the other hand, it is not out of the question that an associate may be asked to take part in questionable conduct. The bottom line is that associates are responsible for their actions. The Nuremberg defense simply does not apply in ethical issues. ■

¹ Jay v. Mahaffey, 218 Cal. App. 4th 1522 (2013).

² CAL. RULES OF PROF'L CONDUCT R. 101(b)(2).

³ CAL. RULES OF PROF'L CONDUCT R. 101(b)(3).

⁴ CAL. RULES OF PROF'L CONDUCT R. 101(b)(4).

⁵ San Francisco Unified Sch. Dist. ex. rel. Contreras v. First Student, Inc., 213 Cal. App. 4th 1212, 1235 (2013); In re Girardi, 611 F. 3d 1027, 1035 (9th Cir. 2010).

⁶ CAL. RULES OF PROF'L CONDUCT R. 1-120.

⁷ CAL. RULES OF PROF'L CONDUCT R. 3-110.

⁸ Waysman v. State Bar, 41 Cal. 3d 452 (1986).

⁹ Crane v. State Bar, 30 Cal. 3d 117, 123 (1981) ("An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority."); see also Black v. State Bar, 7 Cal. 3d 676, 692 (1972); Gadda v. State Bar, 50 Cal. 3d 344 (1990).

¹⁰ ABA MODEL RULES OF PROF'L CONDUCT R. 5.1; CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY §6:150 (2013).

¹¹ In the Matter of Michele Estrada, 140 N.M. 492, 505 143 P. 3d 731 (2006).

¹² DeRoche v. Commodore Cruise Line, Ltd., 31 Cal. App. 4th 802, 810 (1994).

¹³ CAL. RULES OF PROF'L CONDUCT R. 101(b)(2).
¹⁴ Jay v. Mahaffey, 218 Cal. App. 4th 1522 (2013).
¹⁵ CAL. RULES OF PROF'L CONDUCT R. 3-200.
¹⁶ CAL. RULES OF PROF'L CONDUCT R. 3-700(B).
¹⁷ Jay, 218 Cal. App. 4th at 1546.
¹⁸ CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY §6:153 (2013).
¹⁹ Jay, 218 Cal. App. 4th at 1546.
²⁰ BUS. & PROF. CODE §6068.
²¹ ABA MODEL RULES OF PROF'L CONDUCT R. 5.2.
²² RESTATEMENT OF THE LAW (3D) OF THE LAW GOVERNING LAWYERS §12(1) (2006).
²³ Cole v. Patricia A. Meyer & Assocs., APC, 206 Cal. App. 4th 1095, 1100, 1119 (2012) (holding that an associate may not disclaim legal responsibility for actions that are taken on behalf of the client because the associate only took a passive role as a standby counsel).
²⁴ Matter of Maloney & Virsik, 4 Cal. State Bar Ct. Rptr. 774, 2005 WL 103063 (Rev. Dept. 2005).
²⁵ ABA MODEL RULES OF PROF'L CONDUCT R. 5.2(b).
²⁶ RESTATEMENT OF THE LAW (3D) OF THE LAW GOVERNING LAWYERS §12(2) (2006).
²⁷ ABA MODEL RULES OF PROF'L CONDUCT R. 5.2(b).
²⁸ Matter of Hindin, 3 Cal. State Bar Ct. Rptr. 657, 682 (Rev. Dept. 1997) (supervising lawyer responsible for ethics violations of associate).
²⁹ In re Edward S., 173 Cal. App. 4th 387, 415 (2009) (applying ABA Model Rule 5.2).
³⁰ Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves—The Supervising Attorney*, 39 S. TEX. L. REV. 279, 309 (Mar. 1998).
³¹ Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 900 (1997).
³² Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates* 45 BRANDEIS L.J. 199, 209 (Winter 2007).
³³ RESTATEMENT (THIRD) OF AGENCY §§8.08, 8:09(2) (2006).
³⁴ LACBA Formal Op. No. 338 (Dec. 11, 1979).
³⁵ ABA MODEL RULES OF PROF'L CONDUCT R. 5.2(b).
³⁶ CALIFORNIA PRACTICE GUIDE, PROFESSIONAL RESPONSIBILITY §6:153 (2013).
³⁷ Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1055 (2008).
³⁸ Paul E. Rossler, Comment, *Running for Cover Under Sarbanes-Oxley*, 41 TULSA L. REV. 573, 574 (2006).
³⁹ CAL. RULES OF PROF'L CONDUCT R. 3-700(B)(2).
⁴⁰ CAL. RULES OF PROF'L CONDUCT R. 3-500; BUS. & PROF. CODE §6068(m).
⁴¹ LACBA Formal Op. No. 338 (Dec. 11, 1979).
⁴² CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY §6:154 (2013).
⁴³ H. Clay Smith III, *The Nuremberg Defense*, 14 THE YOUNG LAWYER 1 (ABA 2009) [hereinafter Smith].
⁴⁴ See Jacobson v. Knepper & Moga, P.C., 185 Ill. 2d 372, 377-8, 706 N.E. 2d 491, 493-4 (1998). See also Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A. 2d 873, 883 (D.C. 1998) (upholding firing of associate who reported ethical abuses but allowing slander claim); Bohatch v. Butler & Binion, 977 S.W. 2d 543, 547 (Tex. 1998) (upholding law firm's expulsion of partner who reported fellow partner's suspected billing abuses).
⁴⁵ CAL. RULES OF PROF'L CONDUCT R. 3-700.
⁴⁶ Wallace, 715 A. 2d at 883.
⁴⁷ ABA MODEL RULES OF PROF'L CONDUCT R. 8.3(a).
⁴⁸ Smith, *supra* note 43.
⁴⁹ Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 284 (2003) (likelihood of retaliation "strong").

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