

1)

**1. Should the court admit:**

**a) Ben's testimony?**

**Logical Relevance**

Under FRE 401, evidence is relevant if it tends to make a fact of consequence more or less probable. Under California law, evidence is relevant if it tends to make a disputed fact more or less probable without the evidence.

Here, Ben's testimony that Dan had confided in him that he killed Victor likely makes a disputed fact (the fact that Dan killed Victor) more or less probable without the evidence.

Therefore, Ben's testimony is logically relevant.

**Legal Relevance**

Under CEC 352, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, misleading a jury, confusing the issues, wasting undue time, etc. The court will conduct a balancing test.

Here, Ben's statement about Dan's admission is probative, but it is also highly prejudicial. After conducting a balancing test, the court will likely conclude that the probative value of Ben's statement may be substantially outweighed by the dangers of unfair prejudice.

Therefore, Ben's testimony is legally relevant.

**Hearsay**

Hearsay is an out-of-court statement made by the defendant that is being offered for the truth of the matter asserted. When analyzing, we must first ask, is this being offered for the truth of the matter asserted? If so, it will be excluded as hearsay.

Here, Ben is the declarant and his out-of-court statement to Anita is that Dan confided in him that he killed Victor. This, when offered, is being offered for its truth, which is to show that Dan indeed committed the murder of Victor.

Therefore, Ben's statement to Anita is hearsay and will be excluded unless an exception applies.

---

---

**Exception - Statement of a Party Opponent**

The CEC states that an exception to the hearsay rule exists when the declarant is an opposing party, and is being offered against that party.

Here, the statement is being offered against Dan by the prosecutor, and the statement is about Ben telling Anita that Dan confided in him that he killed Victor. Because Dan made the statement to Ben, this statement can be admitted under the party opponent exception to the hearsay rule.

**Conclusion**

Ben's testimony will likely be admitted under relevancy and the party opponent exception to the hearsay rule.

**b) Anita's testimony re: Dan's statement that he was with Frank the night of the murder?**

**Logical and Legal Relevance**

Defined above. This is logically relevant because the disputed fact is whether or not Dan was with Frank in the night of Victor's murder, and thus, whether his alibi is proper. Thus, it is logically relevant. Further, this will not be inadmissible under CEC 352 because the probative value of the statement is not outweighed by the dangers of unfair prejudice.

Therefore, this testimony by Anita is relevant.

**Hearsay**

Defined above. Here, Dan is the declarant and the statement was made out-of-court to Anita. Furthermore, if it is being offered to prove that Dan was with Frank night of the murder, then it is being offered to prove the truth of the matter asserted and is thus hearsay. However, it may not be hearsay by definition if not. If the prosecutor instead can show that it is instead being offered to prove a valid alibi for Dan, it would not be being offered to prove the truth of the matter asserted and thus non-hearsay.

Therefore, this statement may be hearsay and thus inadmissible.

**Statement of a Party Opponent**

Defined above.

Here, because this statement was made by Dan (declarant) and it is being offered against him by the prosecution, this exception to the hearsay rule would apply.

---

Therefore, this testimony would be admissible under the exception to the hearsay rule for a party opponent statement.

### **Attorney-Client Privilege**

However, Dan may assert that admitting this evidence would be a violation of the attorney-client privilege. Under this privilege, any communication between the lawyer and client regarding legal representation and services, that was intended to be kept confidential, will be privileged and thus inadmissible.

Here, Dan can likely argue that Dan entered into a valid retainer agreement with Anita to represent him, and that Anita met with Dan to discuss Dan's defense. Thus, Dan can validly assert that these discussions were made with the intent to remain confidential, and that it was during the course of rendering legal services.

Therefore, Dan can rightfully assert that this testimony is privileged under the attorney-client privilege and thus inadmissible.

### **Work Product Privilege**

#### *Qualified Immunity*

Anything prepared by the attorney or client in anticipation of litigation will be privileged under qualified immunity.

Here, Dan can likely argue that these discussions were in anticipation of litigation, and therefore privileged under qualified immunity.

Thus, qualified immunity may keep the testimony from being admitted.

#### *Absolute Immunity*

Anything created by the attorney that has her mental impressions, theories, conclusions, etc. will be excluded from evidence as it has absolute privilege.

Here, the facts indicate there was just a verbal discussion between the two, in addition to a retainer agreement, and that they were discussing defenses to the murder charge against Dan. Dan can assert this is privileged through absolute immunity, but it will likely be unsuccessful because there were no written mental impressions, theories, conclusions, etc.

Therefore, Dan cannot assert absolute immunity.

**c) Anita's testimony re: that she had received the bloody pants from Ben and turned**

---

---

**them over to the prosecutor?**

**Logical and Legal Relevance**

Defined above. This testimony does make the disputed fact of whether Dan killed Victor more or less probable. However, the testimony's probative value is likely substantially outweighed by the dangers of unfair prejudice because the bloody pants will enflame the emotions of a rational juror.

Thus, although logically relevant, the Superior Court would likely keep this evidence out under CEC 352.

**Attorney Testimony**

Under CEC, an attorney must not testify in the matter that it is representing a client in. The only exceptions are if the attorney and client are in a dispute about legal services that were rendered.

Here, however, Anita had withdrawn from representation so she is not retained counsel in the current matter regarding Dan's murder charge. However, Dan will likely be able to keep this out by asserting again that this testimony was from a time when she was retained. Therefore, he may be able to assert attorney-client privilege.

**Attorney Client Privilege**

Defined above.

Here, Dan will be likely be able to effectively assert that because this was during the time he was represented by Anita, he can enforce that she assert his privilege under the attorney-client relationship.

Thus, under attorney-client privilege, the material may be excluded from evidence.

**d) Anita's testimony that Ben told her that Dan said he had killed Victor?**

**Logical and Legal Relevance**

Defined above.

This statement, like Ben's testimony, is both logically and legally relevant because it (i) tends to make a disputed fact, that Dan killed Victor, more or less probable. It has probative value, but that is not substantially outweighed by unfair prejudice under CEC 352.

Therefore, it is relevant.

---

## **Hearsay**

Defined above.

## **Hearsay within Hearsay**

When there are statements within statements made by a declarant out-of-court, each statement must be excluded or exempted from the hearsay rule to be admitted into evidence.

Here, we already established that Ben's statement to Anita about Dan saying he killed Victor was admissible as an exception to the hearsay rule under a party opponent. However, Anita's statement is not excepted from the hearsay rule and no other exemption/exception applies.

Therefore, both statements will be inadmissible under the "hearsay within hearsay" doctrine.

## **2. What ethical violations did Attorney Anita commit by:**

### **a) Turning over the bloody pants to the prosecutor?**

#### **Breach of Duty of Confidentiality to Dan**

Under ABA and the California Rules of Professional Conduct (CRPC), a lawyer owes a duty of confidentiality to their client to keep communications private that were made in the course and scope of the attorney-client relationship. This must be asserted on behalf of the client if he or she is not present. This duty of confidentiality, however, only applies to *communications* and not *physical evidence*.

Here, because this is physical evidence, the duty of confidentiality will not apply to the pair of bloody pants and therefore, Anita did not breach her duty.

#### **Duty to Safekeep Client's Property**

Under the ABA and CRPC, a lawyer has a duty to safekeep client's property. This does not apply to evidence the lawyer knows to be unlawful.

Here, the bloody pants were evidence and Anita would be in violation for safekeeping that property, and not turning it over to the prosecutor.

Therefore, Anita likely did not violate her duty to safekeep the client's property in this instance.

#### **Breach of Duty of Loyalty to Dan**

Under the ABA and CRPC, an attorney has a duty of loyalty to avoid conflicts of interest and to put the interests of their clients above their own.

---

Here, Anita went against the interest of Dan when she turned over the bloody pants to the prosecutor.

Thus, Anita breached her duty of loyalty to Dan.

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

**Duty of Fairness to Opposing Counsel**

Under the ABA and CRPC, a lawyer owes a duty of fairness to opposing counsel, both inside and outside of litigation. Included in this duty is the duty to disclose adverse evidence to the other party.

Here, Anita found out that Dan was lying about his alibi and decided to disclose it to the prosecutor. On the one hand, Anita made the correct decision by disclosing to opposing counsel, but on the other hand, she violated her duty of confidentiality of Dan.

**Breach of the Duty of Confidentiality to Dan**

Defined above. Regarding the email communication, Anita violated her duty to Dan.

**c) Withdrawing from representing Dan?**

**Permissive Withdrawal**

Under the ABA and CRPC, an attorney can withdraw when (i) there is a frisk of financial harm to the attorney, (ii) the attorney has a physical or mental condition that makes continuing overly burdensome for the lawyer, (iii) the client continues to use the lawyer's services to commit crime or fraud, (iv) when the representation would result in serious bodily harm or death (v) or other good cause exists. Additionally, under the ABA only, a lawyer may withdraw when continued representation would result in substantial financial harm to another.

Here, the facts state that after 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 about the alibi. Although truthfulness and candor are important, it is questionable whether Anita's reason for withdrawing from representation would be sufficient to be labeled by the court as "good cause" to withdraw. However, if Anita can successfully argue that she did not violate the ABA rules or the CRPC because her continued representation would result in Dan violating the law and engaging in fraudulent behavior, she may be able to successfully withdraw from representation and avoid a violation.

Question #1 Final Word Count = 1844

**END OF EXAM**