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**1. Should the following items be admitted into evidence:**

**a. Ben's statement that Dan killed Victor,**

Relevance:

Evidence must be logically and legally relevant in order to be admissible. Evidence is logically relevant if it has a tendency to make a material fact in dispute more or less probable. Evidence is legally relevant under California Evidence Code 352 if its probative value for truth is not substantially outweighed by its potential for prejudice.

Here, Ben's statement is logically relevant, because Ben has been charged with murder. The statement that he killed Victor goes to Dan's state of mind through his consciousness of guilt. It also has a tendency to prove that Dan actually killed Victor. The statement by Dan is also highly probative of guilt, the main issue at trial, but Dan will likely argue that it is highly prejudicial to his case, because he confided in Ben. This is a losing argument. The evidence has little prejudicial potential.

Therefore Ben's testimony is logically and legally relevant.

Hearsay:

Hearsay is an out of court statement used to prove the truth of the matter asserted.

Here, Dan's statement to Ben that he killed Victor was made out of court and is being offered as substantive and circumstantial evidence of the crime.

Therefore, it is hearsay, and will be inadmissible unless a valid exception applies.

Present state of mind:

The present state of mind exception to hearsay that allows statements to come in if they go to the then existing state of mind of the declarant. Statements about future plans, for example, show intent.

Here, it could be shown that Dan's statement to Ben goes to his guilty conscious. However, it is unlikely that this will be the case, because Dan is speaking in concrete terms rather than the abstract.

Therefore, the present state of mind exception does not apply.

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Spontaneous Statement:

The spontaneous statement exception applies to statements made at or near the time of an exciting event where there is little time to fabricate the truth.

Here, Dan told Ben that he had killed Victor, but there are no facts to indicate that this statement was made at or near the time of the incident. However, the statement may have been made when Dan was overwhelmed by guilt in the moment and feeling the impact of his actions later, causing him to exclaim them as if it had just occurred. The facts do not indicate this, and therefore it is a weak argument. The statement does however, describe Dan's own actions, and could have been admissible under this exception if it had occurred close in time to the murder.

Therefore, this exception does not apply.

Statement Against Interest:

A statement against interest is one made against the declarant's pecuniary, penal, or social interests.

Here, Dan admitted to murdering Victor. An admission of guilt such as this is against Dan's penal interests as well as his social interests--because he does not want the reputation of being a murderer.

Therefore, the statement against interest exception applies.

Statement by a Party Opponent:

The statement by a party opponent exception applies to statements made by an adverse party to an action, here, the defendant.

Here, Dan is a party opponent, the defendant, and he told Ben that he killed Victor.

Therefore, the party opponent exception to hearsay applies.

Conclusion:

The statement to Ben by Dan that he killed Victor is admissible as an exception to the hearsay rule.

**b. Anita's statement that Dan told her he was with Frank the night of the murder,**

Relevance:

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See rule, above.

Here, Anita, an attorney, has testified that Dan, her then client, told her that he was with Frank on the night of the murder. This statement is logically relevant to attack Dan's credibility because other testimony and evidence will prove that he was not with Frank, his father, on the night in question. The evidence is probative insofar as attorneys have an ethical obligation to be candid with the courts and the weight of a statement by a former attorney of a defendant's misconduct could be very helpful for the trier of fact. This is exactly why it would be unduly prejudicial to allow such testimony to come into evidence. It would be highly prejudicial, and unfair to Dan's case if his attorney is able to breach her duty of loyalty and confidence to Dan. This statement should not come in on these grounds. If the court does allow it in within some exception, a limiting instruction for the exact purpose of the testimony should be given to the jury.

Hearsay:

See rule, above.

Here, Dan told Anita that he was with Frank the night Victor was murdered. As discussed above, this statement is hearsay under the CA rules of evidence, but can come in as an exception to the rule as a statement by a party opponent/statement against interest. However, the statement was also made after Dan had entered into a valid and written fee agreement with Anita, and was likely made in confidence to her. Dan should have objected on the grounds of attorney-client privilege.

Attorney-Client Privilege:

Statements made to an attorney for the purposes of litigation are confidential and privileged. The client holds the privilege.

Here, Dan's statement was made to his attorney in the scope of her representing him and after a valid fee agreement had been made. The statement was not made to anyone else, and in fact, after the statement was made, Anita properly counseled her client--as she should have--that his alibi was weak. He then told her that he had lied. This should have prompted her to continue counseling and working with him to resolve the issue, to let him know that if he intended to take the stand to testify as to that fact, that he could imperil his case, and if he did decide to take the stand, she could inform the court that he would do so in a narrative fashion so that she does not participate in the lie. However, she did none of these things, and she was representing Dan at the time the communication was made.

Therefore, the statement is privileged.

Conclusion:

The statement should not come in because it is privileged. The fact that Anita has chosen to testify against her former client may also lead to state bar action for failing her duty of loyalty and confidence.

**c. Anita's testimony that she received the bloody pants from Ben and turned them over to the prosecutor, and her ethical violations.**

Relevance:

See rule, above.

Here, the bloody pants are logically relevant to show that Dan was covered with blood, a fact that he may have to explain, and it goes to his guilt for the crime charged. The pants are also probative insofar as they show Dan was covered in blood. The blood could have come from anywhere. The fact that they were turned over by his then attorney is also concerning and highly prejudicial and unfair to a proper defense. However unfair the attorney misconduct may be, the prosecutor is in possession of the evidence. Moreover, Anita has no first hand personal knowledge of where the pants came from. They may not be nearly as probative as they are prejudicial.

Therefore, the evidence is relevant, but not legally, and should not come in.

Tangible Evidence:

Tangible evidence must be properly authenticated by the proponent of the evidence.

Here, Ben told Anita that Dan killed Victor and then handed her a pair of bloody jeans that he claimed came from Dan. This presents multiple issues with respect to authenticity, because Anita has no first hand personal knowledge of the pants and neither does the prosecutor--who cannot establish a proper chain of custody from Dan through to the prosecutor's office. Anita is not competent to testify as to the pants beyond that she gave them to the prosecutor. If the prosecutor asks her where she got them from, she could say Ben, and if asked why they were given to her, she would need hearsay exceptions to explain. Moreover, an attorney does not have a duty to turn over inculpatory evidence to the prosecutor, but the prosecutor has a duty to turn over exculpatory evidence to the defense. Again, Anita has breached her duty of competence, and loyalty to Dan--she only subbed out after this fact.

Therefore, Anita cannot properly authenticate the pants because there are multiple foundational and chain of custody issues involved.

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Conclusion:

Anita lacks the first hand personal knowledge to properly lay the foundation for the pants, she has violated multiple ethical covenants with her former client, and the physical evidence cannot be authenticated. It should not come in.

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

Relevance

See above, the testimony is relevant to whether Ben actually killed victor. However it is also legally relevant because it is probative of truth.

Hearsay:

See rule above.

Here, the statement is hearsay within hearsay, and therefore is likely impermissible.

Conclusion:

The hearsay exception simply does not apply.

**2. Ethical Violations:**

As discussed throughout the essay above, the ABA and CA rules both provide duties of competency, candor, loyalty to the client and courts alike.

Here, Turning over the email exchange is a further violation of the duty to confidence and competence. She should not have violated that duty. Moreover, in CA cumulative violations will lead to sanctions and liability with respect to misconduct proceedings. Withdrawing was also not giving the client meaningful choice, but she followed the proper procedure. In sum, please see arguments above within each section.

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**END OF EXAM**