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## Essay 4

### Question 1

#### Duty of Loyalty

A lawyer is under a duty of loyalty towards its clients. The duty of loyalty requires an attorney to not put any interest before the interest of a client, be it a third parties interest or the lawyer's personal interest. In cases where there are competing or conflicting interests with a client's interests and other interests that their lawyer must regard, there is a conflict of interest (Col).

- **Conflict of Interest**

Cols can be (i) either actual or (ii) potential.

(i) **An actual Col** is where a lawyer is already representing a client in the same controversy, meaning has a client which is in direct adversity with another client. This Col is irreconcilable and cannot be waived. A lawyer is barred from representing two or more adverse parties in the same case.

(ii) **A potential Col** is when there is a significant risk that the representation of a client may be materially adversely impacted due to the lawyer's obligations and duties towards a current or former client, another third party or the lawyer's personal interests. Clients can be paid or pro-bono clients, there is no difference between a for-profit client engagement and a pro-bono engagement in terms of a lawyer's duty of loyalty. These types of Cols are conciliable meaning they can be waived following the necessary procedures.

- **Waiver for Col**

ABA Rules permit a lawyer to obtain waiver from a client for a reconcilable Col if the lawyer (a) reasonably believes that the relevant interest would not impact their representation of the client, (b) informs the client as to the Col in writing, fully disclosing the relevant conflict, (c) obtains written consent from the client as to the acceptance of the Col (effectively waiver). Under CA rules, a lawyer must (a) inform the client as to the Col in writing, fully disclosing the relevant conflict, and (b) obtain informed written consent from the client as to the acceptance of the Col (which is effectively waiver). In both cases the lawyer is required to disclose the conflict to the client and obtain written consent to be able to proceed with with representation.

Here, LawnCare is a company that manufactures chemicals for lawn care. As a client, its interests are to sell and maintain a market for chemicals. LawnCare's interests oppose with C2AC, which is a consumer group that aims to lobby for environmental regulations which clearly oppose LawnCare's interests. Being a member of C2AC, it is very difficult for Andy to ascertain that he would be able to represent LawnCare without any significant risk of material adverse impact due to his personal interests as a member of C2AC. In addition, Andy has previously provided pro bono legal advice to C2AC, which means that Andy is not merely a

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member of C2AC, but C2AC is also his former client. The pro bono nature of the engagement does not change the duty of loyalty Andy owes to C2AC. As Andy provided pro bono legal advice to C2AC in the past, he owes a duty of loyalty to C2AC as his former client.

Thus, Andy must disclose to LawnCare his personal interest as a member of C2AC, as well as the fact that C2AC was his former client. The disclosure must be in writing and, in line with ABA rules, if he still reasonably believes that these interests do not create a material impact on his representation, proceed with representation only if LawnCare waives this conflict in writing. Under CA rules, there is no reasonableness standard, and LawnCare can waive the conflict with written informed consent.

Realistically, following Andy disclosing the conflicts, even if LawnCare were to consent to this representation, putting the former client relationship with C2AC aside, Andy's interest as a member of C2AC will materially and adversely impact his representation of LawnCare. Andy should withdraw from representation. Yet here, let alone withdrawing, Andy is not even disclosing his relationship as a member or the existence of a former client relationship. Andy is clearly breaching his ethical duties and should be subject to discipline based on ethical violation of his duty of loyalty.

### **Duty of Communication**

In addition to the duty of loyalty, a lawyer is under a duty of communication to its clients. The duty of communication requires open and clear communication with the client enabling them to understand the case, all interests, and actions the lawyer plans to take. A client is owed a duty of communication to be able to understand all material and relevant facts of a case and how the lawyer will approach these. Here, Andy's conflicting interest also means that he is not honest to the LawnCare. In addition to the breach of his duty of loyalty, Andy is also breaching his duty of communication to LawnCare by not revealing his private concerns about their chemicals.

### **Duty of Confidentiality**

A lawyer is under the duty of confidentiality with regard to any and all information they obtain as to the client within scope of the client's representation. A lawyer must not disclose confidential information about a client, unless, as per ABA rules, (i) the client consents, (ii) there is a risk of serious bodily harm or death to the client or a third person, or (iii) there is a significant risk of material financial harm. Under CA rules, a client may only disclose confidential information if there is a significant risk of bodily harm or death, in which case the lawyer must first try to convince the client to refrain from such action, then must disclose to the client that the lawyer may disclose confidential information with regard to said risk, and only then disclose confidential information only to the extent limited to prevent said death or imminent bodily harm. There is no exception for any financial losses under CA rules, as California is very protective of confidentiality.

- **Declarations to Press**

According to ABA rules, information about a case may only be disclosed to press if there is public interest. The existence of a case, parties, which stage it is at may be disclosed. CA rules permit an attorney to provide updates to the press regarding the case as long as this disclosure does not adversely impact the case. In both cases, the attorney may not reveal any confidential information as to the client.

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Here, Andy responds to an anonymous questionnaire sent to C2AC members with public information about Paula's complaint against his client LawnCare. While the information is publicly available, Andy's access to said information is presumably due to the fact that he is representing LawnCare. While there is no disclosure of confidential information, Andy is still breaching his duty of confidentiality with the duty of loyalty at the same time. Andy can not defend his disclosure of this lawsuit in any form with regard to LawnCare.

Furthermore, Andy has lied to the CEO of LawnCare who is an officer of his client. While Andy was hired by the company itself, he owes a ethical duties to the representative of the company, here the CEO. When Andy lies about the information he disclosed in C2AC's questionnaire to the CEO, he is breaching his duty of loyalty, honesty, fairness and communication all in one. The advice that Andy is providing to the CEO with regard to not disclosing details about the lawsuit is legal advice which is tainted with his personal interest. Andy is in breach of ethical duties and should be subject to discipline.

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**END OF EXAM**