

2)

1)

An **attorney-client (A/CL) relationship** begins when the lawyer (L) and client (CL) agree to enter into an agreement for the L to represent the CL for a legal matter. The A/CL privilege falls under the duty of confidentiality; under the ABA the privilege lasts forever, even after the CL dies. Under California (CA) rules, the privilege lasts until the CL's estate is distributed.

Here, Linda established an A/CL relationship with Non-Profit when Ellen (E) contacted her and said that Nonprofit would like to retain Linda to help it develop a formal employment agreement with E, to make E officially the Executive Director of Nonprofit. Linda agreed to accept the matter. Therefore an A/CL relationship formed and Linda represents Nonprofit as an organization. Linda must abide by the rules under the organization as a client discussed below.

Ellen could argue that an A/CL relationship formed between Linda and Ellen, as an individual and employee of Nonprofit. However, this argument will likely fail because when E contacted Linda, she specifically said that Nonprofit wanted to retain Linda to help it develop a formal employment agreement with Ellen, to make Ellen officially the Executive Director of Nonprofit. Therefore, no A/CL relationship formed between Linda and Ellen.

### **Linda's Ethical Violations at the time the A/CL relationship was created**

#### Organization as a Client

A lawyer retained by the organization represents the organization itself, and not the constituents of the organization. If a constituent wishes to seek advice from the L, the L must first get informed consent from the organization and explain to both parties how this could affect each party's A/CL relationship.

If there is a rogue employee, under the ABA, the L may report up the chain of command, to the board of directors/executives, and if the L reasonably believes that the employee's conduct could cause substantial injuries to the organization, and the executives fail to act, then L may report out of the organization and reveal confidences as necessary.

Under the CA rules, the L must first encourage the rogue employee to cease his/her actions and inform the employee of the potential consequences, the L may also report up the chain of command if necessary, but the L may not reveal any confidences outside of the organization, and must withdraw from representation.

Here, Linda was retained by Non-Profit and has a duty to Non-Profit. L may not provide advice

---

---

to any of Nonprofits constituents because she represents only Nonprofit. Therefore, Linda is only Non-Profit's attorney.

### Fees

ABA: Fees must not be unreasonable; and must take into account the nature of the relationship between the L and the CL, the novelty and difficulty of the case/representation, time, and experience of the lawyer.

CA: Fees must not be unconscionable or illegal; and must take into account the relative sophistication of the parties and the nature of the work/representation

### - Retainer Agreement

Retainer agreements must be in writing and may not be used for criminal or domestic (family law) cases. Under CA rules, the retainer agreement has to be in writing if it is reasonably foreseeable that the fees would exceed \$1000.

Here, there are not facts to determine what the fees are and whether they violate rules under the ABA or CA. However, with regards to the retainer agreement, Linda agreed to accept the matter and help develop a formal employment agreement, to make Ellen officially the Executive Director of Nonprofit. Ellen's position as Executive Director would be as an officer of the company, but not as a board member. However, Linda failed to memorialize her retainer agreement in writing and under both the ABA and CA rules, retainer agreements must be in writing. This is not a criminal or domestic case, therefore a retainer agreement is allowed. Additionally, under CA rules, if Linda reasonably foresees that the representation would exceed \$1000, then it must be in writing.

Therefore, Linda violated her duty to Nonprofit by not memorializing the retainer agreement in writing.

## **2a) Linda's Ethical Obligations with regards to Ellen's Employment Agreement**

### Duty of Competence

ABA: A lawyer must represent each client with the legal skills, knowledge, thoroughness, and preparedness to the extent reasonably necessary to competently represent the client.

CA: A lawyer must have the mental, physical, and emotional ability to competently represent the client. The lawyer may not intentionally, recklessly, or negligently repeatedly fail to represent the

---

client with competence.

Here, Linda has a duty of competence to Ellen's employment agreement. Linda violated her duty of competence when she received a draft of Linda's employment agreement that included a proposed salary, and told Ellen that the proposed salary was data-driven from a survey of similar positions, but based on the for-profit field rather than the non-profit field (as it should be.) Under the ABA, Linda has a duty to represent Nonprofit with the legal skills, knowledge, thoroughness, and preparedness to the extent reasonably necessary. When Linda saw many other provisions in the draft agreement that were more favorable to Ellen than those in a typical employment agreement, Linda should have communicated this to Nonprofit rather than remain silent.

Under the CA rules, Linda had the mental, physical, and emotional ability to represent Nonprofit competently, but Linda likely acted negligently and recklessly when she realized what Ellen had put in the draft agreement and chose not say anything to NonProfit.

#### Duty To communicate

The Lawyer has a duty to communicate to the client with any information related to the representation. The Lawyer must notify the client of any settlements agreements, plea bargains, and allow them to choose whether to take the settlement/plea bargain, and whether to testify or have a jury trial.

Here, Linda violated her duty to communicate with nonprofit when she failed to let them know of the favorable provisions in Ellen's draft of the employment agreement. Linda also failed to notify nonprofit that the proposed salary was data-driven from a survey of similar positions but based in the for-profit field. Linda also could have communicated this information to Ellen directly and let her know that she (Linda) was going to draft the agreement for the board to approve. Linda would argue that when she arranged the meeting with Nonprofit board to discuss the terms of Ellen's employment agreement, she was going to let them of this information.

If Linda did intend to communicate the information related to Ellen's draft of the employment agreement at the meeting with the board of directors, then Linda would likely not have violated her duty to communicate. If she did not intend to communicate the information, then she would likely violate her duty to communicate with nonprofit.

#### Duty of Loyalty

ABA: A lawyer has a duty of loyalty to avoid conflicts. Conflicts arise when the L's representation of a client is directly adverse to another client, or the lawyer's representation is significantly affected by the lawyer's representation of another CL, a former CL, or lawyer's close personal relationships. If the Lawyer reasonably believes that he/she can competently

---

and diligently represent the CL, then L may do so, so long as the lawyer receives informed written consent from the CL.

CA: Under CA rules, there is not reasonable standard; so long as L believes that he/she can competently and diligently represent the CL, then L may do so, so long as the lawyer receives informed written consent from the CL. Under CA authorities, if the lawyer has a personal, legal, professional, financial, and/or professional relationship with a party to the representation, then L must provide notice the each CL.

Here, Linda's duty is to the organization, and if Linda under the ABA, reasonably believes that she can competently and diligently represent nonprofit, then Linda may do so. Under the CA rules, if Linda believes that she can competently and diligently represent nonprofit, then Linda may do so. Ellen's actions and Linda's failure to act may raise an issue as to whether Linda can competently and diligently represent nonprofit. When Ellen sent the agreement to Linda, Linda knew that Ellen used data driven from the for-profit field, an area that Linda has experience with, and Linda also saw many other provisions in the agreement that were more favorable to Ellen than Nonprofit. If Linda cannot competently and diligently represent nonprofit and cannot keep her loyalty to Nonprofit, then she may have to withdraw from the representation. Nonprofit could argue that Linda failed to disclose this information with them (if true because the facts are silent on this matter), and thus violated her duty to loyalty to them.

Therefore, Linda likely did not breach her duty of loyalty without more facts.

**2b) Linda's Ethical Obligations with regards to Ellens' request for confidentiality regarding the source of the survey data.**

Ellen asked Linda not to tell the Board about the source of the survey data.

Organization as a Client

*See rules Supra.*

Here, Linda is counsel for nonprofit and she must communicate and reveal Ellen's request for confidentiality to the Board of Directors. Linda could argue that Ellen was acting as a rogue soon-to-be employee and should disclose and report this information to the Board of Directors at their meeting, and if the board of directors fail to act, then under the ABA, Linda can disclose confidence she reasonable believes necessary to avoid substantial injury to Nonprofit. Under CA, she must urge Ellen to use the calculations under the for-profit field and report if necessary to Board of Directors. If the Board of Directors fail to act, then Linda must withdraw.

---

Therefore, depending on Linda's actions at the Board of Directors' meeting, she could violate her duty to Nonprofit.

Duty of Confidentiality

L has a duty of confidentiality (see rules above related to A/CL relationship). L may however, reveal confidences if there is a likelihood of substantial bodily harm or death, and under the ABA, financial harms.

Here, Linda could have violated her duty of confidentiality if she finds that Ellen's employment agreement and request for confidentiality could cause financial harm to nonprofit.

Duty of Competence

ABA: A lawyer must represent each client with the legal skills, knowledge, thoroughness, and preparedness to the extent reasonably necessary to competently represent the client.

CA: A lawyer must have the mental, physical, and emotional ability to competently represent the client. The lawyer may not intentionally, recklessly, or negligently repeatedly fail to represent the client with competence.

Here, Linda breached her duty of competence both under the ABA and CA rules if she agreed to not tell the board about Ellen's source of the survey data. Under the ABA, she likely acted without the legal skill and knowledge to the extent reasonably necessary to competently represent nonprofit and under the CA rules, she likely recklessly, or negligently repeatedly fail to represent Nonprofit with competence based on the issue surrounding the employment agreement and Ellen's confidentiality request. .

Therefore, Linda breached her duty of competence both under the ABA and CA rules.

Question #2 Final Word Count = 1822

**END OF EXAM**