

## QUESTION 4

Dan is facing trial in the Superior Court of California for the murder of Victor. Dan entered into a valid retainer agreement with Attorney Anita for her to represent him. Anita met with Dan to discuss Dan's defense. In their interview, Dan claimed he had spent the entire evening when the murder occurred with his father, Frank. The next day, Anita sent an email to Dan expressing her concern that his alibi was weak. Dan replied to the email and admitted that he had lied about his alibi, but denied that he killed Victor.

Anita visited Dan's apartment and spoke with Dan's roommate, Ben, who said that Dan confided in him that he had killed Victor. Ben gave Anita a pair of Dan's pants that were covered in blood. The next day, Anita gave the prosecutor the bloody pants and the email exchange about Dan's alibi.

Anita then decided she did not want to represent Dan any longer because she was tired of his lies. Anita petitioned the court to withdraw as Dan's attorney. The court granted permission for Anita to withdraw. Frank then immediately hired another lawyer to represent Dan.

At Dan's trial, the prosecutor called Ben as a witness to testify to Dan's statement that he killed Victor. The prosecutor then called Anita to testify: (1) about Dan's statement that he had been with Frank on the night of the murder; (2) that Anita had received the bloody pants from Ben and turned them over to the prosecutor; and (3) that Ben had told Anita that Dan said he killed Victor.

1. Assume all proper objections have been made. Should the following items be admitted into evidence:
  - a) Ben's testimony? Discuss.
  - b) Anita's testimony regarding Dan's statement that he was with Frank the night of the murder? Discuss.
  - c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor? Discuss.
  - d) Anita's testimony that Ben told her that Dan said he had killed Victor? Discuss.

Answer each according to California law.

*QUESTION CONTINUES ON THE NEXT PAGE*

2. What ethical violations, if any, did Attorney Anita commit by:

a) Turning over the bloody pants to the prosecutor? Discuss.

b) Turning over the email exchange regarding Dan's alibi to the prosecutor? Discuss.

c) Withdrawing from representing Dan? Discuss.

Answer each according to California and ABA authorities.

## **QUESTION 4: SELECTED ANSWER A**

Under Proposition 8 of the California constitution, all relevant evidence is admissible during a criminal trial, unless it is subject to an exclusion such as hearsay or privilege.

### **Logical relevance**

For any evidence to be admissible, it must be logically relevant. Evidence is logically relevant when it makes the existence of any fact of consequence more or less likely to be true. In California, the fact of consequence must also be in dispute.

### **Legal relevance**

Evidence is legally relevant when the probative value of the evidence exceeds the risk of undue prejudice, confusing the jury, or unnecessary delay.

### **1. (a) Ben's testimony**

#### **Logical Relevance**

See rule above.

Ben's (B's) testimony is logically relevant. B is able to testify that D admitted to killing Viktor (V). That is a fact at issue and of consequence, and highly relevant to this case.

#### **Legal Relevance**

See rule above.

B's testimony is also legally relevant. D's statement has substantial probative value. It wouldn't confuse the jury or cause undue delay. And while it would be prejudicial to D's case, it would not be unduly prejudicial, as the requirement of legal relevance does not prohibit any evidence that may show guilt.

#### **Witness Competency**

In order for witnesses to testify as to a certain topic, they must have personal

knowledge of the facts they are speaking to, and a present recollection of the events.

They must also take an oath to tell the truth and be able to present their testimony in a way that is helpful to the trier of fact.

Here, B is competent to give this testimony. It is based on his personal knowledge of his conversation with D, and he is able to presently recall it.

Accordingly, because his testimony is relevant and he is a competent witness, he was properly allowed to testify.

### Hearsay

However, the issue is whether D's statement that Ben is testifying to is hearsay.

Hearsay is an out of court statement offered for the truth of the matter asserted.

Hearsay is not admissible, because the party is offered against is not able to impeach the witness or make issue of the declarant's credibility.

Here, D's statement is hearsay. It was told to B out of court, and it is being offered by the prosecutor as evidence that D killed V. Accordingly, it is inadmissible as hearsay.

However, there are exceptions and exclusions to the hearsay rule. If one exists, the statement can still be offered into evidence.

### Party admission

A party admission is an exclusion from hearsay. It exists when the opposing party has offered the statement out of court, and it is an admission of a relevant fact.

Here, the statement is being offered into evidence by the prosecution, so D is the opposing party. Additionally, this constitutes an admission of the most important fact of all - that D killed V. Accordingly, D's statement could be offered into evidence as a party admission.

### Statement against interest

D's statement could also possibly be offered as a statement against interest. In order for this exception to apply, the defendant must make a statement that is against their proprietary, pecuniary, penal, or social interest, and they are aware it is against their interest when it is offered.

Here, this statement is clearly against D's penal interest. By admitting to a murder, he could be charged and sent to prison. This is also a fact that any reasonable person would be aware of.

However, in order for this exception to apply, the declarant must be unavailable. A declarant is unavailable when they are dead or sick, when they refused to testify, or when they assert a privilege, among other reasons. Here, it is possible that D, as the defendant in this case, will assert his right not to testify. If he were to do so, this exception would also be available.

In conclusion, this testimony was properly admitted as a party admission, and may also be proper as a statement against interest if D choose not to testify.

### **(b) Anita's testimony regarding Dan's statement.**

#### Logical Relevance

See rule above.

Anita's (A) testimony is logically relevant because it speaks to D's possible alibi.

Whether or not D was with Frank is a fact of consequence, and one that it is in dispute.

#### Legal Relevance

See rule above.

Her testimony is also legally relevant. Information concerning D's alibi has substantial

probative value and outweighs any of the other factors discussed above.

#### Witness Competency

A is competent to testify to testify on this topic because it is based on her conversation with D.

#### Attorney/Client Privilege

The issue is whether D's statement is covered by attorney/client privilege.

Attorney client privilege prevents the disclosure of any confidential information obtained from the attorney from their client for the purpose of furthering the representation. The privilege is held by the client, and only the client can choose to waive it, not the attorney. In California, the privilege lasts until the client's will has been probated after their death.

Here, D's statement to A was made during the representation. D and A entered into a valid retainer, and then the two of them met to discuss the case and provide A with the facts. The statement was provided as D's alibi, and while he later admitted that the statement was false it was still made as part of the representation and in furtherance thereof.

#### Hearsay

Additionally, the statement may be objected to as hearsay. However, it would not be provided into evidence for the truth of the matter asserted because (1) the prosecutor would not want to help D establish an alibi, and (2) D later admitted it was false.

In conclusion, the statement is protected by the attorney/client privilege and should not be admitted into evidence.

**(c) The bloody pants.**

### Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it speaks to the source of important evidence.

### Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

### Witness Competency

A is competent to make this testimony because it is based on her personal interaction with B, and she has a present recollection of the events.

### Attorney/Client Privilege

See rule above.

D may also assert that this evidence is subject to attorney/client privilege. However, information regarding where the bloody pants came from was not communicated to A by D. The attorney client privilege only covers statements made in confidence from the client to the attorney, not statements made by third parties, and not information obtained independently from the attorney. Because A received the bloody pair of D's pants from B, no information surrounding them is subject to attorney/client privilege.

In conclusion, the testimony regarding the bloody pants should be admitted into evidence.

**(d) Ben's statement that Dan had killed Victor.**

### Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it is an important admission by D as to his guilt.

### Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

### Attorney/Client Privilege

D may once again attempt to assert attorney/client privilege. However, for the reasons discussed above, statements by third parties are not covered by the privilege, only statements between attorney and client. Accordingly, this information is not subject to attorney/client privilege.

### Hearsay

See rule above.

However, this statement is also hearsay, as it is being offered for the truth of the matter asserted. When there are two layers of hearsay, both of them must be admissible for the statement to be admitted into evidence. Here, D's statement to B that he killed V is hearsay, and B's statement to A that D admitted to killing V is also hearsay.

D's statement to B would be admissible for the reasons discussed above. It is a party admission, and potentially a statement against interest.

However, Ben's statement does not fit into any hearsay exception. Because the hearsay rules require that all levels of hearsay have an exception, this statement should not be admitted.



In conclusion, B's statement to A regarding Dan's admission should not be admitted.

## **2. Anita's ethical violations.**

### **(a) Turning over the bloody pants.**

#### Duty of confidentiality

A may have violated her duty of confidentiality to D under the ABA and California rules of professional conduct. An attorney owes their client a duty of confidentiality. All confidential info obtained by an attorney in the course of representation must not be disclosed to third parties, and only used for their client's benefit. This duty is broader than the attorney/client privilege, as it prevents all disclosures not just testimony. Here, that duty covers all confidential information A obtained about D during their representation. However, the duty of confidentiality does not extend to the fruits of a crime.

#### Fruits of a crime

If an attorney comes into possession of the fruits of a crime, that information cannot be protected by the duty of confidentiality. It must be turned over to the authorities. If a client informs their attorney where evidence of their crimes is located, the attorney is under no obligation to retrieve it. If they do, they must turn it in. However, an attorney is allowed to hold an item of evidence for a reasonable period of time in order to inspect it as part of building their client's case. Additionally, the attorney cannot disclose the source of the evidence when turning it over.

Here, A was under an obligation to turn in the bloody pants and did not violate her duty of confidentiality by doing so. However, if she was to disclose any information regarding where the evidence came from, that would have been a violation. Though that does not

appear to have occurred based on the facts presented.

Accordingly, A did not violate an ethical obligation by turning in the bloody pants.

### **(b) Turning over the email**

#### Duty of confidentiality

See rule above.

However, A did commit a breach of her duty of confidentiality by turning over the emails from D. That information was protected by the duty of confidentiality, and A was under no requirement to turn that information over.

By disclosing this email, she breached her duty to D.

#### Duty of competence

A also may have breached her duty of competence. An attorney owes a duty to their clients to use their skill, knowledge, thoroughness, and preparation solely for their client's benefit. They must act prudently and diligently in their client's best interest.

By turning over an email admitting he lied about his alibi, A has violated that duty. A reasonably prudent attorney would not turn over confidential information regarding their client's case and alibi.

If D has insisted on testifying at trial that he had this alibi when A knew it was not true, she would have ethical obligations to dissuade him from testifying, to seek to withdraw if D insisted on offering false testimony, and to only allow him to testify in a narrative fashion if she could not withdraw. However, this was far before that point

Accordingly, A also breached her duty of competence owed to D.

In conclusion, by turning over the email, A breached her duty of confidentiality and duty of competence.

### **(c) Withdrawing from representation.**

#### Mandatory withdrawal

An attorney is required to withdraw when (1) they are terminated, (2) when their representation of the client violates the law or ethics rules (such as in the case of a conflict), (3) when a mental or physical condition prevents the attorney from undertaking effective representation, and (4) where the client's course of conduct requires the attorney to participate in or assist with a crime or fraud.

Here, A has not been terminated, there is no violation of law or ethics rules, she has no mental or physical condition preventing her from representing D, and D has not asked her to participate in a crime or fraud. Accordingly, there are no rules mandating that she withdraw.

However, there are also grounds that exists for permissive withdrawal.

#### Permissive withdrawal

Under the ABA, an attorney is permitted to withdraw if they can do so without prejudicing their client's case. This rule does not exist under the California ethics rules. Under both sets of rules, an attorney can also withdraw if the client insists on a course of action the lawyer disagrees with or considers repugnant, if the client has misused the client's services in the past, or if the client has not performed their duties (such as the payment of fees).

The most likely reason for withdrawal that A could argue is that D is insisting on a course of conduct that she disagrees with or considers repugnant. If she believes based on the evidence that D is guilty, and is lying about his innocence, that may be sufficient grounds. As the court has allowed her to withdraw from this case, it appears that they

agree with her.

However, A is required to give D notice prior to withdrawal. It does not appear that she has done so. By not providing him notice, there is a risk that her withdrawal has prejudiced his case.

Additionally, A is required to return any portion of an unused fee that D has paid and return his files promptly. The facts don't appear to indicate that she has done this either.

In conclusion, A has violated a duty to D by improperly withdrawing.

## **QUESTION 4: SELECTED ANSWER B**

### **Ben's Testimony**

#### **Relevance**

In order to be admissible, evidence must be both legally and logically relevant. Under the CEC, evidence is logically relevant if it tends to prove or disprove any fact in dispute related to the matter. However, judges have broad discretion to exclude logically relevant evidence if it is not legally relevant. Evidence is legally relevant if its probative value is not substantially outweighed by other factors such as unfair prejudice, waste of time, delay, unnecessarily cumulative evidence, or confusing the jury. Under Proposition 8, all relevant evidence is admissible in a criminal trial, subject to some exceptions such as hearsay and privilege rules.

Ben's testimony is logically relevant, since it tends to prove a fact in dispute (that Dan killed Victor). It is also legally relevant since its probative value is not substantially outweighed by unfair prejudice or other issues. Prop 8 will not apply because the statement is hearsay.

#### **Hearsay**

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Here, Dan's statement that he killed Victor is an out-of-court statement that is being offered to prove that Dan killed Victor (the truth of the matter asserted). Thus, the statement is hearsay and will be inadmissible unless an exception applies.

### **Statement by Party Opponent**

A statement made by a party to a proceeding will be admitted even though it is hearsay

if it is offered by the party's opponent. Here, the hearsay declarant is Dan, who is a party to the proceeding. The statement is being offered by his opponent, the prosecution. Thus, the statement qualifies as a statement by a party opponent and will be admissible.

### Statement Against Interest

A statement against interest is a statement that was against the penal, financial, or social interest of the declarant when it was made. In order to be admissible as an exception to hearsay, the declarant must be unavailable to testify. A declarant is unavailable to testify if they have a total loss of memory, are dead, or are unreachable by subpoena. Here, Dan's statement that he killed Victor was against his penal interest, since confessing to murder can get you arrested and sent to prison. However, if Dan is testifying in his own defense, then he is available, and the exception will not be available. If Dan is not testifying in his own defense (as is his right as a criminal defendant), then he will be considered unavailable, and the statement may come in under this exception. Regardless, the statement will be admitted under the "statement by party opponent" exception.

### Conclusion:

Ben's testimony is admissible.

### **Anita's Testimony: Dan's Statement**

#### **Relevance**

Anita's testimony about Dan's statement that he was with Frank the night of the murder is logically relevant, as it tends to make it less likely that Dan killed Victor. Additionally, depending on how the prosecutor tries to use it, it may be relevant as impeachment

evidence. However, it may not be legally relevant. Since Anita used to be Dan's attorney, having her testify against him may hold undue influence with the jury, and create unfair prejudice that substantially outweighs the probative value of her evidence. Thus, the evidence may not be legally relevant.

### **Privilege**

Even if the evidence is logically and legally relevant, it is protected by the attorney-client privilege. Attorney-client privilege is an evidentiary privilege held by the client, whereby an attorney may not disclose anything a client told her in confidence in the course of seeking legal services. Here, Dan clearly told her that he was with Frank in confidence, as they met (apparently alone) in order to discuss his case. Additionally, Dan told Anita this while seeking legal services, since they were discussing Dan's defense. Thus, Anita violated the attorney-client privilege by testifying against Dan without his waiver of the privilege. Under the CEC, the attorney may only violate the privilege in limited circumstances. For instance, the attorney may violate the privilege to prevent a crime that would result in substantial bodily harm or death to another. Here, the crime has already occurred, so Anita's testimony does not fall within the exception.

Prop 8 does not overcome attorney-client privilege.

### **Hearsay**

Dan's statement to Anita does not qualify as hearsay, because it is not being offered to prove the truth of the matter asserted (that Dan was with Frank). Rather, it is either being offered for impeachment purposes (to show that Dan was lying), or for some other purpose. However, the testimony was still improperly admitted as it violated the attorney-client privilege.

## **Impeachment**

If this statement is being offered for impeachment purposes, it is also improperly admitted, as it is not permissible to impeach a witness by prior inconsistent statement (in this case, Dan) who has yet to testify (and thus, there is nothing that his prior statement could be inconsistent with). It is also improper to impeach a witness by prior inconsistent statement if that witness is not given a chance to explain the inconsistency (which Dan will not get if he is asserting his Fifth Amendment right not to testify).

## **Character Evidence**

If this statement is being offered to show Dan's character for dishonesty, it was also improperly admitted. In a criminal trial, character evidence is only admissible about traits pertinent to the crime charged and is only admissible once the defendant has opened the door. Here, Dan has not opened the door, and honesty is not a pertinent trait in a murder trial. Thus, this would be improperly admitted character evidence.

## **Anita's Testimony: Bloody Pants**

### **Relevance**

Anita's testimony about the bloody pants is logically relevant, since the fact that Dan had bloody pants tends to make it more likely that he killed Victor. Additionally, Anita's testimony can be used to authenticate the pants. There is the same legal relevance issue as before, where the fact that Anita was formerly Dan's attorney might create unfair prejudice sufficient to outweigh the probative value of the testimony. Thus, this testimony likely should not be admitted unless Prop 8 overcomes this issue.

### **Privilege**

Receiving Dan's pants from Ben would not qualify as privileged information, since it was



not a statement made by Dan for the purpose of obtaining legal services. Thus, the attorney-client privilege does not apply.

### **Personal Knowledge**

A witness must have personal knowledge about the matter of which they are testifying. Anita knows that she received the bloody pants from Ben and turned them over to the prosecutor. Thus, she had personal knowledge sufficient for this requirement.

### **Conclusion**

The testimony about receiving Ben's pants was improperly admitted unless Prop 8 allows the evidence in despite the legal relevance issue.

### **Anita's Testimony: Ben's Statement**

#### **Relevance**

Anita's testimony about Ben's statement is logically relevant because Dan's statement that he killed Victor tends to make that fact more likely. Anita's testimony still has the same legal relevance issue related to her being Dan's prior attorney. However, other than that the probative value is not outweighed by unfair prejudice, and so the evidence is legally relevant.

#### **Personal Knowledge**

There is no personal knowledge problem, because Anita is testifying about what Ben told her Dan said, rather than testifying that she heard Dan said something to someone.

#### **Hearsay within Hearsay**

Anita's testimony contains two levels of hearsay: the outer hearsay is Ben's statement, and the inner hearsay is Dan's statement. Where there are multiple levels of hearsay,

each level must be admissible under an exception in order for the entire statement to be admissible.

#### Dan's Statement (Inner Hearsay)

Dan's statement is hearsay because it is being offered to prove the truth of the matter asserted (that Dan killed Victor). As discussed above, this is likely admissible as the admission of a party opponent.

#### Ben's Statement (Outer Hearsay)

Ben's statement is hearsay because it is being offered to prove that Dan said he killed Victor. This is hearsay not admissible under any exception. It is not the statement of a party opponent since Ben is not a party. It also was likely not an excited utterance to Anita, as there is no indication that Ben was under the stress of a stressful event when he made it. Thus, because the outer hearsay is inadmissible, the entire statement was improperly admitted. Prop 8 cannot overcome hearsay issues.

#### **Privilege**

Attorney-client privilege does not apply to this statement, since Ben was not Anita's client and Dan's statement was not made directly to Anita (because it was made to a third party, it was not confidential).

#### **Ethical Violations: Turning over Pants**

##### **Duty of Candor/Duty of Fairness to Opposing Counsel**

Attorneys have an obligation of candor to the tribunal and a duty of fairness to opposing counsel. This duty prohibits them from concealing evidence. While Anita likely should have refused to take the bloody pants in the first place, it was likely not an ethical violation for her to turn them over to the prosecutor once she had them.

## **Ethical Violations: Turning over Email Exchange**

### **Duty of Loyalty**

Lawyers have a duty of loyalty to their clients. Anita violated this duty when she turned over the email exchange about Dan's alibi to the prosecutor, since a defendant in a criminal case could reasonably expect his attorney not to help the prosecution in ways not required by law or the ethical rules. Thus, this constituted a violation of the duty of loyalty.

### **Duty of Confidentiality**

Under both the ABA and California rules, lawyers have a strict duty of confidentiality to their clients. This prohibits lawyers from revealing any information they learn related to their client's case that is not known to the general public. This rule is broader than the attorney-client privilege; the California rule is much stricter than the corresponding ABA rule.

Under the ABA rule, a lawyer may break the duty of confidentiality if it is necessary to prevent a crime, substantial bodily harm or death, or mitigate financial loss if the lawyer's services were used in connection with that financial loss. Additionally, if the lawyer's services were used or are currently being used to perpetrate a crime or fraud, the lawyer may break confidentiality to mitigate the harm. Under the California rules, confidentiality may only be broken in order to prevent a crime that is likely to result in substantial bodily harm or death.

Here, the breach of confidentiality was not permissible under either the ABA or California rules. Turning over the email exchange did not prevent or mitigate the harm from any crime or activity in which the lawyer's services were used. Anita might try to

argue that Dan was attempting to use her services to lie to the court by lying about his alibi. However, there is no indication that Dan was going to lie on the stand at trial, as he admitted his alibi was false. Additionally, even if he was planning on lying on the stand, Anita had a duty to try to mitigate by attempting to persuade him not to lie. If he insisted on lying on the stand, Anita would have been allowed to withdraw (under the ABA rules), or simply allow him to testify without engaging (the narrative approach, under the California rules). However, Anita did not attempt to dissuade Dan from lying, if that was even his intention in the first place. Thus, Anita violated her duty.

### **Duty to Communicate**

Lawyers have a duty to communicate with their clients. By not telling Dan that she was turning the email exchange over to the prosecutor, Anita likely violated her duty to communicate with Dan and keep him apprised of her actions related to the case.

### **Ethical Violations: Withdrawal**

#### **Duty to the Profession**

Lawyers have a duty to the profession that discourages them from withdrawing from the representation of clients simply because they are guilty, especially criminal defendants. Anita likely violated this duty by her withdrawal.

#### **Permissive Withdrawal**

Under the California rules, a lawyer is allowed to withdraw from representation if the client is making the representation unreasonably difficult. Here, the fact that Dan lied once about his alibi is probably not enough to meet the standard of "unreasonably difficult". It sounds like she has only had one conversation and one email exchange with him and did not even try to see if he had a different alibi. Additionally, just the fact that a

client is guilty is not "unreasonably difficult". Thus, Anita likely violated her duty under the California rules by withdrawing when it was not permitted.

Under the ABA rules, an attorney may withdraw if it will not result in unfair prejudice to the client. Here, the trial had not started, and Frank was immediately able to hire another lawyer for Dan. Thus, it is unlikely that there was unfair prejudice, and Anita did not breach her duty under the ABA rules. The ABA rules also permit withdrawal if a client's view is repugnant to the lawyer, which Anita can argue that Dan's views are.

### **Mandatory Withdrawal**

Mandatory withdrawal under the ABA and California rules arises when a client is insisting on a course of conduct that would violate the law or ethical rules, or if the client insists on a course of conduct solely to harass another person (California only), or if the lawyer's mental or physical condition make it impossible to continue. None of these exceptions apply, so Anita is not covered by mandatory withdrawal.