

QUESTION 4

Des is on trial in a California superior court for possession with intent to distribute hundreds of pounds of cocaine from January through October in 2019.

At trial the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that through 2019, she had acted as a “distributor” for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that all her customers agreed to sell cocaine. The prosecutor asked Carol to identify a notebook, which Carol testified was hers, and which she used to keep track of income and expenses related to the cocaine sales as each occurred. Carol testified that on pages 1–2 of the notebook were notations of sales of cocaine from January through April of 2019 by Carol to various people other than Des. She further testified that on pages 3–4 were notations of sales from May through October in 2019 to various people, including Des. The court admitted pages 1–4 into evidence.

On cross-examination, Des’s attorney asked Carol if the prosecutor, Pete, had offered her a reduced sentence in exchange for her testimony. Carol answered, “No.” Des’s attorney then called Carol’s attorney, Abe, to the stand and asked him the same question. Pete asserted attorney-client privilege. The court denied the assertion of privilege, and Abe testified that the reduction of charges against Carol had been in exchange for Carol agreeing to testify against Des.

Des took the stand and denied the charge. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, “Yes.”

1. Assuming all credible objections were timely made, did the court properly admit:
 - a. Pages 1–4 of the notes? Discuss.
 - b. Evidence of Des’s conviction for forgery? Discuss.
2. Did the court properly deny the assertion of attorney-client privilege? Discuss.

Answer according to California law.

QUESTION 4: SELECTED ANSWER A

To be admissible, all evidence must first be relevant. Evidence is relevant if it has any tendency to make a fact of consequence, which is in dispute, more or less likely.

Furthermore, the court has discretion to exclude evidence under CEC 352 if the unfair prejudice, confusion, or waste of time it would create, substantially outweighs its probative value.

In California, Prop 8 amended the California Constitution and makes all relevant evidence admissible in criminal cases. Prop 8 did not change, however, the rules of evidence relating to: (1) the U.S. Constitution; (2) hearsay; (3) character evidence; (4) the secondary evidence rule; and (5) CEC 352.

(1(a))

Relevance

The threshold question is whether this evidence is relevant. These pages are relevant because they show that Carol has knowledge of the ring of cocaine dealers, Des was involved in this ring and purchased cocaine from her. It also shows that Carol's oral testimony is more likely to be true, because it supports it.

Authentication

Nontestimonial evidence must be authenticated. Authentication requires the evidence's proponent to adduce sufficient evidence for the trier of fact to conclude that the nontestimonial evidence is what it purports to be.

These pages are nontestimonial evidence and thus, for them to be admitted, they have to be authenticated.

Here, Carol testified that the notebook the prosecutor showed her was her notebook and that it was the notebook she used to keep track of her cocaine business. This is sufficient evidence for the trier of fact to conclude that this notebook is, in fact, Carol's record of her cocaine sales and, thus, it has been properly authenticated.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless a hearsay exception applies. It does not matter whether a person is currently testifying at trial; what matters is whether the statement was made in or out of court. Thus if a witness seeks to testify about something she said earlier, out-of-court, for the purposes of proving the truth of that statement, it is hearsay.

Here, Carol's notations of sales in pp 1–4 of the notebook are hearsay. They are out-of-court statements: Carol wrote them in the book out-of-court and now the prosecutor is seeking to introduce them in-court. Moreover, the prosecution is introducing them to show that Carol sold the amount of cocaine to the people as she described in the notations. Thus, they are being offered for the truth of the matter asserted.

These statements, therefore, must fall within a hearsay exception to be admissible.

Statement of a Co-Conspirator

Des is accused of possessing cocaine with the intent to distribute from January through October 2019. In pp 1–2 of Carol's notebook, she notes sales to people other than Des from January through April 2019. In pp 3–4 of the other notebook, she makes notes of sales from May to October 2019, including to Des.

Statements made by a co-conspirator in furtherance of the conspiracy, offered against the opposing party, are exceptions to hearsay. The proponent of the hearsay must show by a preponderance of the evidence that there was a conspiracy between the hearsay declarant and the opposing party and that the statements offered were made in furtherance of that conspiracy. The hearsay itself can be used to show the conspiracy. (A conspiracy is an agreement between at least two people to commit a crime and at least one overt act in furtherance of that intent.)

Here, the notations in Carol's notebook are in furtherance of the conspiracy between her and the ring of cocaine dealers, including Des, to distribute drugs. She did not make these statements when she was cooperating with the police, but rather beforehand when she was working to further the conspiracy's goal of cocaine distribution.

The prosecution will be able to show sufficient evidence to establish that between May and October 2019, Des and Carol were co-conspirators. Carol's testimony about the ring of cocaine dealers, Des's involvement in the scheme, and everyone's agreement to sell cocaine, as well as the notes on pp 3–4 show that the two of them were part of a conspiracy to distribute cocaine. Thus, the notes on pp 3–4 fall within this co-conspirator exception to hearsay.

It is a closer call whether the notes on pp 1–2, which cover the time period from January to April 2019, fall within this exception. They do not mention Des and so cannot be used to show a conspiracy standing alone. However, Carol testified that she sold cocaine to many people including Des "during the period of the charged crime," i.e. starting in January 2019. This testimony may suffice to show a conspiracy existed between Des and Carol beginning in January, 2019. On the other hand, Des can argue that the fact Carol did not record any sale of drugs to him until May shows that they were not co-conspirators until that time (if at all), and thus this is a not a statement made by a co-conspirator falling within an exception to hearsay. Absent other evidence showing that Des entered into a conspiracy with Carol prior to April 2019, or Carol's explicit testimony about when she sold cocaine to Des or when he agreed to sell cocaine, the statements in pp 1–2 were not made in furtherance of the conspiracy between Carol and Des and therefore are inadmissible hearsay.

Business Records

These notes may also fall within another hearsay exception: business records.

Business records are excepted from the prohibition against hearsay. A business record is: (1) a record of facts, events, and/or activities of the business; (2) regularly recorded as part of the business's ordinary course; (3) by an employee with personal knowledge, or by an employee who learned of the information by an employee who had a duty to report this information; (4) is certified the business; and (5) there are no indications of untrustworthiness.

Arguably, Carol recorded the notations in her notebook as part of her business: selling cocaine. She did so based on personal knowledge and as a regular part of her business activities.

This exception will probably not work, however, because there is no indication the notebook was certified as accurate and there are indications of untrustworthiness: it is a record of an illegal enterprise and thus there is a strong incentive not to accurately record everything incriminating.

In sum, pp 3–4 are not hearsay because they fall within an exception but pp 1–2 most likely are inadmissible hearsay not falling within an exception.

CEC 352

Finally, the court must decide if the unfair prejudice, confusion, or waste of time caused by this evidence substantially outweighs its probative value.

With respect to pp 3–4, this evidence is highly probative of Des's involvement in this ring of cocaine dealers and therefore intent to distribute, and thus the prejudice arising out of it is not even unfairly prejudicial, let alone substantially outweighed by unfair prejudice. All evidence is prejudicial to some degree, but just because evidence shows that a defendant is more likely to have committed the charged crime does not make it *unfairly* prejudicial.

If pp 1–2 do fall within the co-conspirator exception, they should probably have been excluded as unfairly prejudicial. They are about sales to people other than Des and thus they may cause the jury to believe unfairly that this evidence shows that Des distributed more cocaine than he bought from Carol than he actually did. Furthermore, it may cause confusion about the conduct of these other dealers, who are not even defendants in this case, and Des's case.

Thus, the court correctly admitted pp 3–4 of the notes, but erred in admitting pp 1–2.

(1(b))

Relevance

Des's conviction was for forgery. Forgery is a crime of moral turpitude because it is a crime reflecting on the dishonesty of the defendant. Here, Des is being charged with intent to distribute cocaine. He has also testified in his own defense.

Thus, this evidence is relevant for two purposes. First, it shows that he is a convicted criminal and it thus has a tendency to show that he may have been more likely to have committed another crime. Second, this evidence is relevant because it tends to show that Des is untruthful and, because he is testifying, his truthfulness is relevant.

This first potential relevance is impermissible, as discussed below. But the threshold question of whether this evidence is relevant is satisfied.

Character Evidence

Character evidence is evidence of a person's character that is being used to show that the defendant acted in conformity with this character in the present case. If the conviction for forgery is admitted for the purposes of showing that Des committed this crime because he acted in conformity with his "criminal tendencies," then it is character evidence.

In a criminal case, a prosecutor generally cannot introduce evidence of a defendant's character unless the defendant opens the door. California recognizes several exceptions: (1) in a sexual assault/child molestation case; (2) in a domestic violence case; (3) in an elder abuse case; and (4) where the defendant has put on evidence of the victim's violent character, the prosecution can put on evidence of the defendant's violent character.

Here, Des has not opened the door to character evidence because he has not testified that he has any particular character trait, let alone one for being law-abiding. Furthermore, none of the exceptions apply.

Thus, this evidence is not admissible for the purposes of showing that, because Des was previously convicted of forgery, it is more likely he committed this crime.

Impeachment Evidence

The second purpose for which this evidence may be admitted, however, is to show that Des is a liar.

If someone testifies, then the opposing party can impeach the witness's testimony and show there is a reason for the jury not to trust his testimony.

Impeachment by conviction is permissible under certain circumstances. First, a party may introduce evidence of a prior felony conviction for a crime of moral turpitude. Additionally,

under Prop 8, the prosecutor may also introduce evidence of a prior misdemeanor conviction for a crime of moral turpitude in a criminal case. Unlike under the Federal Rules of Evidence, California does not impose a specific time limit for determining remoteness.

Here, Des testified and thus exposed himself to impeachment. The prosecutor then was able to introduce evidence of Des's prior felony conviction for forgery, which is a crime of moral turpitude, by asking Des whether he had committed the crime. (The prosecutor could have introduced extrinsic evidence instead of asking Des, but did not have to). This was proper impeachment evidence.

In addition, this was also proper impeachment via evidence of a prior bad act. In a criminal case, a prosecutor can ask a defendant if he previously committed a prior bad act in the past, that reflected the defendant's moral turpitude, if the prosecutor has a good faith basis for doing so. Prop 8 also allows the prosecutor to admit extrinsic evidence of this prior bad act. Here, Des's conviction for forgery is evidence of his prior bad act that reflects his moral turpitude, and thus was improper impeachment evidence under this rule as well.

CEC 352

Thus, this evidence was admissible to impeach Des and show that he was not a credible witness. The final gatekeeping question for the court was whether the unfair prejudice of this evidence substantially outweighed its probative value.

The age of the conviction—eleven years—weighs against admission because it is remote. However, it is quite probative of Des's credibility and he is denying the charge on the stand.

Thus, on balance, the unfair prejudice does not substantially outweigh its probative value and the court properly admitted the evidence.

(2)

Attorney-client privilege protects confidential discussions between a client and her attorney for the purposes of providing the client legal advice. If the privilege applies, absent waiver by the client, the attorney cannot reveal communications protected by this privilege. There are some exceptions to the privilege: (1) the client was using the attorney's services as part of criminal or fraudulent activity; (2) the client was in a joint representation with another client and the two clients are now suing each other over the subject matter of the joint representation; (3) the client and attorney are involved in a malpractice suit against one another about the representation; and (4) the attorney reasonably believes that the client is going to commit a criminal act resulting in death or serious bodily injury and the attorney could not talk the client out of it and told the client that she would reveal this privileged communication.

Here, Des's attorney asked Carol if the prosecutor had offered her a reduced sentence in exchange for her testimony. Carol said no (which was a lie).

Abe, Carol's attorney, was required to testify about the reduction of charges and the court

denied his assertion of attorney-client privilege. This reduction was offered by Pete the prosecutor. Pete's offer to reduce the proposed sentence in exchange for her testimony and Carol's acceptance of the deal would not be covered by the attorney-client privilege.

First, Pete is not Abe's client or an agent of Carol, so his statement does not fall within the privilege. Second, Carol's response was presumably communicated to Pete because the deal was reached. Thus her acceptance was not confidential or for seeking the provision of legal services. Thus, her acceptance of Pete's offer is not protected by the privilege either. In sum, the attorney-client privilege does not protect the fact that Carol and Pete entered into an agreement.

Carol's discussions with Abe in confidence about whether to accept this deal would fall within this privilege, but Abe was not required to testify about this. The question was whether Pete had offered Carol a reduced sentence and not about Carol and Abe's confidential discussions.

Thus, the court did not err in denying the assertion of attorney-client privilege.

QUESTION 4: SELECTED ANSWER B

1. Admission of Evidence

Relevance. As a starting point, all relevant evidence is admissible in a criminal trial, subject to certain exclusions and privileges. Relevant evidence is that which has a tendency to make any fact at issue in the case more or less likely to be true.

Authentication. For documentary evidence, in order to be admissible the party offering the evidence must make a showing that the document is authentic—that it is in fact what it purports to be.

Here, Carol's notes were properly authenticated by the prosecutor before they were offered into evidence. It appears the prosecutor showed Carol the notebook and inquired whether she recognized it; Carol testified that she did, and that it was her own notebook, thus establishing Carol's basis of knowledge for authenticating the notebook.

Prop 8. In criminal trials in California state court, the law known as Prop 8 acts as a victim's bill of rights, and provides that all relevant evidence shall be admitted, subject to certain restrictions and exclusions, including hearsay rules, constitutional principles, evidentiary exclusions in place before 1982, and any exclusions adopted after 1982 that were ratified by a 2/3 vote of the legislature. Absent an applicable exclusion under Prop 8, evidence that is relevant will be admitted.

a. Pages 1–4 of Carol's Notes

Relevance. Pages 1–2 of Carol's notes are arguably not relevant to Des, because, as we are told, they reflect records of cocaine sales by Carol to various people other than Des. The sales do fit the time period with which Des is charged, however, including January through April of 2019. And the standard of relevance is fairly low. Does the fact that Carol sold drugs to many other people in a pattern that likely fits the later period, in which her records do reflect sales to Des, make any aspect of her narrative more probable? A jury could logically infer that laying a foundation of Carol's earlier sales makes it more likely that the pattern continued into the period in which she has records that include Des. By the same token, Des could well argue that because Carol's notes do not reflect any sales to him during this period, that there were none. (This strategy likely wouldn't do much good for Des, as it would tacitly acknowledge the potential credibility of the later sales records.) On balance, these records likely have some minimal relevance, although their probative value is not particularly strong, and will be subject to balancing under Section 352, as discussed below.

Pages 3–4 of the notebook are more clearly relevant to Des's alleged criminal conduct. They purport to reflect cocaine sales by Carol to him within the charged timeframe, and the sales from Carol to Des would show his possession of the cocaine. Carol's testimony further provided that those to whom she sold possessed the cocaine with intent to sell it themselves. Thus,

pages 3–4 of the records would be highly relevant evidence, and would be important to corroborate the testimony of the cooperating witness, Carol.

Hearsay. The notebook, however, remains subject to a hearsay objection. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, the statements made in the notebook by the declarant, Carol, are offered as proof of what they purport to show—that Carol made cocaine sales in certain amounts and on certain dates to the defendant, Des. Thus, the statements are hearsay, and unless an exception applies, they will be excluded. As noted, the hearsay rules are an exception to Prop 8 and still apply.

Two primary hearsay exceptions are potentially applicable here. First, the statements may be deemed statements of a co-conspirator made during and in furtherance of a conspiracy. It bears mention that Des is not charged with the crime of conspiracy. That is no impediment to use of the evidentiary hearsay exception, however, so long as an adequate factual predicate for the exception is supplied. Here, Carol's testimony appears to have done so. She does not explicitly testify to an express agreement between the various retail drug dealers to whom she sold cocaine as a wholesaler. Therefore one could argue that no such agreement existed. More likely, however, a court could logically infer an implied conspiracy among the entire group, in which Carol acts as the hub of the conspiracy and the various retail dealers are the spokes. Courts have long acknowledged this type of hub and spoke conspiracy can exist, even when the individual spokes do not know each other directly and have their explicit understanding individually with the central hub, here Carol.

Were the statements during and in furtherance of the conspiracy? It appears that they were. Carol made the records to aid her in operating and keeping track of the business, and for the efficiency and effectiveness of the overall operation. Therefore they were likely "in furtherance" of the conspiracy's aims. And they reflect the time period for which Des is charged, and appear to have been contemporaneously made at the time of the events. For these reasons, if relevant, the pages are likely admissible as co-conspirator statements. As noted, the claim of relevance is stronger for pages 3–4, although the low standard of relevance may be met for pages 1–2 as well.

The pages could also potentially be admitted as records of regularly conducted business activity. This exception applies when records are made in the ordinary course of business, by one with personal knowledge, at or about the time of the recorded activity, and maintained by the business for a business purpose. Here, although Carol's business is unlawful, the requirements appear to be met here for the drug ledger, and therefore the records could properly be admitted as business records.

The records are likely not subject to exclusion under the Confrontation Clause of the Sixth Amendment. The records are not testimonial—they were not offered to law enforcement to assist them or in their effort to solve the crime—and hence they are not subject to exclusion and do not violate Des's right to confrontation.

The evidence is still subject to the overall balancing test that evidence can be excluded when the danger for unfair prejudice substantially outweighs its probative value. Here, the relevance

of pages 1–2 is slight, and potentially it's prejudicial to Des in that it paints Des as being part of a large drug organization. But not unfairly so. On balance, the evidence is likely still admissible as more probative than prejudicial.

Because the evidence is admissible, Prop 8 would not need to be reviewed here.

b. Des's Prior Forgery Conviction

Under the CEC, Des's prior conviction for forgery was likely properly admitted. Forgery is likely considered a crime of dishonesty or moral turpitude. Des has placed his credibility at issue by testifying in the case, and therefore his credibility is something jury will need to assess. Admission of a prior conviction in this way, when the prior conviction is for a crime of moral turpitude in California, will likely be admitted, subject to balancing its probative value against its danger of unfair prejudice.

Under the FRE, a question would arise as to whether the conviction is too old to be admitted, given that it is more than ten years old. The time period would run from Des's release from any prison term he served. However, there is no similar time limitation under the CEC. The purpose of the federal rule, however, does point to a potential issue that the probative value of a prior conviction is slight after so much time has passed. Thus, a court could potentially decide to exclude the prior conviction if it found that the danger that the jury would give undue weight to the prior conviction—in effect, branding Des as a convicted criminal and not paying careful enough attention to the more direct evidence at hand. Indeed, the evidence is relevant for the limited purpose of Des's truthfulness, and not his propensity to engage in criminal conduct generally. The danger of the propensity inference would provide a sound basis for excluding the conviction here. Any such ruling, however, would likely be reviewed for abuse of discretion, and this is a close enough call that the judge likely did not abuse her discretion in admitting the evidence.

The balancing test discussed above is one of the recognized exceptions to Prop 8, so that would not become an issue in this circumstance either.

2. Attorney-Client Privilege

The attorney-client privilege is owned by the client, and protects from disclosure confidential communications between an attorney and a client made for the purpose of seeking or providing legal advice, and that are kept confidential (i.e., not disclosed to third parties).

Here, although Abe and his client Carol have likely had many privileged conversations, the communications between Carol and the prosecutor, or between Carol, Abe and the prosecutor, are not privileged, because the presence of the third party (the prosecutor) destroys the confidential nature of the communications.

Here, even if the conversation were privileged, the "crime/fraud" exception" may well apply. It appears that Carol has given testimony that is false, and that the attorney would know is false, by stating that the prosecutor did not offer her a reduced sentence in exchange for testifying

against Des. It is possible, however, that as a result of privileged conversations with Carol, the attorney believes that Carol misunderstood this state of affairs, but under all the circumstances here that seems unlikely.

The duty of attorney-client confidentiality duty is broader than the attorney-client privilege. It is possible that if Abe had raised his professional duty of confidentiality to his client as an objection, and refused to testify on that basis, that the court would have viewed the matter differently. In California, Abe would not have been permitted to reveal client confidences unless the matter presented an imminent danger of serious bodily harm or death, circumstances not present here. But again, the conversations with the prosecutor are not privileged, and for the same reason not confidential—they took place with a third party present, and therefore it was likely Abe's obligation to testify truthfully to them after he had made the best valid objections he could. It does still raise the advocate-witness problem—by putting Abe in the position of being a witness and a lawyer in the same case—and unfortunately puts Abe in the difficult position of having to truthfully answer a question that will potentially be damaging to his client. For all these reasons, Abe should seek to withdraw from the representation, although he should do so in the way that is likely to be the least damaging to Carol's interests.