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===== Start of Answer #2 (1433 words) =====

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

Logical Relevance

Evidence is relevant if it has a tendency to make a material fact more or less probable. Under CEC, the material fact must be in dispute.

Here, Claire wants Luke to testify in regards to what Wendy told him which was that Don had admitted to her that he had defrauded Claire. Since Claire is suing Home, Inc. due to fraud and Don previously worked at Home Inc., the evidence is relevant to show that there was fraud that took place. Therefore, the evidence is logically relevant.

Legal Relevance

Evidence is legally relevant, if its probative value outweighs its prejudicial effect. Here, the prejudicial effect would be towards Home Inc because there would be an admission of fraud. But, the value of the evidence is higher than the prejudicial effect it would have against Home Inc. Therefore, the evidence will likely be legally relevant as well.

Attorney-Client Privilege

An attorney can invoke the attorney client privilege even when the client is deceased or when the client has fired the attorney. This means that the end of the attorney client relationship does not necessarily end the attorney client privilege. Moreover, the attorney client privilege covers all confidential communications made between the attorney and the client.

Here, the communications were between Wendy and Luke. Wendy was Don's sister and therefore not his client. Because Wendy was not Luke's client, Claire will argue there is no attorney client privilege that applies to their communications. But, the communications between Wendy and Luke were in the course of anticipation of litigation. Therefore, Luke was wrong in invoking

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attorney-client privilege when instead he had to invoke the attorney work-product doctrine because his discussion with Wendy were most likely in preparation for litigation. Thus, Luke will likely be compelled to testify because although he claimed attorney-client privilege, none existed between him and Wendy.

Therefore, since no privilege exists, the court can compel Luke to testify.

**2. (a) Should the court compel Luke to produce his memorandum: to the extent it recounts what Wendy told him?**

Attorney-Client Privilege

See rule above.

The memorandum drafted by Luke recounted what Wendy told him. Similarly to above, the memorandum was prepared in anticipation of litigation. Although Claire will claim that is it a transcript of what occurred, that would not matter here because Luke was Don's attorney and was preparing for Don's case by talking to Wendy and finding out what she knows in anticipation for trial. Therefore, the memorandum is protected by attorney-client privilege.

Attorney Work-Product Doctrine

An attorneys mental thoughts or impressions are protected under the attorney work-product doctrine.

Here, Luke drafted a memorandum recounting what Wendy had told him in regards to Don admitting to her that he had defrauded Charlie. As discussed above, Luke will argue that this memorandum was drafted in anticipation for litigation. Since the memorandum was made in preparation for Don's case, it is likely that Luke will succeed in claiming attorney work-product doctrine.

California Rule:

The CEC allows for disclosure if it would be entirely too difficult for the opposing party to get on their own merit.

Here, Claire will argue that it would be difficult for her to obtain the information that Luke received via Wendy. But, there is nothing in the facts that state that Wendy is unavailable to testify, on the contrary, Don is the one who is now unavailable because he is deceased. Therefore, Luke should argue that Claire can call Wendy to the stand and ask her about Don. Therefore, this is an issue for the court and will depend on the difficulty of Claire obtaining the information. Moreover, the court can decide if they want to introduce the entire memorandum or the court can decide to omit certain parts that are protected under attorney-client privilege and the attorney work-product doctrine.

**2. (b) Should the court compel Luke to produce his memorandum: to the extent it express his belief that Wendy would be a good witness for Claire?**

Attorney-Client Privilege

See rule above.

As discussed above, the memorandum does not fall into attorney-client privilege because Don was Luke's client, not Wendy. It is more likely that it will fall under attorney work-product doctrine, discussion below.

Attorney Work-Product Doctrine

See rule above.

Here, Luke drafted a memorandum expressing his belief that Wendy would be a good witness for Claire. This would fall under the attorney work-product doctrine because Luke took his mental impressions of his conversation with Wendy and came to a conclusion. Therefore, this will be considered to fall into the attorney work-product doctrine.

California Rule:

See rule above.

As discussed above, Claire could state it would be difficult for her to obtain this

information on her own. This will likely fail because (as stated above) there is nothing in the facts that show that Wendy is unavailable or unwilling to testify at trial. Therefore, it is unlikely that Luke will have to produce the part of the memorandum where he states that Wendy would be a good witness for Claire.

### **3. What ethical violations has Luke committed?**

#### **Duty of Confidentiality**

An attorney owes their client a duty of confidentiality, which means that an attorney will not disclose what the client has said to him in confidence unless the client has given approval to disclose the information or they understand it will be disclosed in order to provide adequate representation. Additionally, this duty of confidentiality extends even when the client fires their attorney.

Here, Luke disclosed to Wendy, Don's sister, that Don had admitted to Luke that he had defrauded Claire. This is a violation because although Don had already state this to Wendy, Luke had no reason to believe he was allowed to disclose this to Wendy. Moreover, Luke's disclosure has nothing to do with his representation of Don because him admitting that Don told him that same thing Wendy knew, does not further his case. Therefore, Luke violated his duty of confidentiality to Don.

Moreover, it should be noted that the duty of confidentiality exists even when the client is deceased. Although the interaction with Wendy occurred prior to Don's death, Luke would still owe the duty of confidentiality to Don if Don was alive or deceased.

#### **Duty to Report**

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Under the ABA, attorneys have a duty to report to the authorities if their client is likely to cause substantial harm to someone. Moreover, an attorney has a duty to not help their client perpetuate fraud.

Here, because we are dealing with fraud, it could be argued that Luke helped Don commit fraud. This does not seem to be the case because although Don stated that he defrauded Claire, he never stated he planned to defraud more people nor did he ask Luke to help him do this. Instead, Don admitted he had defrauded Claire but state he has never defrauded anyone else, before or since. Thus, although Don had committed fraud previously, he stated he was not doing this to other people presently or planning to do it in the future. Therefore, Luke did not have a duty to report Don.

#### Duty of Candor to Court

An attorney has a duty of candor to the court. This means that the attorney must act honestly and in good faith. Here, it could be said that Luke was helping Don even though Don had admitted to Luke that he had defrauded Claire, therefore Luke should have been honest with the court about Don's fraud. On the other hand, an attorney does not have to disclose every negative thing that his client tells him. Moreover, nothing in the facts state that Luke planned to lie to the court.

#### Conflict of Interest

Conflict of interest arise when the attorneys representation is compromised by a conflict that exists at the time that would make his representation problematic. When conflicts of interest arise, the attorney must disclose this to his client and receive written consent if the client wants to continue representation.

Here, the one issue that could arise is that Luke represented Don only and not Home Inc. But, Luke does not seem to have any interest in Home Inc or anything that would hinder his representation of solely Don. If the facts stated that Luke was the in-house counsel for Home Inc, the outcome of this would be different because Luke would owe a duty to Home Inc and not Don and would have to

express that to Don. But, that is not the case here. Don hired Luke and there are no conflicts of interest that exist.

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Question #2 Final Word Count = 1433

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