2)

1. W's Communications with L

Discovery

A party is entitled to request answers to interrogatories, documents, and other evidence with request reasonably calculated to lead to admissible evidence, so long as the material is not protected by a privilege. The California Code of Civil Procedure (CCP) prohibits use of discovery for the improper purposes of harassing, annoying, embarassing, or unduly burdening responding parties, by methods that include propounding overbroad and duplicative discovery.

Here, C settled her claim against D before D fired L and D died. However, she is still proceeding on an identical claim against H. As the owner of H, D allegedly (and by privileged admission) defrauded C. A request for such information certainly meets the standard of being reasonably calculated to lead to evidence of C's claim, presuming she does not already have it from her identical and resolved claim against D. The facts only state that D's estate executor settled C's claim, not that C has already received the information she has requested (which is unlikely, see below re privilege/work product). If she did already receive this information, L can argue that this duplicative request is for the improper purpose of harassing and unduly burdening L and H. But most importantly, the discovery process permits parties to obtain information from one another, not information from the parties' attorneys, especially not information subject to a privilege.

Additionally, there are no facts or circumstances suggesting C has even attempted to call W as a witness. As will be analyzed below, D cannot meet her high burden to show that her need for L's testimony of W's statement substantially outweighs the risks of breaching attorney-client privilege.

W's MTC

After a party has propounded proper discovery upon a responding party, and the

responding party has failed to satisfactorily respond to the propounded discovery, the propounding party may move the court to compel those satisfactory responses and/or for sanctions. The propounding party faces the burden of showing that the request was reasonably calculated to lead to discoverable evidence, and that the responding party has either impermissibly withheld the information or failed to provide it in a code-compliant fashion. If the response is privileged, the requesting party must show that their need for the evidence substantially outweighs the risk of harm by violating the privilege. In any event, the testimony sought is not admissible under the California Evidence Code as it does not meet a hearsay exception.

Attorneys as Witnesses

Litigation, discovery proceedings, and discovery motions do not allow for parties to call opposing parties' attorneys as witnesses to information material to the case.

Here, C seeks to call L as a witness to communications from D in her case against H. L was D's attorney in C's claims against D and H, representing D only and not H. C will unsuccesfully argue that since L was never H's attorney, she can properly call L as a witness. C will unsuccessfully argue that L was never W's lawyer, and she is therefore entitled to the communication. Ultimately, C is improperly seeking to call an attorney to testify as to information obtained out of the representation in the present case, and should be denied.

Thus, the court should not compel L to testify about W's communications.

Hearsay

With specific exceptions, the CEC prohibits out-of-court statements to be admitted as evidence at trial. The most closely related exception here is an admission by a party opponent. When there are mutiple levels of hearsay, the hearsay may be admitted so long as each level meets one of the CEC

exceptions.

In any event, C wants L to testify as to W's out-of-court statement that D admitted defrauding C as it relates to her claim against H. Because D was owner of H at the time of the conduct, C could argue that this meets the party opponent statement exception. But W is certainly not a party opponent, nor does her communication meet any of the hearsay exceptions. In any case, the communication arose out of L's representation of D and is likely protected.

Again, nothing suggests W is not available to C as a witness, so none of the exceptions concerning unavailable witnesses apply.

Under the CEC, the testimony sought by W would not be admissible, and thus the court should not compel L to testify as such.

Attorney-Client Privilege

With few exceptions, lawyers are prohibited from revealing information arising out of the attorney-client relationship. Both a client and the lawyer may invoke the privilege. The privilege survives the end of the attorney-client relationship, as well as death. Lawyers are exempt from the privilege when the client consents to revealing the information, the lawyer is defending themselves against a claim by the client, and to prevent an immediate substantial risk of seriously bodily injury or death from occuring to a certain party. While the ABA Model Rules permits disclosures to prevent significant financial harm, no counterpart exists in CA Rules of Professional Conduct.

None of those exceptions apply here. D never gave L permission to reveal his admission of guilt before D died. Although the testimony sought is regarding W's statement, L obtained that information out of his attorney-client relationship with D and investigating D's defenses, and it is thereby privileged. Regardless of whatever harm C may have previously suffered from the fraud, C faces no

imminent harm, physical or financial.

Conclusion

The testimony sought by W is inadmissible hearsay protected by the attorney-client privilege doctrine and violates procedural safeguards against calling parties' attorneys as witnesses to material matters. The court should not compel L to testify about what W told him.

2. L's Memorandum

a. W's Statements to L

Attorney Work-Product Doctrine

Attorney work product includes any notes, diagrams, recordings, or other items created by an attorney in the scope of her representation of a client. The CCP, CEC, and Rules of Professional Responsibility protect attorney work product from demands by other parties. While a party and their attorney may invoke the attorney work product doctrine as a privilege in response to discovery requests, the CCP entitles propounding parties to a privilege log by the party invoking the privilege. A privilege log describes the contents of the purportedly protected information. Upon sufficient showing of entitlement and availability, the propounding party may request that the court review the purportedly protected information to determine whether it is actually protected.

Here, L drafted a memorandum recounting that W told L that D admitted defrauding C to her, and noted his belief that W would be a good witness for C. At best, W is entitled to a privilege log acknowledging L's interview with W took place. For all the evidentiary and protection issues discussed above, W is not entitled to the memorandum, and it would not be admissible at trial.

Thus, the court should not compel L to produce the memorandum's recollection

of W's statement.

b. L's Subjective Belief

The attorney work product doctrine does not protect statements or information obtained outside the scope of the attorney-client relationship. C can argue that the memo's expression of L's belief that W would make a good witness for C falls outside the scope of the doctrine and is not protected. L will argue that his belief as recorded in the doctrine was made as a part of evaluating the strength of D's case, and is thereby protected. In any event, L's subjective belief is inadmissible evidence at trial as it is not probative to C's case.

A court will not likely find that this part of the memo is unprotected and is unlikely to compel L to disclose it.

3. L's Ethical Violations

Attorney-Client Privilege

Again, an attorney's duty not to reveal information arising out of the attorney-client relationship survives both the relationship and death.

But even prior to D firing L or D's death, L told W that D also admitted to him that D defrauded C. Even though W was D's sister, none of the aforementioned exceptions to attorney-client privilege are applicable to this disclosure.

Thus, L violated his duty not to reveal information arising out of his attorney-client relationship with D.

Mandatory Withdrawal

Under ABA and CA rules, an attorney *must* withdraw from representation if fired by the client and obtain the court's permission to do so. In some cases, a court

will not permit withdrawal if it materially injures the client's rights.

Here the facts are unclear as to what happened after D fired L. D fired L shortly before trial, and died soon thereafter. Then, D's estate executor settles C's claim against D, apparently without D's involvement. If D failed to withdraw timely with the court's permission, or failed to withdraw at all and remained the attorney of record as the executor was left to fend for himself, D was in violation of this rule.

This, D may have violated the rule requring him to properly withdraw when fired by a client.

Fees

While the ABA rules only require written fee agreements for contigency agreements, CA rules require a written agreement when the fees will foreseeably exceed $1,000. Under both ABA and CA authorities, unearned retainer expenses must be promptly returned to the clients upon termination of the relationship.

Here, there was a valid retainer agreement. However, no facts indicate that L attempted to return any unearned fees to D's estate after L was fired.

Thus, L may have violated the rule requiring him to return unearned fees at the end of representation.

Duty of Competence

Both ABA and CA authorities prohibit lawyers from materially prejudicing their clients by incompetence, such as failure to make appearances, meet deadlines, and perform other duties to the client.

Here, L did not seem to withdraw or do anything to protect D's estate after being fired. As a result, the executor was left to fend for itself and settled C's fraud

claim.

Thus, L violated the duty of competence.

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