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PART I – ESSAY QUESTIONS

Question 1. (60 minutes)

You are an established attorney in Utopia, the 51st state in the USA. Daniel Defendant is a young business man that you have represented for three years in relation to his growing business. He has asked you to represent him in a paternity suit brought by Paula Plaintiff. Daniel is relatively confident that the child is his, however he is resisting the suit on the basis that Paula does not have to bear the child to term, with the current availability of abortion during the first 5 or 6 months of pregnancy. Paula is currently 2 months pregnant. The lawsuit was filed last week.

During your initial interview with Daniel, he revealed that he has known that he is HIV positive for almost a year. His disease is part of his motivation in demanding that Paula seek an abortion, since he is afraid the child would be infected. However, because he is worried about liability for infecting Paula, he has not told her that he is HIV positive, but merely insisted that since he has no legal rights to the decision to carry the child, he should have no legal obligations if the child is born.

Paula's petition does not include any claims for infecting her with the HIV virus, but current methods of testing may not reveal infection for a six-month period after exposure. Additionally, medical evidence suggests that the HIV virus is not transmitted to an infant in utero, but rather during the trip through the birth canal. Thus the prevailing theory is that infecting the child can be avoided by delivering the child via cesarean section.

What do you do? What do you advise the client to do? Considering all possible responses by the client, do you take any further actions? If so, what would they be? In drafting your answer consider the implications of the following statute in effect in Utopia.

§ 22.012. Intentionally Exposing Another to AIDS or HIV

(a) A person commits an offense if the person, knowing that he or she has AIDS or is a carrier of HIV and with intent to cause serious bodily injury or death, intentionally engages in conducts reasonably likely to result in the transfer of the actor's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the other person's skin or other membrane, except during in utero transmission of blood or bodily fluids, and:

- (1) the other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretions; or
- (2) the other person consented to the transfer but at the time of giving consent had not been informed by the actor that the actor had AIDS or was a carrier of HIV.

- (b) In this section, "AIDS" and "HIV" have the meanings assigned by Section 9.01, Communicable Disease Prevention and Control Act (Article 4419b-1, Utopia Statutes).
- (c) An offense under this section is a felony of the third degree..

Added by Acts 1989, 71st Leg., ch. 1135, § 14, eff. Sept. 1, 1989.

Question 2. (30 minutes)

A lawyer working at the Social Security Administration wrote a set of regulations on the eligibility for disability benefits of AIDS patients. The process of drafting these regulations involved review of many medical sources and consultation with numerous doctors on what should be the standard for eligibility for benefits. A year after the final regulations were adopted, the same lawyer went into private practice. Under the Model Rules, may he represent a person who has AIDS in a claim for disability benefits? The application for benefits would be evaluated using the regulations that the lawyer had written. Identify and discuss the application of any relevant rules.

Question 3. (40 minutes)

Alex Attorney is in-house counsel for Med-Tech Corporation, a manufacturer of medical equipment and devices. Eighty per cent of Med-Tech's sales are made to hospitals and clinics in the United States, with the remaining twenty per cent made to Canadian and Western European medical centers. One of Med-Tech's best selling products is its body ventilator. Current U.S. standards set by the FDA for such ventilators require the use of ventilator cuffs that experience a failure rate f less than 4 per 1000. Canadian and Western European standards tolerate a failure rate of 3 to 5 failures per thousand. (A ventilator cuff is the part of the ventilator that attaches the necessary equipment to the patient's respiratory system. Failure of the ventilator cuff results in the patient being deprived of oxygen.)

Unfortunately due to the late discovery of broken eknometer in one of the machines involved in the production of the cuffs, 15,000 new machines have ventilator cuffs with a failure rate of 8 per 1000. Replacement of the eknometer is estimated to take three weeks. Med-Tech is under contract to ship 8500 machines during the upcoming three weeks. The company is late on delivery of another 3500 due to stopping shipments while the stock is checked for this defect. There are no machines in stock that meet American, Canadian or Western European standards.

Company management asked Alex about prospective liability for shipping the machines in stock to fill back orders. Alex was adamant that this should not be done. Management then asked for a cost projection for lawsuits and settlements that might occur if the

defective machines were shipped, in order “to better assess whether this was a business risk that they were willing to take. Alex was adamant that such projection was unnecessary because this proposed course of conduct was absolutely immoral and bordered on criminal.

In light of the concerns that Alex raised, some senior management decided to attempt to market the ventilators to Eastern European governments that had not developed standards for medical equipment. The preliminary letter describing the ventilators stated:

These ventilators have been manufactured to meet or exceed American and Western European standards. Med-Tech is offering these ventilators at a discount to Eastern European governments to establish the company's place in the market, on the theory that once the products are used and Med-Tech is recognized as the manufacturer of quality ventilators, market share will more than compensate for initial discounts.

The Director of Distribution just received a 2000 unit order from the Polish government with directions from the Vice-President of Marketing to ship the ventilators in stock. Troubled by this, the Director brought the sales letter and order to Alex for his advice on whether to ship the defective ventilators.

Alex told the Director to ship the ventilators to Poland. The Director asked for a written confirmation of this advice, which Alex gave her.

Having experienced an abnormally high failure rate with the ventilator cuffs, one year later the Polish government filed suit for restitution and damages due to misrepresentations and fraud. Ultimately, Alex's memo confirming that the ventilators should be shipped emerged in discovery. One of the American relatives of a Polish patient who died due to cuff failure filed a complaint with the State Bar of Utopia.

Please write a preliminary report for the Bar Counsel, assessing whether Alex is subject to discipline for his conduct. Your report should cite possible rules that may have been violated. Consider arguments supporting and opposing discipline, and conclude with your recommendation on whether to proceed.

[PART TWO OF EXAM CONTINUES ON NEXT PAGE]