

**FEBRUARY 1997 CALIFORNIA BAR EXAMINATION  
ESSAY QUESTIONS AND SELECTED ANSWERS**

*Professional Responsibility*

**QUESTION**

David has been arrested for and charged with murder and robbery. David made a telephone call to Attorney, a member of the California Bar. Attorney came to see David in the small rural jail in which David is being held and agreed to represent him.

In an interview in the jail, David told Attorney that he killed the victim and stole the victim's shirt, shoes, and ring, and was wearing them when he was arrested. David also told attorney that he had hidden the shirt and shoes as best he could in his cell, and that he had thrown the ring out of the cell window into a trash can behind the jail. David is now bare-chested, bare-fingered, and bare-footed.

Attorney told David to do nothing else to hide or destroy evidence and David reluctantly agreed. Attorney then left, went behind the jail and looked into the trashcan. The trashcan was empty except for a ring. At this point, Attorney heard a noise, looked up, and saw David throw a pair of shoes out of the cell window. The noise also attracted a police officer, who discovered the shoes and ring. The police officer asked Attorney what he knew about the ring and shoes. Attorney refused to tell the police officer anything about them.

Attorney returned to the jail and spoke to David again. David told him that he had torn the shirt into strips, which he plans to burn. Attorney told David not to burn the strips, but David insisted that he will burn them.

Attorney is called before the Grand jury investigating the murder and robbery. Consistent with his ethical obligations:

1. Should Attorney have told the police officer anything about the shoes or the ring? Discuss.
2. Should Attorney tell the Grand jury that David is threatening to burn the scraps of the shirt? Discuss.
3. May Attorney tell the Grand jury anything about any of the other events described above? Discuss.
4. Should Attorney continue to represent David? Discuss.

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**ANSWER A**

Relationship between Attorney and David

David called attorney from jail and attorney visited him in the jail. Attorney agreed to represent him so an attorney-client relationship has been established.

1. Attorney's Duty to Reveal Source of Ring/Shoes to Police Officer

a. Attorney Duty of Confidentiality

An attorney owes his client a duty to keep confidential all information which he learns from his client and all information which he learns in the scope of the representation from whatever source. Thus, the duty of confidentiality is broader than the attorney-client privilege because it applies to much more than confidential communications between the attorney and client or their respective agents. In addition, the duty of confidentiality applies to many more settings than court-ordered compulsion. Under the Model Rules and California ethical duties, Attorney cannot use any confidential information gained in the representation to harm David.

Here, David told attorney about the ring he had thrown into the trash can outside his cell window. The location of the ring and how it got there is confidential information. The ring itself is not covered either by the attorney client privilege or the duty of confidentiality because it is fruits of a crime.

Under the authority of Meredith v. California where an attorney learns during the representation of a client about the location of the fruit of a crime, he is under no duty to retrieve it. If he does retrieve it, it is not privileged and he must turn it over to the authorities. He may keep it for a reasonable time to obtain information needed for the representation and then must turn it over. He may not however reveal the source of the item (i.e., how it got there). The rationale is that if the attorney has moved it from its location, he has destroyed that evidence. The jury will be told where the item was found but not that it came from attorney or how it got there.

An attorney may go to the scene and view the item to determine the veracity of the client's statement and to assist in client's defense. As long as he does not retrieve it there is no duty to turn it over. Here, attorney went to view the ring. While there, shoes came out of the cell window. Attorney likely knew the source of the shoes. However, this information is also privileged and confidential because Attorney learned their source in talking with David.

Therefore, the duty of confidentiality prevents attorney from telling officer anything about the source of ring or shoes.

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b. Attorney-Client Privilege

The attorney-client privilege prevents compelled disclosure of confidential communications. It would not apply to the out of court conversation with officer. However, the statement about the ring and the shoes is privileged and it would be another reason attorney could not disclose his knowledge about them to officer.

c. Attorney Duty Not to Conceal Evidence/Commit Fraud

The attorney was under an obligation to tell David not to do anything else to hide or destroy evidence. Here, Attorney did that. Attorney cannot counsel or in any way assist David in his attempt to conceal evidence.

d. Duty of Loyalty

Attorney owes David a duty of loyalty. Neither Attorney's interest (to avoid arrest or a problem with the officer) nor his duty to a 3<sup>rd</sup>-party (general civic responsibility in dealing with officer) can compromise his duty of loyalty to his client. Thus, even if officer threatens Attorney with arrest, Attorney cannot reveal the source.

2. Attorney's Responsibility to Testify Before the Grand Jury Regarding David's Attempt to Burn the Shirt

a. Duty Not to Conceal Evidence/Perpetrate a Fraud

Attorney went back to the jail and told David not to destroy evidence again. David informed attorney that he intended to burn the shirt taken from the victim. At this point, attorney has a duty to insure he does not assist in the fraudulent conduct and may have to withdraw (see discussion below). In any event, he should strongly discourage such activity.

b. Compelled Testimony Before the Grand Jury - Attorney/Client Privilege

If Attorney is called before the grand jury, the attorney client privilege would apply to David's statements about the shirt. To reveal that David intends to burn the shirt would be revealing a confidential communication between the Attorney and David during the course of the representation. The attorney-client privilege applies before the grand jury as it is compelled testimony.

Exceptions to Attorney-Client Privilege

There is an exception to the attorney-client privilege where the attorney learns of a client's future crime or fraud. Such statements are not covered. In California, the crime must be a serious crime (threatening death or serious bodily injury).

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David's actions would be fraudulent and criminal. However, it would not be of the serious crime nature necessary to violate the attorney-client privilege. In addition, Attorney may believe David will heed his advice not to burn them. Here, it says David is insisting he will burn them. Nonetheless, Attorney would not reveal that information to the grand jury.

3. Attorney's Duty to tell the Grand Jury about the Ring and Shoes

a. Attorney-Client Privilege

As discussed above, the attorney client privilege applies to compelled disclosure of information. It would prevent Attorney from disclosing any confidential communications of David. Here attorney learned of the ring and shoes from David. Attorney knew of the location of the ring (and could infer the source of the shoes from David's statements. He cannot be compelled to disclose that information.

The same exclusion for fraud/crime discussed does not apply. Here, however, it is a past crime. Attorney does not have to reveal past crimes he learns in his communications with David.

The district attorney may argue that Attorney is obligated to testify to what he saw outside the jail. While this has initial merit because it is not protected as a confidential communication, such testimony would reveal indirectly why Attorney had gone to the trash can (David's statement about the ring). Attorney should not be compelled to testify.

b. Duty of confidentiality

The duty of confidentiality applies to non-compelled testimony. Here Attorney is being asked to testify before the grand jury.

c. Exclusionary Rule

The exclusionary rule does not apply to grand juries. Thus evidence illegally obtained is admissible. However, the attorney-client privilege does apply.

4. Continued Representation of David

a. Duty not to Participate in Fraud

Where an attorney is asked advice about fraudulent conduct he must (1) dissuade the client (2) withdraw if the client insists. When the attorney learns the client has used his advice to commit a fraud he must withdraw. Here, Attorney learned that David was

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going to burn his shirt despite Attorney's instructions to the contrary. Attorney must withdraw.

b. Attorney as a Witness

Where an attorney believes he may be called as a witness he cannot act as trial counsel. If he learns afterward, he must withdraw. Here Attorney was a witness to the shoes from the cell window. He may have to withdraw on these grounds.

c. Duty to Represent Client Zealously

Attorney, with knowledge of David's fraud, has a duty to the court to not use it. He could not argue based on any testimony that he knows is perjured. Under the Model Rules, the attorney has a duty to reveal the perjury. In California, the attorney must seek to withdraw or ignore the perjured evidence.

Attorney knows information he cannot use in his representation of David. He must withdraw.

d. Attorney's Withdrawal Must Not Prejudice Client

As this is a criminal case and early on, there would be no prejudice.

**ANSWER B**

1. Should Attorney have told the police officer anything about the shoes or the ring?

An attorney owes a client a duty to keep confidential anything learned in the course of his representation of a client. That duty begins as soon as the client consults the attorney and seeks representation, whether or not the attorney ultimately does represent the client. In California, the attorney has a duty not to reveal a client's confidences and secrets. Confidences are those communications which are covered by the attorney-client privilege. Secrets constitute anything else learned by the attorney from whatever source in connection with the representation.

The attorney-client privilege relates to the ability of a tribunal to force an attorney to reveal confidences. The duty of confidentiality concerns whether an attorney may voluntarily reveal information obtained in the course of the representation.

Here, the shoes and the ring pose different problems. David told the attorney that he had stolen the ring and that he had thrown it out of the cell into a trashcan below. Clearly, the attorney's sole knowledge of the ring stems from a confidential communication covered by the attorney-client privilege.

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If a client gives an attorney the instrumentalities of a crime or told where to locate them, it is permissible for the attorney to inspect them and obtain whatever information he needs from them. After doing so, however, he must turn them in to the proper authorities without revealing his source of information, i.e., the client. In this case, attorney was proper in not telling the police officer anything about the ring because to do so would have violated the attorney-client privilege as well as a client secret.

However, the shoes pose a more difficult problem. Here, David admitted to the attorney that he had stolen the victim's shoes and that the shoes were hidden in the cell. Attorney properly advised David not to hide or destroy any of the evidence. But in this case, the attorney was a witness to a criminal act by David the attempted destruction of evidence of a crime by throwing the shoes out the window. The attorney will argue successfully that any information about the shoes imparted to him in confidence by David is strictly privileged and may not be revealed.

The attorney may also argue that because he learned of the shoes being thrown out the window by virtue of his representation of David, that that information should be protected as well. However, an attorney has a duty to not actively participate in a crime, nor to further the commission of a crime by a client. Inasmuch as the attorney was a witness to the commission of a crime, he must reveal that he saw David throw the shoes out the window, or else he might be guilty of obstruction of justice. However, the police officer is not a tribunal. Thus, the police officer cannot require the attorney to divulge what he saw David do. Accordingly, the attorney should not have told the police officer anything about the shoes or the ring that he learned from his representation of David.

2. Should Attorney tell the Grand Jury that David is threatening to burn the scraps of the shirt?

The attorney-client privilege is held by the client, and if the client is not available, the attorney must claim the privilege on behalf of the client. A disclosure by a client of an intent to commit a crime in the future is not protected by the attorney-client privilege. In this case, the proposed crime is the destruction of evidence of a crime. Because there is no protection by the attorney-client privilege, the attorney must reveal it to the grand jury. With respect to permissive disclosure of an intent to commit a crime, California holds that an attorney may disclose a client's intention to commit a crime if it involves death or serious bodily injury.

3. May attorney tell the grand jury anything about any of the other events described above?

The attorney may not disclose to the grand jury any of the confidences imparted to him by David. Since David is not present, the attorney must claim the privilege for him. The admissions by David that he killed the victim and stole the victim's shirt, shoes and ring, and that he was wearing them at the time he was arrested are all privileged communications that are protected by the attorney-client privilege. Also protected by the privilege is David's admission that he hid the shirt and shoes and that he threw the ring out of the cell window into the trash can

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behind the jail. The attorney may, however, be required to tell the grand jury that he saw David throw the shoes out the window. What the attorney saw is not a communication protected by the attorney-client privilege, rather, it is a criminal act - the destruction or attempted destruction of evidence of a crime. Inasmuch as it is not protected, Attorney must reveal what he saw to the grand jury.

4.     Should attorney continue to represent David?

If an attorney knows in advance that he will be called as a witness in a case, he has a duty not to accept representation. If an attorney learns during the representation that he will be called as a witness, he should withdraw provided that his withdrawal will not prejudice the client. In this case, after the attorney had begun his representation, he witnessed David throw the shoes out of the window. As a witness to the event, he will likely be called to testify at David's trial. Since it is early on in the proceedings, and there is no evidence that the attorney's withdrawal would prejudice David, the attorney should withdraw.

In addition, the attorney may withdraw if a client fails to comply with the attorney's advice. In this case, David ignored attorney's advice not to do anything else to hide or destroy evidence. Based on this, the attorney has grounds for permissive withdrawal. However, if the attorney has already initiated representation, he will need the court's permission to withdraw.