

### Question 3

Vicky was killed on a rainy night. The prosecution charged Dean, a business rival, with her murder. It alleged that, on the night in question, he hid in the bushes outside her home and shot her when she returned from work.

At Dean's trial in a California court, the prosecution called Whitney, Dean's wife, to testify. One week after the murder, Whitney had found out that Dean had been dating another woman and had moved out, stating the marriage was over. Still angry, Whitney was willing to testify against Dean. After Whitney was called to the stand, the court took a recess. During the recess, Dean and Whitney reconciled. Whitney decided not to testify against Dean. The trial recommenced and the prosecutor asked Whitney if she saw anything on Dean's shoes the night of the murder. When Whitney refused to answer, the court threatened to hold her in contempt. Reluctantly, Whitney testified that she saw mud on Dean's shoes.

The prosecution then called Ella, Dean's next-door neighbor. Ella testified that, on the night Vicky was killed, she was standing by an open window in her kitchen, which was about 20 feet from an open window in Dean's kitchen. She also testified that she saw Dean and Whitney and she heard Dean tell Whitney, "I just killed the gal who stole my biggest account." Dean and Whitney did not know that Ella overheard their conversation.

Dean called Fred, a friend, to testify. Fred testified that, on the day after Vicky was killed, he was having lunch in a coffee shop when he saw Hit, a well-known gangster, conversing at the next table with another gangster, Gus. Fred testified that he heard Gus ask Hit if he had "taken care of the assignment concerning Vicky," and that Hit then drew his index finger across his own throat.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Allow the prosecution to call Whitney? Discuss.
2. Admit the testimony of:
  - (a) Whitney? Discuss.
  - (b) Ella? Discuss.
  - (c) Fred? Discuss.

Answer according to California law.

## **Answer A to Question 3**

### **California Proposition 8: Truth in Evidence Rule**

Under Proposition 8 in California, all non-privileged, relevant evidence is admissible in a criminal prosecution brought in California unless it falls within one of the specified exceptions to the rule. Evidence that is admissible under Proposition 8 is still subject to CEC 352 balancing.

Here, as this case involves the prosecution charging Dean with murder, Proposition 8 will apply to admit any evidence that is relevant and is not excluded for CEC 352 balancing.

### **1. Allow the Prosecution to call Whitney**

The first issue is whether the prosecution should be allowed to call Whitney. This depends on whether Whitney ("W") can claim one of the spousal privileges: spousal communications privilege or spousal testimonial privilege.

#### **Spousal Communications Privilege**

The spousal communications privilege protects all confidential communications between spouses that are made in the course of an existing marriage and in reliance on the intimacy of the marriage. This privilege belongs to both spouses and may be claimed by either to prevent the other spouse from testifying. Moreover, the privilege exists regardless of whether the marriage has ended in divorce, so long as the communication itself was made during a period when the marriage existed. For purposes of the privilege, marriage does not end until there is a valid divorce.

Here, Whitney was called by the prosecution to testify that she saw mud on Dean's shoes. This observation occurred when Dean and W were still married as Dean and W have yet to obtain a divorce and reconciled prior to W providing any testimony. Although W and D had separated because W had discovered that D was dating another woman and W had moved out, for the purpose of this privilege, it extends for any

communication made prior to divorce. Finally, as W was called to testify to an observation, rather than a communication between W and Dean, it would not be protected under the communications privilege.

Thus, this privilege would not apply to prevent W from testifying as she did or to prevent her from taking the stand.

### **Spousal Testimonial Privilege**

The spousal testimonial privilege allows one spouse to refuse to testify against another spouse in any action. For this privilege to apply, a valid marriage must still exist. The privilege belongs to the testifying spouse, as the privilege is designed to protect the harmony of the marriage, which is not salvageable if the testifying spouse wishes to testify. Moreover, in California, the privilege allows the testifying spouse to avoid taking the stand entirely.

Here, W was called to the stand to testify that she saw mud on D's shoes during the night of the murder. Although W and D had been separated, because W moved out and stated the marriage was over when she discovered that D had been dating another woman and moved out, the marriage had not ended for the purposes of the privilege, which requires a valid divorce. As such, W was privileged to choose not to take the stand.

In this case, W initially was angry and was willing to testify against D and thus agreed to take the stand and testify. W actually took the stand and was sworn in, prior to the recess in which W and D reconciled and W decided not to offer testimony. Thus, the prosecution will argue that W waived the privilege because she took the stand and was sworn under oath.

By contrast, W will assert that she did not waive the privilege because, although she took the stand, she asserted the privilege the first time that she was asked a question

by the prosecution. W refused to answer when court resumed and the prosecutor asked W if she saw anything on D's shoes at the night of the murder.

As W asserted the privilege prior to answering any questions, the court will find that she had a spousal testimonial privilege and could not be forced to testify against D. However, W took the stand voluntarily and thus it was proper to allow the prosecution to call W because she was the holder of the privilege and had not yet claimed it. Proposition 8 does not allow privileged information to be admitted and thus will not change the outcome.

## **2. Admit the Testimony**

### **(a) Whitney**

The first issue is whether the court should have admitted the testimony of Whitney.

#### **Logical Relevance**

Under California law, evidence is relevant if it makes a fact of consequence that is actually in dispute more or less probable than it would be without the evidence.

Here, W testified that she saw mud on D's shoes. As V was killed on a rainy night, and the prosecution was arguing that D hid in the bushes outside her home and shot her when she returned from work, this evidence would make it more likely that D was present in a muddy flowerbed and committed the murder.

Thus, it is relevant.

#### **Legal Relevance**

Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, waste, or undue delay.

Here, D will argue that the testimony about mud on his shoes is likely to confuse and mislead the jury, particularly if the prosecution has failed to establish that the mud came from a flowerbed near Vicky's home. However, as this evidence has high probative value in that it shows that D was standing outside in mud on a rainy night, it will likely be admitted. Thus, this objection will fail.

### **Personal Knowledge**

In order to be competent to testify, a witness must have personal knowledge of the facts to which she is testifying based upon her percipient observations.

Here, W saw mud on D's shoes in the night in question and thus testimony about the state of the shoes is within her perception and personal knowledge.

### **Spousal Communications Privilege**

As discussed above, this will not protect W's testimony about the mud on D's shoes as it was not a communication, but was an observation.

### **Spousal Testimonial Privilege**

As discussed above, this will protect W's testimony because she is still married to D and therefore cannot be compelled to offer evidence against him in the criminal action. Prop 8 does not change the outcome as privileged information is excluded.

### **Conclusion**

W's testimony will be excluded as a result of the spousal testimonial privilege.

### **(b) Ella**

The second issue is the admissibility of Ella's testimony.

### **Logical Relevance**

See rule above.

Ella's testimony that she overheard D tell W that he "just killed the gal who stole my biggest account" is highly relevant to the case. D is charged with murder and his alleged motivation for killing Vicky is that they were business rivals. The statement thus indicates that D committed V's murder, particularly because it was made on the night that V was killed. This fact is in dispute as it relates to whether or not D is guilty of the crime with which he is charged. Thus, this testimony is logically relevant.

### **Legal Relevance**

See rule above.

Although D will argue that this statement is highly prejudicial and should be excluded because it could be misinterpreted and it fails to identify V specifically, the court will likely find that its probative value in showing that D committed the murder and that he had a motivation to commit the murder far outweighs the risk of prejudice. Moreover, the information goes to the heart of D's guilt or innocence.

Thus, the evidence will not be excluded on this ground.

### **Personal Knowledge**

See rule above.

Here, Ella was standing by an open window in her kitchen, which was about 20 feet from an open window in D's kitchen. Ella could both see D and W and could hear D tell W that "I just killed the gal who stole my biggest account." Thus, Ella's testimony was based on her percipient observations as she could personally see and hear what was happening in D and W's house.

Thus, this objection will be overruled.

### **Hearsay**

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception or is being used for a non-hearsay purpose. Proposition 8 will not apply to admit otherwise inadmissible hearsay as hearsay is an exception to Proposition 8.

Here, Ella's testimony that D told W, "I just killed the gal who stole my biggest account" is offered to show that D was in fact the person who killed V. Thus, it is an out-of-court statement offered to prove the truth of the matter asserted and is only admissible if it falls within an exception.

### **Party-Opponent Admission**

A statement by a party-opponent regarding a relevant fact of the case is admissible over a hearsay objection as it is a California exception from the hearsay prohibition.

Here, the statement that Ella testified about was a statement by D, who is the defendant in the criminal action. This statement is highly relevant to the issues involved in the case because it indicates whether or not D actually committed a murder of V, for which he is being charged.

Thus, this exception would allow the statement to be admitted.

### **Statement Against Interest**

A statement is admissible under an exception if it qualifies as a statement against interest. A statement against interest is a statement of a now unavailable witness that was against the person's proprietary, pecuniary, penal, or social interest when made and that the declarant knew was against his interest when made.

Here, D made the statement to W that "I just killed the gal who stole my biggest account." This statement would be against D's penal interest, because it could subject him to prosecution for murder. Moreover, it could subject him to social ridicule, ostracism and humiliation because he would be labeled as a murderer. D will argue

that the statement was not against his interest because it was made to his spouse in reliance on the confidentiality of their marital relationship and thus he did not think that it could be used against him. Moreover, he did not believe at the time it was made that it would subject him to social disgrace as he expected his spouse to maintain the confidentiality of the statement. As D likely did not know that the statement could be used against his interest when it was made, this exception likely would not apply.

A declarant is unavailable if he can claim a privilege against testifying. As D can claim the privilege against self-incrimination under the Fifth Amendment, he would be considered unavailable for the purposes of this exception.

Thus, this exception would not apply because D likely did not know it was against his interest when made.

### **Spontaneous Statement**

A spontaneous statement is a statement made shortly after witnessing a startling event and while the declarant was still under the stress of excitement.

Here, D made his statement to W and said "I just killed the gal..." indicating that he may still have been under the stress of excitement from the murder. Moreover, a murder is likely a startling event, especially when it involved hiding in the bushes and shooting someone at their home and then seeking to avoid detection.

Thus, D's statement might be a spontaneous statement if he was still experiencing the stress of excitement.

### **Contemporaneous Statement**

A contemporaneous statement is a statement made at or near the time of an event that explains or describes the defendant's actions.

Here, D told W, "I just killed the gal who stole my biggest account." Because D specified that he "just" killed a gal, the statement may have been made near the time of



the event. Moreover, the statement describes D's own conduct in killing the gal and explains his reasons for that conduct--she "stole my biggest account."

Therefore, provided it was made sufficiently close in time, it may qualify as a contemporaneous statement.

### **Spousal Communications Privilege**

See rule above. In addition, the spousal communications privilege is waived if the privilege is not made in reliance on the intimacy of the marriage. A statement is not made in this reliance, if it is made in the presence of a third person who does not fall within the privilege. If the spouses could not have reasonably foreseen that the communication would be overheard by a third party, then the privilege is not waived and D may prevent Ella from testifying on the basis of the privilege. However, if the spouses made the statement negligently when it could be overheard by a third party, then the privilege has been waived as no reasonable efforts were made to maintain its confidentiality.

Here, D and W had a conversation in their kitchen. No one else was present in the home and D and W were having an intimate conversation as spouses, thus suggesting that the conversation was made in reliance on the intimacy of the marriage. However, D and W had this conversation while the window to their kitchen was open. This window was only 20 feet from a neighbor's window which was also open and D was talking in a sufficiently loud voice such that Ella could overhear the conversation. But, because D and W engaged in a private communication between themselves and they did not know that Ella overheard the communication, they likely were not so negligent as to waive the confidentiality of the communications. D and W could rely on the privacy of their home, even with an open window.

Thus, the spousal communication privilege will prevent this testimony.

### **(c) Fred**

### **Logical Relevance**

Fred's testimony that the day after Vicky was killed he was having lunch and heard that two gangsters had "taken care of the assignment concerning Vicky" is relevant to establish that Dean was not the person who killed Vicky. As whether or not D killed Vicky is the primary issue in the murder trial, this is both highly relevant and in dispute.

This objection will be overruled.

### **Personal Knowledge**

Here, Fred was having lunch at a coffee shop when he saw Hit and Gus conversing and overheard the conversation. Thus, Fred had personal knowledge regarding the statements that were made.

This objection will be overruled.

### **Hearsay**

See rule above.

Here, F is offering testimony regarding the statements of both H and G, and both of these statements must fall within a hearsay exception in order to be admitted. These statements are offered to show that F and G committed the murder of Vicky.

### **G's Statement**

#### **Effect on Hearer**

D will argue that G's statement asking whether H had "taken care of the assignment concerning Vicky" is not offered to show the truth of that statement, as it was a question, but instead to show its effect on H, who answered the question.

A statement offered to show the effect on the hearer is not hearsay and is admissible over a hearsay objection.

Here, as this question is offered to show the effect on H in answering, it will be admissible.

### **H's Statement**

Although H merely made a gesture by drawing an index finger across his throat, such an action can qualify as hearsay if it is intended to communicate.

Here, H's conduct was done in order to answer G's question regarding whether or not H had "taken care of the assignment concerning Vicky." As this was intended to communicate that H had in fact gotten rid of Vicky, it will qualify as hearsay.

### **Statement Against Interest**

Here, this statement is against H's penal interest as he would be subject to prosecution for murder if he killed Vicky. As H made this statement while at a coffee shop where other people like F were around, H would know that he could be subject to punishment for making it at the time it was made. It is unclear whether H is unavailable and the admissibility will depend on this.

Thus, this is likely admissible testimony.

## **ANSWER B TO QUESTION 3**

### **People v. Dean**

#### **1. Did the court properly allow the prosecution to call Whitney?**

##### **Spousal Testimonial Privilege**

The California Evidence Code (CEC) contains a spousal privilege. The spousal privilege allows a defendant's spouse to refuse to take the witness stand and testify against his or her spouse. Although Dean's trial is a criminal trial, the CEC makes no distinction between criminal and civil trials--the spouse may refuse to testify against his or her spouse in either civil or criminal trials.

The spouse and defendant must be married during the time of trial. Here, although Whitney had moved out of the house prior to Dean's trial and said the "marriage was over," there is nothing to indicate that Whitney and Dean's marriage was legally dissolved. Thus, Whitney was married to Dean at the time of trial, and therefore can invoke the spousal testimonial privilege.

The spouse--not the defendant--is the holder of the privilege. Thus, even if Dean did not want Whitney to testify against him, Whitney could if she so chose, and so long as the matter she testified to was not otherwise privileged.

Under the CEC, the witness spouse may refuse to take the witness stand completely. Here, although Whitney initially took the stand, intending to testify against Dean, she could have refused to take the stand altogether. The issue is whether Whitney could later invoke the privilege after voluntarily waiving the spousal testimonial privilege.

The CEC does not dictate that a spouse has waived the spousal testimonial privilege once he or she takes the witness stand. Here, Whitney has testified to nothing yet. Thus, although she has taken the witness stand, she is still not otherwise

prohibited from invoking the spousal testimonial privilege. Thus, her testimony should not have been compelled.

However, the court did not err in allowing the prosecution to call Whitney to the witness stand because Whitney initially wanted to testify against Dean. Thus, error, if any, was on the court's compelling Whitney to testify, not on the court allowing the prosecution to call Whitney to the witness stand.

## **2. Did the court properly admit the testimony of Whitney, Ella, and Fred?**

### **Whitney**

#### **Logical Relevance**

To be admissible, evidence must be relevant. Under the CEC, evidence is relevant if it has any tendency to make the existence of some fact of consequence to the action more or less probable than the absence of such evidence. The CEC further requires that to be relevant, the fact must be in dispute.

Here, Whitney's testimony that she saw mud on Dean's shoes is relevant because it makes a disputed fact--whether Dean was hiding in the bushes outside Vicky's home that rainy night--more probable than the absence of the evidence.

#### **Legal Relevance**

Even if logically relevant, the court may exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. Here, the probative value of Whitney's testimony is relatively high. Because Whitney is Dean's wife, her testimony tending to inculcate Dean is especially probative. That Dean had mud on his shoes the night of the murder tends to show that Dean might have been hiding in the bushes that night. There is little risk of unfair prejudice because there is nothing to indicate that Whitney's testimony that she saw mud on Dean's shoes will cause the jury to have prejudice against Dean.

### **Spousal Testimonial Privilege**

As discussed above, Whitney should have been able to invoke the spousal testimonial privilege because she is married to Dean at the time of trial and thus may refuse to testify against him. Although she took the stand--which California allows a spouse to refuse to do--Whitney still had the privilege to not testify against Dean.

### **Confidential Marital Communications Privilege**

Whitney may attempt to alternatively invoke the confidential marital communications privilege. Any confidential communication between spouses is privileged and inadmissible. Here, however, Whitney testified as to an observation, not a communication. Whitney merely saw mud on Dean's shoes. Whitney did not testify as to any communication Dean made to her. Thus, the confidential marital communications privilege does not apply.

In conclusion, Whitney's testimony--although relevant--should have been excluded because of the spousal testimonial privilege.

### **Ella**

#### **Logical and Legal Relevance**

Ella's testimony that Dean told Whitney "I just killed the gal who stole my biggest account" is extremely relevant. If Dean told Whitney this, it tends to make it more probable that Dean in fact did kill Vicky. The probative value is high, and there is little risk of unfair prejudice as a result of Dean's statement to Whitney.

#### **Hearsay**

Ella's testimony may be objected to on the grounds that it is hearsay. Hearsay is an out of court statement being offered to prove the truth of the matter contained therein. Here, Dean's statement is out of court because it was made in his home to his wife. If offered to prove that Dean did kill Vicky, it would be being offered for its truth. Thus, the statement is hearsay by definition.

### **Nonhearsay: Declarant's state of mind**

Dean's statement may be offered for the nonhearsay purpose of showing his state of mind. It could be offered to show Dean's intent to kill, rather than the fact that he did kill Vicky. However, if offered only for this purpose, it would be highly prejudicial because it would be very difficult for a jury to not consider the statement as evidence that Dean actually killed Vicky. Thus, it should not likely be admissible solely for this purpose.

### **Admission of a party/opponent**

Alternatively, Dean's statement to Whitney could be offered for its truth if it comes under a hearsay exception. The CEC provides an exception to the hearsay rule for admissions made by parties and offered by an opponent. Here, Dean's statement to Whitney is a statement made by Dean--a party--and offered by the prosecution--an opponent. Thus, although hearsay, Dean's statement may be admissible as an admission--an exception to the CEC's rule against hearsay.

### **Confidential Marital Communications**

However, Dean may seek to exclude his statement to Whitney on the grounds that the statement was a confidential communication between spouses and thus is privileged. Both spouses are holders of the privilege. Here there is a twist because a third person is attempting to testify as to a confidential communication between spouses. Both Dean and Whitney did not know that Ella overheard their conversation. Thus, Dean and Whitney believed Dean's statement to be in confidence. Ella was standing 20 feet away and in the house next door when the statement was made. If Dean and Whitney's belief that the communication was confidential was reasonable, such communication was privileged. Here, it appears that Dean and Whitney's belief that their communication was in confidence was reasonable--notwithstanding the fact that Ella overheard the communication 20 feet away.

The purpose of the confidential marital communications privilege is to foster the confidence of the marital relationship, and to encourage open and honest

communication. Here, if Ella is permitted to testify as to Dean's statement if Dean and Whitney reasonably believed their communication was made in confidence, such an allowance would seem to go against the grain of the purpose of the confidential marital communications privilege. Spouses should not have to take every measure to ensure their communications are confidential so as to invoke the benefit of the confidential marital communications privilege. A reasonable belief that the communication is made in confidence should be sufficient. Here, the court should not allow Ella's testimony for this reason.

### **Logical and Legal Relevance**

Fred's testimony that Hit implicitly admitted to killing Vicky is relevant because it makes it more probable that Dean did not kill Vicky. Assuming that the Vicky that Gus was talking about was the same Vicky who died the day before, such evidence would be extremely probative to show that Dean was not the killer, but Hit was.

### **Hearsay**

Hearsay is an out-of-court statement. To be a statement, there must be some assertive words or conduct. Although Gus's question to Hit was out of court, it was not a statement because it was not assertive. A question is not an assertion. Thus, Gus's question to Hit whether Hit had taken care of the assignment concerning Vicky was not hearsay.

The issue becomes whether Hit's drawing his index finger across his throat was assertive conduct. Taken in light of the surrounding circumstances, Hit's conduct seems to indicate that Hit acknowledged to Gus that he in fact killed Vicky. To be hearsay, the declarant need not utter actual words. Here, the judge would use his or her discretion in deciding whether Hit's conduct was assertive. The court should hold that the conduct was assertive when taken in context with Gus's immediately preceding question.



Because Hit's assertive conduct was made out of court, and if offered to prove the truth--that Hit did kill Vicky--it is hearsay by definition. Hearsay is inadmissible absent any exception.

### **Statement against Interest**

Dean may argue that Hit's statement was a statement against interest. However, for a statement against interest to be admissible, it must be shown that the declarant is "unavailable" to testify. No such showing has been made, and therefore Hit's statement may not be admitted as a statement against interest.

### **Admission**

Hit's statement cannot come in as an admission because Hit is not a party to the action.

### **Present Sense Impression/Contemporaneous Statement**

Hit's statement may not be admitted under the present sense impression/contemporaneous statement exception because Hit's statement was not made either while killing Vicky or immediately thereafter. Also, Hit was not describing his conduct, he merely made a motion tending to indicate that he killed Vicky. Thus, this exception does not apply.

### **Confrontation Clause**

The Sixth Amendment right to confrontation applies to the states, including California, and provides that criminal defendants shall have the right to be confronted with the witnesses against them. Here, because Dean is offering the out-of-court statement made by Hit, the Sixth Amendment right of confrontation does not apply.

### **Conclusion**

Because Hit's conduct was assertive, given the surrounding circumstances, and because it is only relevant to prove the truth of his statement--that he killed Vicky, and thus inferentially, Dean did not kill Vicky--Hit's statement was hearsay. Because no

exception to the rule against hearsay applies, Hit's statement should not have been admitted.