

## QUESTION 2

Claire had been a customer of Home Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home Inc. and Don in California state court, alleging that they had defrauded her.

Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home Inc. in Claire's action. Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else, before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him too that he had defrauded Claire. Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire.

Shortly before trial, Don fired Luke. Don soon died unexpectedly.

Claire filed a claim against Don's estate and a claim against Home Inc., alleging as in her action that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate, but not against Home Inc.

At trial against Home Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work-product doctrine.

1. Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law.
2. Should the court compel Luke to produce his memorandum:
  - a. To the extent it recounts what Wendy told him? Discuss. Answer according to California law.
  - b. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.
3. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.

## QUESTION 2: SELECTED ANSWER A

1. Should the court compel Luke to testify about what Wendy told him?

### Attorney-Client Privilege: Don and Luke

The attorney-client privilege protects confidential communications made to facilitate legal representation. It is narrower than the duty of confidentiality, which applies to any information related to the representation of a client, even if no attorney-client relationship is formed. The attorney-client privilege protects communications made by the client or the client's agent to the lawyer or the lawyer's agents. In the corporate context, the attorney-client privilege, in California, protects communications made by a spokesman for the corporation or by someone whose actions could be imputed to the corporations for purposes of liability.

The attorney-client privilege attaches and applies even if a lawyer is subsequently removed from a case. Thus, here, Don's decision to fire Luke did not prevent the privilege from applying to confidential communications made to facilitate legal representation. However, in California, the attorney-client privilege ends when the client dies and his estate is entirely disposed of. Consequently, here, the attorney-client relationship between Luke and Don ended when Don died and his estate settled Claire's claim against the estate. In California court, Luke would not be able to claim attorney-client privilege.

Moreover, the issue here is whether the attorney-client privilege covers communications between Wendy and Luke in the first place. As noted, in order for the privilege to apply, the communication must be confidential and it must be made for the purposes of facilitating a legal relationship. Additionally it must be communicated by either the client or the client's agents. Here, it does not appear that the communication was confidential or that Wendy was Don's agent. Wendy told Luke that Don had admitted to her that he

had defrauded Claire. By sharing this information with a third party, Don arguably made it unprotected because it was no longer confidential. Consequently, the attorney-client privilege would not apply on that basis.

Second, it does not appear that Wendy was Don's agent. The attorney-client privilege will potentially protect communications made by a client to the lawyer's agent, such as a physician hired to examine the client, or by the client's agent, such as an employee speaking on behalf of the corporation. But it does not cover statements made by everyone who knows the client or is in a familial relationship with him or her. Here, Wendy does not appear to have been acting in any way as an agent of Don, nor is she an agent of Luke. Consequently, the attorney-client privilege between Luke and Don would not apply.

#### Attorney-Client Privilege: Wendy and Luke

Additionally, Wendy was not speaking with Luke for the purpose of facilitating his legal representation of her--she was not a client. Moreover, as noted above, it does not appear the communication was confidential. Consequently, there does not appear to be an argument for an independent attorney-client privilege between Wendy and Luke.

Given that Wendy's statement does not appear to have been protected by the attorney-client privilege based on Luke's representation of Don or any purported attorney-client relationship between Luke and Wendy, the court should likely compel Luke to testify about what Wendy told him.

## 2. Luke's Memorandum

#### Attorney-Client Privilege

As noted above, the attorney-client privilege does not seem applicable here, either based on Luke's representation of Don or any purported attorney-client relationship

between Luke and Wendy. Consequently, the attorney-client privilege is not a basis for the court to refuse to compel production of the memorandum.

### Work Product

In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere.

#### a. Wendy's Statements

To the extent the memorandum recounts what Wendy told Luke, it is qualified work product. This portion of the memorandum would not constitute Luke's mental impressions or opinions regarding the interview. It is merely a factual recounting of the interview. Consequently, this portion of the memorandum would likely receive qualified protection. If Claire can show substantial needs and inability to acquire the information contained in the interview without compelled disclosure, then the court should compel Luke to produce his memorandum. However, this seems unlikely to apply here. The facts indicate Don died, but they do not state that Wendy died. Based on the facts, it appears that Claire could easily subpoena Wendy in order to ask her questions and try to establish the same information she is seeking from Luke. Without this showing of inability to get the information without compelled disclosure, it appears unlikely the court should compel Luke to turn over the memorandum.

## b. Luke's Belief That Wendy Would be a Good Witness for Claire

To the extent the memorandum expresses Luke's belief that Wendy would be a good witness for Claire, it is absolutely privileged. This portion of the memorandum is made up of Luke's mental impressions and opinions. The court should absolutely not compel Luke to produce this portion of the memorandum. It is worth noting that the mere presence of an absolutely protected mental impression or opinion in a document does not make the entire document or the information contained therein absolutely privileged. If the court did determine there was substantial need and unavailability, and chose to compel Luke to produce the memorandum to the extent it recounts his interview with Wendy, then it could redact or eliminate the portions of the memorandum that are absolutely privileged.

## 3. What ethical violations, if any, has Luke committed?

### Fee Agreement--Financial Duties

In California, fee agreements must be in writing unless the amount is less than \$1,000, the work is for a corporation, the client agrees to forego a written agreement, the work is routine, or there is an emergency. Here, Don entered into a valid retainer agreement. Thus, there is an assumption that this requirement is satisfied. But if the retainer agreement was not in writing, it would likely be a violation of California ethical rules because none of the exceptions appear applicable. The ABA does not have a similar requirement for non-contingent fee agreements--they do not have to be in writing, although it is encouraged. Consequently, there is no ABA violation regardless of whether the fee agreement is in writing.

### Luke's Decision to Tell Wendy about the Fraud--Duty of Confidentiality

The duty of confidentiality requires a lawyer not to disclose information learned in the course of representation. It attaches even when no attorney-client relationship is

formed, unless there is a disclaimer in plain English, so long as the information is related to legal representation. It survives the representation and the client.

Here, Luke violated the duty of confidentiality by telling Wendy that Don had admitted to defrauding Claire. Luke learned of this information in the course of representing Don, thereby making the information confidential. Luke then failed to safeguard this information by actively revealing it to Wendy.

California and ABA authorities provide exceptions to the duty of confidentiality when a client makes a claim against a lawyer, when the information relates to the services provided by the attorney, when disclosure is required by the court, and when the lawyer learns information relating to imminent death or substantial bodily injury of a third-party. An attorney is also allowed to reveal information that is necessary to represent the client or that the client consents to him revealing. The ABA permits disclosure when a client is using the lawyer's services to perpetrate fraud or commit a crime that is likely to result in substantial financial loss. It also permits disclosure when seeking an ethical opinion on a matter. California does not have an exception for financial loss. Here, none of these exceptions seem applicable. It does not appear that Don consented to Luke telling Wendy that Don had defrauded Claire, nor does it appear that such an admission to Wendy was necessary for Luke's representation of Don. Luke may argue that there was implied consent because Wendy told him that Don had admitted the fraud to her, but it does not appear that Don ever instructed Luke to share this information prior to the interview. Under ABA authorities, Luke could argue that his disclosure was necessary to prevent financial loss, but this argument would not prevail because Don was not using Luke's services to defraud anyone and, since the fraud had already occurred, there was no imminent, substantial financial loss to any party. Moreover, this exception is inapplicable in California.

Consequently, Don likely breached his duty of confidentiality by telling Wendy about the fraud.

## Luke Testifying at Trial--Duty of Fairness

Under ABA authorities, a witness may not represent a client if he is likely to have to testify at trial. A client generally may not testify at his client's trial unless his testimony relates to his services, a breach of his duties, or his testimony is necessary to prevent undue hardship. In California, an attorney may testify at a bench trial and may testify if his client consents at a jury trial. Here, Luke would not breach his duty by testifying in the suit against Home Inc. because it was not his client.

## Duty of Competence

An attorney owes a duty of competence to his clients. He must have the necessary skill, thoroughness, and preparation required for competent representation. The duty requires the attorney to communicate with the client about important matters. Here, Don fired Luke shortly before trial. Although these facts do not themselves implicate the duty of competence, it suggests that Luke may not have been acting competently in his representation of Don, leading Don to fire him from the case. Moreover, the fact that Luke chose to reveal confidential information, apparently without consulting with Don, further suggests a violation of the duty of competence. California punishes intentional, repeated, or reckless violations of the duty of competence. Here, the facts do not suggest one way or another whether Luke intentionally, repeatedly, or recklessly violated his duty of competence. Thus, it is unclear whether he would be subject to any discipline even if he did act incompetently according to ABA authorities.

## Duty of Loyalty

The duty of loyalty requires an attorney not to use non-public information against a client in a subsequent proceeding. According to ABA authorities, if there is a significant likelihood that an attorney will be materially limited in his representation of a client by professional or personal interest, the attorney can only take on the representation if: he reasonably believes he can provide representation unaffected by the conflict, he informs

the client, and he receives consent. The informed consent must be memorialized in writing. In California, there is no reasonable belief requirement, both potential and actual conflicts require disclosure, and consent must be in writing unless it is based on an attorney's past representations or personal conflicts. Here, Luke took on the representation of Don, independent of Home Inc. If Luke had tried to represent both Home and Don, then he would have had a significant risk of material limitation and a potential conflict, which would have required informed written consent under the ABA and consent in writing in CA. Given that he did not appear to have any conflicts here, he is likely not in violation. However, if he testifies at Home Inc.'s trial, he may violate his continuing duty of loyalty if he reveals any non-public information he learned in the course of representing Don.

#### Duties on Withdrawal

When an attorney is fired, he must return all unspent retainer money as well as the client's papers and documents necessary for representation. California authorities specifically prohibit holding on to client documents for the purpose of getting paid. Here, so long as Luke returned Don's papers and any unspent retainer money, he likely did not commit a breach of his duties upon withdrawal from representation.

## **QUESTION 2: SELECTED ANSWER B**

### **1. LUKE'S TESTIMONY ABOUT WENDY'S STATEMENT**

#### *Protection by Attorney Client Privilege*

At issue is whether Luke's interview of Wendy is protected by the attorney-client privilege.

In California, the attorney-client privilege attaches to a communication made in confidence between a client and his lawyer in the course of the representation. The client, the sole holder of the privilege, can bar the lawyer from testifying as to the content of the communication. However, the privilege does not survive the death of the client after the client's executor has finished distributing his estate. There are certain exceptions to the attorney-client privilege, including when the lawyer reasonably believes that disclosure would be necessary to avert serious bodily harm to others, and when the client is attempting to use the lawyer's services to perpetrate a crime or fraud.

Here, as part of his preparation for trial, Luke interviewed Don's sister, Wendy. Wendy told Luke that Don had admitted to her that he had defrauded Claire, but never anyone else. Nothing in the facts indicates that Wendy did not tell Luke this information in confidence. Her statement, however, was not a communication between a lawyer and client, but between a lawyer and a third party. It therefore falls outside the scope of the attorney-client privilege. Moreover, by the time Claire was attempting to compel Luke to testify at trial, Don had died. We also know that his executor had closed his estate, since the executor had settled Claire's claim against Don. Therefore, Don's ability to invoke the privilege died along with him, and there is no bar under the attorney client privilege to Luke's testimony. The court should compel Luke to testify.

### **2. LUKE'S MEMORANDUM**

#### *Attorney-Client Privilege with Regard to Wendy's Statement and Luke's Belief*

At issue is whether Luke's description of Wendy's statement or Luke's belief about Wendy's suitability as a witness is protected by the attorney-client privilege.

As noted above, the attorney client privilege only attaches to confidential communications between lawyers and clients, and it does not survive the death of the client. Here, Luke wrote a memorandum after interviewing Wendy that contains two components: Wendy's statements, described above, that Don had admitted he had defrauded Claire; and Luke's belief that Wendy would make a good witness for Claire. Neither of these is a communication between Don, the client, and Luke, the lawyer. Moreover, because Don is deceased and his estate has been closed, no one survives to invoke the privilege. The attorney-client privilege does not provide a justification for Luke to refuse to produce the memorandum.

#### *Work Product Doctrine with Regard to Wendy's Statement*

At issue is whether Luke's memorandum, to the extent that it recounts Wendy's statement, is protected by the work product doctrine. California law privileges from discovery documents produced in anticipation of litigation. It also draws a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and an absolute privilege, which attaches to statements of belief or opinion by an attorney contained in work product. The qualified privilege may be overcome by a showing that there is a substantial need for the facts contained in the work product and that they are unavailable through other means, whereas the absolute privilege cannot be overcome. The work product doctrine survives the death of the client.

Here, Luke's memorandum contains Wendy's statement that Luke had defrauded Claire. Luke prepared this memorandum after Don retained him to defend him in the fraud action, causing him to interview Wendy. It was therefore made in anticipation of litigation, placing it within the scope of the work product doctrine. The description of what Wendy told Luke, however, is a factual one. It is therefore subject only to a qualified privilege, and Claire may be able to overcome it. Don's admission that he defrauded Luke would be damning evidence against Home Inc., the remaining defendant at trial. Claire can likely show that there is a substantial need for the testimony. However, it does not appear on these facts that Claire would not be able to

obtain this testimony by other means. She could simply subpoena Wendy, or she could have noticed Wendy's deposition during discovery, to obtain Don's admission from Wendy herself. If Wendy is for some reason unavailable, then Claire may be able to compel production.

Therefore, the qualified privilege that attaches to Wendy's statement likely protects the memorandum from discovery.

#### *Work Product Doctrine with Regard to Luke's Belief*

At issue is whether Luke's belief about Wendy's suitability as a witness is protected by the work product doctrine. As noted above, this belief is expressed in a memorandum that Luke prepared in anticipation of litigation; indeed, there would be no other reason to speculate as to whether Wendy would make a good witness. Luke's belief, however, is absolutely protected by the work product doctrine, since it expresses a lawyer's beliefs and opinions about the proper strategy for trial. Therefore, regardless of what showing Claire makes at trial, it is protected, and the court should not compel production.

#### *Overall Conclusion*

Neither Wendy's statement nor Luke's belief is protected by the attorney-client privilege, but both are likely protected by the work product doctrine. The court should deny the motion to compel.

### **3. LUKE'S ETHICAL VIOLATIONS**

#### **Duty of Confidentiality**

At issue is whether Luke breached his duty of confidentiality to Don.

Under the ABA and California rules, a lawyer owes his client a duty of confidentiality. This duty prohibits a lawyer from revealing to any third party information learned from or about the client in the course of the representation, unless an exception applies. It attaches as soon as a lawyer-client relationship begins. Here, Luke and Don entered into a lawyer client relationship when they executed a valid retainer agreement. Luke

then interviewed Don and learned that Don had defrauded Claire—a fact learned about Don during the course of the representation. Luke then, in his conversation with Wendy, revealed this fact to Wendy. This was thus a disclosure of a client's confidential information, so unless an exception applies, Luke is subject to discipline under both the ABA and California rules.

### *Exceptions to the Duty of Confidentiality*

#### i. Implied consent

A client may impliedly consent to a lawyer's use of his confidential information, when such disclosure would be a natural and necessary feature of the representation. Here, Luke could argue that Don impliedly consented for him to reveal this information to Wendy, since Wendy was Don's sister and Luke might need the information to build a rapport with her. However, especially since Luke only revealed the information after Wendy had told him what Don had told her, this exception does not apply.

#### ii. Averting physical harm

A lawyer may reveal a client's confidential information under the ABA and California rules if he reasonably believes that disclosure is necessary to avoid imminent bodily harm to a third person. In California, the harm must arise out of a criminal act, and the lawyer must first attempt to dissuade the client and inform him of the lawyer's intent to reveal. Here, Don admitted to past fraud, which seems to pose no risk of bodily harm—criminal or otherwise—to anyone. Therefore, this exception does not apply.

#### iii. Serious financial harm using the lawyer's services

The ABA, but not California authorities, allow disclosure if the lawyer believes it to be reasonably necessary to avoid serious financial harm to a third party, and the harm would be perpetrated using the lawyer's services. Here, Don admitted to fraud in the past, but said he had not defrauded anyone else since. Nor does he appear to have sought Luke's help in perpetrating any such fraud. Therefore, this exception does not apply.

iv. Fact has become generally known

Under both ABA and California rules, a lawyer may reveal a client's confidential information if that information is no longer confidential because it has become generally known. Here, Luke can argue that because Wendy already knew that Don had admitted to defrauding Claire, there was no breach of confidence by revealing what Don had told Luke. However, although this fact might have been known to Wendy, it was not *generally* known in the world. Therefore, this exception does not apply.

### *Conclusion*

Luke is subject to discipline because he breached his duty of confidentiality and no exception applies.

### **Safeguarding the Client's Property**

At issue is whether Luke violated any ethical rules by not returning the memorandum to Don when Don fired him.

A lawyer owes his client a duty to safeguard the client's property under both ABA and California law. This includes a duty to return to the client all materials related to the representation upon the end of representation. A lawyer may not retain a client's case file, including for the purposes of recovering his fee. Here, Don fired Luke before trial, but Luke appears to have kept possession of the memorandum recounting his meeting with Wendy until the time of trial. Therefore, by failing to return the memorandum to Don or his estate, Luke breached his duty to safeguard client property.