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Proposition 8

Prop 8 is an amendment to the CA constitution which provides that under criminal cases in CA, all relevant evidence will come in. This is subject to the exceptions of the confrontation clause, hearsay, open the door, privilege, secondary evidence, etc..

Here, C brought a suit against Home inc. and Don (D), alleging that they had defrauded her when she was dissatisfied with work the home improvement company did for her. Fraud is a civil action.

Thus, Prop 8 does not apply to this instance.

Note: Res judicata

A party will be prevented from filing an action if it involves 1) same parties, 2) same claim, and 3) a final judgment on the merits.

Here, the facts mention that C filed a claim for fraud against D and Home Inc. Then, C filed a claim against D's estate and home inc for the same cause of action. Therefore this is for the same claim between the same parties; however, there is no final judgment on the merits.

Thus, res judicata does not prevent this (if the facts suggest that two claims were filed by C).

**1) should the court compel L to testify about what W told him?**

Relevance

Evidence must be logically and legally relevant to be admitted. Under the FRE,

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Evidence is logically relevant if it tends to prove or disprove a material fact. Under the CA rules, that fact must also be in dispute. Evidence is legally relevant if its probative value outweighs its prejudicial value.

Here, L interviewed Wendy (W) regarding the suit against her brother D. During the interview W told L that D had admitted to her that he had defrauded C. L's testimony is logically relevant under both the FRE and CA rules because it tends to prove that D admitted to his sister (W) that he defrauded C. Because this is a fraud action, this fact is also in dispute. The evidence is prejudicial because it shows a party admitting to fraud. However, the probative value far outweighs the prejudicial value.

Thus, L's testimony is relevant.

### Hearsay

Hearsay (H) is an out of court statement offered to prove the truth of the matter asserted in the statement. Hearsay is not admissible in court unless an exception applies. Under the FRE, there are also exemptions to the H rule. However, CA titles everything as an exception.

Here, L would testify about statements that W said to him during their interview. Thus, the things he would be testifying about are hearsay.

### Family exception

If the declarant is testifying about what their close family member told them, who is now unavailable, then the H may be admitted. D is dead, thus unavailable to testify. However, C is not asking the court to compel his sister W to testify about statements her brother D made to her, rather, C wants to compel L to testify about what W told him during their interview.

Thus, this exception does not apply.

attorney client privilege

under the FRE and CA rules, statements made to an attorney are privileged if made during the course of representation.

Here, L does not represent W, but he represented W's brother D in the fraud action. L interviewed W because of her relationship with her brother and did so on the behalf of his client. This interview was protected by the attorney client privilege.

**2) should the court compel L to produce his Memo?**

**2a. Compel to produce memo in regards to what W told L?**

Relevance

See rule above.

Here, L's memo is logically relevant under both the FRE and CA rules because it tends to prove that D admitted to his sister Wendy (W) that he defrauded C. Because this is a fraud action, this fact is also in dispute. The evidence is prejudicial because it shows a party admitting to fraud. However, the probative value far outweighs the prejudicial value.

Thus, the memo is relevant.

Hearsay

See rule above.

Here, the memo was produced outside of court and is thus hearsay.

Therefore, the court will not admit the memo unless an exception to the H rule applies.

Hearsay within hearsay

when a piece of evidence involves double H, each layer of the evidence must be admissible on its own before it can be admitted into evidence.

*First layer- Wendy's statement to L.*

W was interviewed by L and told L that her brother told her that he defrauded C.

Family exception

See rule above. Here, W and D are siblings. D is unavailable to testify.

Therefore, the hearsay would come in under this exception to the hearsay rule.

Thus, the first layer is admissible.

*Second layer- L writing the memo*

After L interviewed W he drafted a memo recounting what W told him.

Hearsay

See rule and analysis above.

Here, the memo is hearsay and does not appear to meet any of the hearsay exceptions.

Thus the second layer does not have an exception to the H rule and the memo will not be admissible to the extent that it recounts what W told him.

Work Product

An attorney's work product is not discoverable or admissible in evidence under both the federal and California rules of evidence and federal procedure. Memos are protected if they convey the thoughts of the attorney. Here, the memo was produced by L. The fact that the memo shows that L thought D was a good witness for C proves that this memo conveys L's thoughts.

In sum, the memo as it recounts what W told L is not admissible under CA rules of evidence (Or FRE).

**2b. Compel to produce memo to the extent it expresses his belief that W would be a good witness for Claire**

Relevancy

see rule and analysis above

Work product

see rule above.

Here, L indicated in the memo that he thought W would make a good witness for C. This is belief and strategy of the attorney.

Thus, this portion of the memo is protected by the work product privilege and will not be admissible in evidence.

**3) Ethical violates L has committed**

Lawyers have many duties. The ABA proscribes the model rules for professional responsibility. Further, the California code of conduct prescribes specific rules for attorneys licensed in CA. L has committed multiple ethical violations.

Duty of competence

Under the ABA, L must act using the skills, knowledge, thoroughness, and

preparedness necessary to adequately represent their client. Under the CA rules, L must not act recklessly or grossly incompetent, or repeatedly act with incompetence. L may gain competency by associating with an attorney that is competent in the area of law if L is not competent in the subject matter.

Here, L was hired by D when C brought an action against Home Inc and Don in a California superior court. There are no indications that L is not competent in the area of law.

Thus, L did not violate this duty.

Duty of confidentiality

L owes a duty of confidentiality to D. A lawyer must not disclose anything in regards to representation. Under the ABA, a lawyer may disclose confidential information if they have 1) consent, 2) to defend in malpractice, 3) to prevent serious injury or death, or 4) to prevent serious financial harm. Under CA authorities, the rule is similar; however, L may not disclose to prevent serious financial harm and is not required to disclose to prevent injury or death (but they must encourage their client NOT to do those things).

Here, during the interview with W, L disclosed a client confidence. L told W that D had admitted to him too that he had defrauded C. L should not have mentioned this to W because his client D communicated this information to him in confidence. No exception to the rule is evident here.

Thus, L violated the rule of confidentiality.

Duty of fairness to opposing counsel

under ABA and CA, L must not communicate with individuals they know are represented by another attorney without that attorney's consent.

Here, D is an employee of Home Inc., thus D may be an agent of Home inc.. If he was acting within the scope of his employment when he allegedly defrauded C, then it is likely that Home inc is liable for the actions of D through respondeat superior. However, C is suing D in his individual capacity as well in this action. Thus, D would need his own legal representation aside from the attorney representing Home inc. Regardless, L should have contemplated this rule prior to meeting with D.

Thus, on balance, it is likely that L did not violate this rule.

#### Financial duties

L owes a duty of financial integrity.

#### Retainer agreement

Under the ABA, a retainer agreement must be reasonable and may not be used in certain instances. Under CA, a retainer agreement must be in writing and must provide an accounting of what the fees will be used for.

Here, D entered into a valid retainer agreement with L and engaged L to represent him in C's fraud action. The facts do not indicate the price. As long as the retainer is not outrageously high, it will be fine under the CA rules. However, all expenses must be accounted for in writing and the facts do not indicate whether this was done.

Thus, L may have violated his financial duty to L if the financial agreement was not in writing and provided detailed information about expenses.

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