

1)

1. Assume all proper objections have been made. Should the following items be admitted into evidence:



Prop 8

Evidence is admissible in California under Prop. 8 of its constitution. Even though it conflicts with the CEC. Unless it falls under an exclusion.

Relevance

All evidence must meet legal and logical relevance in order to be permitted.



Legal Relevance

Evidence may or may not be admissible if probative value outweighs unfair prejudice.

Logical Relevance

Is evidence that proves or disproves a material fact. CA the fact needs to be in dispute.

a) Ben's Testimony?



Duty of Confidentiality

An attorney must maintain a duty of confidentiality to her clients in their representation. Communications between her and her client are privileged when client is either seeking information or has retained attorney.

Here, Dan entered into a valid retainer agreement with Anita to represent him. Anita met with Dan to discuss Dan's defense.

Thus, Anita owed a duty of confidentiality and breached it to Dan when she communicated with Ben about Dan's case without Dan's consent.

Witnesses

For the purposes of preparing a case, an attorney is permitted to interview witnesses for her client. However, the client needs to provide **informed written consent** to her client regarding communication to witnesses and party's not to the case (if necessary).

Here, from the facts there is nothing to conclude that Anita discussed with Dan about

permission to speak with Ben or provided Dan with a document to sign consenting to interviewing Ben.

Thus, Anita owed a duty to obtain informed written consent to Dan before speaking with Ben.



Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. It is not admissible unless it meets an exception.

Here, Ben, Dan's roommate, who told Anita (Dan's atty.) that Dan confided in him that he killed Victor. The prosecutor has called Ben as a witness to testify to Dan's statement that he killed Victor.



Thus, the statement is hearsay because it made out of court to Dan's attorney.

Logical Relevance

Defined above.



Here, Ben's statement if permitted would tend to prove that Dan did kill Victor.

Thus, Ben's statement may be admissible if permitted under logical relevance.

Legal Relevance

Defined above.



Here, the probative value of Ben's statement does not outweigh the probability of unfair prejudice.

Thus, because Ben's statement could sway the jury whether or not it is true to believe that Dan is guilty of Victor's murder.

Exceptions



Attorney- Client Privilege

Communications between an attorney and client are confidential.

Here, Anita is Dan's attorney, not Ben's. When Ben spoke to Anita she was breaching her duty of confidentiality to Dan (as discussed above) and did not communicate to Ben the risks of him speaking with her about Dan's case.

Thus, the attorney-client privilege does not apply.



State of Mind

A statement by a witness may be admissible if it is offered to present the defendant's state of mind when the crime occurred.

Here, Ben doesn't meet this exception because he was not present during the killing nor is it evident from the facts when Dan said this to Ben, if at all.

Thus, this does not qualify as an exception.

Conclusion

Because Ben's statement to Anita was not privileged and hearsay and does not fall under an exception or meet the relevance standards, Ben's statement should not be admitted into evidence.

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



Attorney as Witness

Attorneys are not permitted to be a witness in a current or past case unless the case pertains to a claim against the attorney.

Here, the Prosecutor has called Anita to testify about Dan's statement that he had been with Frank on the night of the murder.

As discussed above, an attorney has a duty of confidentiality in CA until death of the client and under the FRE in perpetuity. Dan's statement to Anita was made while he and Anita were preparing his defense.

Documents/Discussion in Preparation for Litigation

Documents and discussions with clients during preparation for litigation are deemed privileged.

Here, 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.

The email exchange would qualify as attorney client privilege and document prepared for litigation, as Anita was discussion strategy with Dan.

Thus, the email would be inadmissible.

Thus, Anita is not permitted to testify against Dan, because he is her former client and still owed him a duty of confidentiality as well as when the statement was made it was **in preparation for litigation which is deemed privileged.**



c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor?



Attorney to keep Client's property safe



Attorney must keep client's evidence under safekeeping so as to protect evidence.

Here, Ben had given Anita bloody pants when she was at the apartment.

Following her approved withdrawal from representing Dan, Anita turned over the blood pants and the email exchange between her and Dan to the Prosecutor.

Anita has violated her duty of confidentiality as well as her responsibility to her former client to turn over what belonged to Dan (pants). However, Anita could be excused or potentially face a violation for hiding evidence or puoporting a crime if she had not turned the evidence over the prosecutor.

Regarding the email, Anita was not required to turn that over because as discussed above it was in preparation for litigation.

Attorney Fairness to the other side

Attorneys and prosecutor's have a duty of fairness to each other. That is, if there is evidence or law that benefits their client, they are to disclose it to opposing council.

Anita likely felt compelled in turning over the bloody pants, but took it a step further with the email.

Regarding the prosecutor, knowing the rules of professional conduct, compromised Anita and the evidence.

Thus, this testimony may be admissible if the court determines so.

Chain of Custody

When evidence such as the bloody pants is collected and admitted to court, it needs to have documented chain of custody.

Here, the pants began with Ben, we don't know if Dan gave them to Ben intentionally or Ben

found them. Secondly, Ben then handed the pants to Anita. From the facts all we know is she turned them into the prosecutor after withdrawal. We do not know if they were stored properly, etc.

Thus, the pants and the testimony are unlikely to be admitted.

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

Double Hearsay

 Doubles hearsay is hearsay within hearsay. 

Here, Anita is testifying about what Ben told her Dan said about the killing. This type of evidence is not admissible and there are no exceptions.

Conclusion

As discussed above, Anita would not be permitted to testify because he was Dan's attorney previously.

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

a) turning over the bloody pants to the prosecutor.

 Discussed above.

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

 Discussed above.

c) Withdrawing from representing Dan.

Withdrawal

Withdrawal from representation of a client may be permissible if approved by the court, does not unnecessarily impede her client's case or when the client is using the attorney to commit a crime or attorney finds the client's behavior repugnant or client is not following attorney direction.

Here, Anita petitioned the court to withdrawal from Dan's case. She decided she did not want to represent Dan any longer because she was tired of his lies.

Perhaps she used the reasoning of finding Dan's behavior repugnant because he was lying to her. Perhaps she believed Dan's behavior was hindering his case as well as her strategy to

defend him. From the facts we are not made aware of what reasoning under permissive withdrawal she used, but the court approved and she was able to withdraw.

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