

## QUESTION 5

Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Mike had been the president and Sue supervised Pam, David, and Ed.

Pam was fired. A week later, David circulated the following email to all the other employees:

I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.

A month later, Mike died.

Pam sued David for defamation.

At trial, Pam testified that, although it is true she was fired, the remaining contents of the email were false. Pam called Ed, who testified that he had received the email at work, that he had printed it, and that he had received hundreds of other unrelated emails from David. Pam introduced a copy of the email through Ed.

In defense, David called Sue, who testified that she had caught Pam stealing \$300 from the petty cash drawer, and that, when Sue confronted Pam and accused her of taking the money, Pam simply walked away. David himself testified that the contents of the email were true. He also testified that he had overheard Pam and Mike yelling at each other in Mike's office a few weeks before Pam left; that he recognized both of their voices; and that he heard Pam cry, "Please don't leave me!," and Mike, in a measured tone, reply, "Our affair is over — you need to get on with your life."

Assume all appropriate objections were timely made.

Should the court have admitted:

1. The email? Discuss.
2. Sue's testimony? Discuss.
3. David's testimony about
  - a. what Pam said to Mike? Discuss.
  - b. what Mike said to Pam? Discuss.

Answer according to the California Evidence Code.

## QUESTION 5: SELECTED ANSWER A

Because this is a civil case, Proposition 8 does not apply.

### 1. The email

The issue is whether the court properly admitted the email.

#### Relevance

The first question is whether the email was relevant. Under the California Evidence Code (CEC), evidence is relevant if it tends to make an issue of consequence (a material fact) more or less probable. In other words, evidence must be material and probative (although the level of probativity is very low--it must only affect probability to a slight degree). Under the California rule, the issue must be actually disputed (this is different than the Federal Rules). Relevance is in general a low bar.

Here, the email is relevant. First, it is relevant to the issue of whether the allegedly defamatory statements were made at all. It is also relevant to the question of publication. Defamation requires publication (dissemination) of a statement to a third party. Here, the existence of the email is relevant (although the printing of the email was not necessary for publication). There may be some argument that the issue of the statement and the publication are not disputed, but this would probably not succeed, especially given that under the secondary evidence rule, the email itself should be admitted rather than mere testimony as to its contents.

The next issue is whether the relevance is substantially outweighed by the likelihood of unfair prejudice. It is important to note that any prejudice must be unfair--any evidence counter to a party's case will be prejudicial. The prejudice must actually be unfair--the type that would unduly influence a finder of fact. Here, it is highly unlikely that the email would be found to be unfairly prejudicial.

## Authentication/Foundation

The next question is whether the email was properly authenticated/whether a proper foundation for introduction of the email was made. Here, the email has likely been properly authenticated. Ed testified that he has personal knowledge of the email--he received it. Moreover, his testimony that he had received hundreds of other emails from David supports a finding that the email did in fact come from David. It should be noted that the evidence need not be proven to be conclusively authentic. Rather, a jury must be able to conclude that the email is authentic.

## Hearsay

Next, there could be an argument from David that the email is inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the email is an out-of-court statement made by David. However, it is not being offered for the truth of the matter asserted. The email is not being introduced to prove its contents (Pam is in fact arguing the email was false). The email is of independent legal significance--the fact that the statement was made is relevant to the cause of action. Moreover, even if the email were hearsay, it would be admissible under the exception for statements of a party-opponent (California does not make party-opponent statements exempted from hearsay; they merely fall under an exception).

Therefore, the email was properly admitted.

## **2. Sue's testimony**

### Relevance

The first issue is whether the testimony is relevant, under the standard recited above. Here, Sue's testimony is relevant to the issue of whether the contents of the email were truthful, which is an issue disputed in the case. Her testimony makes it more probable

that the email is true (as compared to the likelihood without her testimony). And there does not appear to be any unfair prejudice that would substantially outweigh the relevance.

### Foundation

The next issue is whether Sue has personal knowledge and the proper foundation has been laid. Here, Sue is testifying based on her own personal knowledge that she saw Pam stealing. Therefore, the proper foundation exists.

### Character Evidence

Pam may object to the evidence being introduced as character evidence. Normally, character evidence is not admissible in civil cases. An exception applies when character is at issue. Here, Pam's character is at issue. Her argument is that the email was false. Therefore, whether Pam embezzled or not is directly at issue, and evidence on embezzlement is relevant and admissible. Therefore, Sue's testimony that she had seen Pam stealing money from the cash drawer is not inadmissible as character evidence.

### Hearsay

Pam may also argue that the testimony about her walking away is inadmissible hearsay. As discussed above, hearsay is an out-of-court statement offered to prove the truth of the matter above. "Statements" can include assertive conduct, such as nodding or hand gestures. Here, Pam would argue that her walking away was an assertive act and therefore a statement. It is questionable as to whether her act in walking away is a statement. But even if it is, here the statement is admissible under the hearsay exception for party-opponent statements. Pam is a party to the lawsuit and she is David's opponent (David is offering the testimony).

Pam could further try to attack Sue's testimony that she "accused [Pam] of taking the money" as inadmissible hearsay. It is unclear exactly how Sue's testimony was phrased. However, even if the testimony did constitute an out-of-court statement, David has several arguments for admitting the testimony. First, he could argue that Pam adopted the statement and that therefore it falls under the party-opponent statement. A statement is adopted where a person could reasonably be expected to respond to a statement but does not. Here, David would argue that Pam could reasonably be expected to deny the accusation and that her silence and walking away adopts Sue's statement. However, this is not a typical situation where the adopted statement theory would apply, since it is unlikely that Pam would adopt a statement that she had stolen the money. There could also be an argument that the statement is not hearsay at all because it is not being offered to prove the content of Sue's statement. For example, it could be argued that the statement is being offered to show its effect on Pam (although this argument does not seem particularly strong). It could also be argued that the statement goes to a fact of independent significance, since it shows the fact that Sue caught Pam stealing money (as asserted in the email).

It seems most likely that this testimony was not recounting an out-of-court statement at all, and was merely discussing Sue's action. But the other arguments above may also allow admission, even if it is testimony of an out-of-court statement.

David could also argue that, if it were determined that Pam had adopted Sue's statement, it was a prior inconsistent statement (Pam testified that the email was false), and that therefore the statement was admissible under the CEC for both impeachment and to show the truth of the matter asserted. However, as discussed above, the argument that Pam adopted the statements seems likely to succeed.

Overall, the court was likely correct in admitting the testimony.

### **3. David's testimony**

The next issue relates to David's testimony.

#### **a. Pam's statements to Mike**

##### Relevance

As to Pam's statements to Mike, the first issue is relevance. This testimony is relevant because it again goes to whether the contents of the email were true. With the testimony, it is more likely than without the testimony that the email's contents about David's and Pam's relationship is true. Pam could argue that her statement by itself does not establish that there was any relationship--it was ambiguous. But, the evidence need not be sufficient to establish the ultimate fact at issue. Instead, it merely needs to make the likelihood that there was an affair (a disputed issue) more probable than it would be without the evidence. The testimony here clears that low bar. And again, there does not seem to be any unfair prejudice that would substantially outweigh the relevance.

##### Foundation

The second question is foundation. David testified that he recognized Pam's voice. Without more, that assertion may not be enough to show foundation and personal knowledge. But if David were to testify, for example, that he had long worked with Pam and had previously heard her voice, the foundation would likely be sufficient.

##### Hearsay

Pam may attempt to argue that this testimony is inadmissible hearsay. The statement is likely hearsay--it was an out-of-court statement. And it is being offered to show that Pam made that statement to Mike (because they were having an affair). But this

statement falls into the party-opponent exception for hearsay. Even if it did not, it may also fall under the excited utterance exception since Pam's emotions seem to have been aroused the time of her statement. A witness need not be unavailable for that exception to apply.

Moreover, David could argue that this statement is admissible as a prior inconsistent statement. Pam testified that the email was false. David could argue that this statement was a previous inconsistent statement, which under the California Evidence Code would be admissible for both impeachment purposes and to show the truth of the matter asserted.

#### **b. Mike's statements to Pam**

The next issue is whether the court previously admitted David's testimony about what Mike said to Pam.

#### Relevance

The first question is relevance. As discussed above, the question of whether there was an affair is at issue in the case because Pam is arguing falsity of the email. David's testimony about Mike's statements makes it more likely that the email was true than without his testimony. Again, the testimony need not conclusively establish truth. Rather, it must only make it more likely than it would be without the evidence. Mike's statement is even more clearly relevant than Pam's statement, since it explicitly references an affair.

#### Foundation

The next issue is whether David testified with the appropriate foundation and personal knowledge. As mentioned above, Pam may argue that David lacked the foundation to testify based on only hearing the voices rather than actually seeing the argument.

Without any testimony as to how David knew that Mike was speaking, the proper foundation is probably lacking. But if David were able to testify that he had previously heard Mike's voice, there would be a proper foundation. Moreover, the fact that the conversation was overheard from Mike's office would support the identification of Mike. Again, it need not be conclusively proven that it was Mike's voice. It just needs to be enough to support a verdict.

### Opinion Evidence

Pam could potentially argue that David offered improper opinion evidence when he said that Mike replied in "a measured tone." Lay opinion testimony is admissible if it is 1) based on the witness's perception, 2) helpful, and 3) did not require any specialized knowledge. Here, David has a strong argument that his statement that Mike responded in a measured tone is helpful to provide context to the jury and to show the affair (if David were mad, for example, it could be argued that his statements were false or made in the heat of passion). This testimony as to the tone of voice is probably admissible.

### Hearsay

The crux of whether the statement is admitted is likely whether it is inadmissible hearsay. Here, there was an out-of-court statement made by Mike. And it is likely being offered for the truth of the matter asserted--that there was an affair (see below for an argument that it is not hearsay). Therefore, the question is whether it falls under the California exceptions.

California has a hearsay exception for dying declarations in all civil and criminal cases. But Mike's statement does not satisfy that exception. True, Mike is dead, as is required by the California exception. But Mike did not make the statement as his death was impending and it does not relate to the cause of his death.



This also is not an excited utterance--Mike replied in a measured tone. This is not a statement of past or present physical or mental condition (although Mike would satisfy the unavailability requirement). And this is not a statement where Mike is describing his current actions.

David may have a good argument that this is a statement against interest. Under the federal rules, a statement is against interest if it is against penal or pecuniary interest. California also applies the exception where the statement is against social interest. The witness must be unavailable. Here, Mike satisfies the unavailability requirement (he is dead). And this statement could be found to be against social interest. Mike's statement that he was having an affair could be seen as exposing him to adverse social judgments. This would be David's best exception for a hearsay exception to apply.

David could also attempt to argue that this was not hearsay at all because, while it is an out-of-court statement, it is not being offered to prove the truth of the matter asserted. Rather, David could attempt to show that it was being introduced to show its effect on him, the listener. This argument may not be successful because it would be questionable whether such evidence would be relevant. In a defamation case, truth is a defense. But it is not clear that David's state of mind is relevant. If Sue and/or Mike were public figures or if the matter were one of public interest, then David's state of mind would be relevant, since fault would need to be shown. But if fault need not be shown, then the statement may not be admissible for its effect on him. If the statement were admitted for such a purpose, a limiting instruction would likely be given.

David could also attempt to argue against inadmissibility by arguing that this statement is being used for impeachment purposes, since Pam testified. However, the out-of-court statement of another person is generally not admissible to impeach.

Overall, the best argument is that this was not hearsay or, even better, was a statement against interest. It seems that the testimony was very likely properly admitted.

## QUESTION 5: SELECTED ANSWER B

### California Evidence Code & Truth in Evidence (Prop 8)

The California Evidence Code (CEC) governs the admission of evidence in California state courts. A constitutional amendment called the Truth in Evidence Amendment (Prop 8) was passed in the 1980s. Prop 8 applies only in criminal cases. It provides that all relevant evidence in California is admissible notwithstanding CEC rules to the contrary. Prop 8 has a number of exclusions, however: (1) hearsay rules; (2) the confrontation clause; (3) CEC 352 (balancing test); (4) privileges; (5) character evidence; (6) the secondary evidence rule.

Because this is a civil lawsuit and not a criminal lawsuit, Prop 8 does not apply.

#### 1. The Email

- *Logical relevance*

In order for evidence to be admissible, it must be logically relevant. That means that it must have the tendency to make any fact of consequence to the dispute more or less probable than without the evidence. Under the CEC, the fact must also be in dispute. Here, the email is logically relevant because it constitutes the basis of the lawsuit and is actually in dispute.

- *Legal relevance*

In order for evidence to be admissible, it must also be legally relevant, as tested under CEC 352. In order to be legally relevant, the probative value of the evidence must not be substantially outweighed by undue prejudice, waste of time, or confusion. In addition, there must not be any policy exclusions that might apply to prevent introduction of the evidence (such as prior offers to settle, etc.). Here, the email is

legally relevant because its probative value--whether it supports a case for defamation--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for relevant tangible evidence to be admissible, it must also be authenticated. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. A number of different kinds of authentication evidence are permissible: (1) personal knowledge; (2) circumstantial evidence; (3) expert testimony; (4) admission, etc. Here, Ed introduced the email. He testified that he had received the email at work and printed it, and that he had received hundreds of other unrelated emails from David. While it would be preferable to have David authenticate the mail he wrote, this authentication is likely sufficient to sustain a finding of authenticity.

- *Secondary Evidence Rule*

When the contents of a writing are at the heart of the matter, the secondary evidence rule requires that either an original or duplicate of the document be introduced into evidence (or testimony where the original is unavailable). In California, a duplicate can be: (1) photocopy; (2) carbon copy; or (3) handwritten copy (not true in FRE). Here, the contents of the email are relevant to defamation cause of action. This printing of the email is essentially a photocopy and would satisfy the secondary evidence rule.

- *Independent Legal Significance*

Pam might argue that the email is not hearsay because it has independent legal significance. Indeed, because this is a defamation action and the email is the defamatory statement, this is likely to be successful.

- *Layered Hearsay*

Hearsay is an out-of-court statement offered for the truth of the matter asserted. It is generally inadmissible unless it falls within an exception. (The FRE has both exemptions and exceptions, but the CEC only has exceptions.) Here, if the email were not admitted as having independent legal significance, the email is layered hearsay so both the email itself and the statement contained therein must fall admissible under an exception.

- *Email: Business Record*

A business record is: (1) a recording of an event or condition; (2) made by someone with personal knowledge; (3) made at or near the time the event; (4) kept in the ordinary course of business. Here, the email would not qualify as a business record because David was under no business duty to send this email.

- *Statements in Email: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Here, David's statement is being offered against him, and thus it would be admissible as an admission by a party opponent.

- *Conclusion*

The email will be admissible because it has independent legal significance and is thus not hearsay.

## 2. Sue's Testimony

- *Logical Relevance*

See rule above. This evidence is logically relevant because it has the tendency to make a fact of consequence that is in dispute (whether Pam is a thief) more or less probable.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam is a thief--is not outweighed by undue prejudice, waste of time, or confusion. Pam may argue that this is unduly prejudicial because it paints her as a thief, but she has asserted that the statement in the email is false, and thus the court will allow it.

- *Competence*

For a witness to be competent to testify, she must have personal knowledge, present recollection, the ability to communicate, and understand that she is under a legal duty to tell the truth. These factors appear to be met -- Sue has personal knowledge of her interaction with Pam and appears to have a present recollection of the interaction. Furthermore, there is nothing to indicate that she lacks the ability to communicate or that she doesn't understand her legal duty to tell the truth. Sue is competent to testify.

- *Character Evidence: Pam Stealing \$300 of Petty Cash*

Character evidence is evidence that tends to convey a moral judgment about someone. The testimony about Pam stealing \$300 from the petty cash drawer is character evidence. In California, character evidence in civil cases is inadmissible to prove circumstantial evidence of guilt (there are no exceptions like under the FRE). However, character evidence is admissible if it is in issue, as is the case

here. This is a defamation case where Pam has alleged that David's statement calling her a thief is false. Therefore, evidence of her being a thief is highly probative and directly in issue. Thus, the court will allow Sue's testimony that Pam stole \$300 of petty cash.

[Note that this could also be considered impeachment evidence. Pam has testified that the contents of the email were false. Specific incidents can be used to impeach a witness, and this would also be appropriate impeachment evidence.]

- *Sue's statement accusing Pam of Taking the Money: Not Hearsay*

Sue's statement accusing Pam of taking the money is not hearsay because it is not being offered for the truth of the matter asserted. Instead, it is being offered to show its effect on the listener (Pam).

- *Sue's statement that Pam walked away: Hearsay*

Sue also seeks to testify about Pam walking away when accused of a crime. This statement is hearsay. Hearsay encompasses all assertive conduct, which is conduct that is intended to communicate something. Thus, unless it falls within a hearsay exception, this statement which is being offered for the truth of the matter asserted (that she would not have walked away if she weren't guilty) is hearsay.

- *Admission by Party Opponent: Adoptive Admission*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Adoptive admissions occur where a party is accused or confronted and we would expect them to deny a statement but instead they remain silent, implicitly adopting the statement. Here, we would expect an innocent party accused of stealing

to defend herself if it were not true. By simply walking away, Pam has adopted the statement.

- *Conclusion*

Sue's testimony about Pam stealing \$300 of petty cash is admissible because it is character evidence that is in issue in a defamation case; her statement to Pam accusing her of taking the money is not hearsay because it is offered to show its effect on the listener; her statement about Pam's reaction is admissible as an adoptive admission by a party opponent.

### **3a. David's Testimony About What Pam Said to Mike**

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam was having an affair with Mike--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for this testimony to be admissible, David must be able to authenticate that it was, indeed, Pam speaking. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. Here, David is presumably familiar with Pam's voice

and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Hearsay Exception: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. This statement, made by Pam, is being offered against her. It is thus admissible as an admission by a party opponent.

- *Hearsay Exception: Excited Utterance*

An excited utterance is a statement made relating to a startling event or condition made while under the stress or excitement of that event or condition. A declarant's availability is irrelevant. Here, Pam cried in what appears to be an excited voice: "Please don't leave me!" This may qualify as an excited utterance, but the better fit is an admission by a party opponent.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony is admissible as an admission by a party opponent.



### **3b. David's Testimony About What Mike Said to Pam**

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Authentication*

See rule above. Here, David is presumably familiar with Mike's voice and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Declaration Against Interest*

A declaration against interest is a statement made by an unavailable declarant that was against his interest at the time it was made and that the declarant knew was against his interest at the time it was made. In California, it can be against a person's penal, financial, or social interest. A statement is against someone's social interest if it would

subject them to hatred, ridicule, or disgust. Declarations against interest are only admissible where a declarant is unavailable. A declarant can be unavailable due to death, inability to secure their presence through reasonable process, total memory failure, privileges, or their refusal to testify out of fear and despite a court order.

Here, Mike died and is thus unavailable. The statement by Mike ("Our affair is over") is against his social interest. He was acknowledging that he was having an affair with Pam in the first place. Thus the first part of his statement "Our affair is over" is admissible as a declaration against interest.

- *Dying Declaration*

A dying declaration is a statement made by a declarant while he thought he was imminently dying and describing the conditions or circumstances of his death. The declarant must be unavailable, and in California the declarant must have actually died and it can be used in either civil or criminal cases. This statement does not appear to be while David thought he was dying or about the conditions and circumstances surrounding his death. It is thus inadmissible as a dying declaration.

- *Excited Utterance*

See rule above. This exception does not apply because the facts state that David responded "in a measured tone." Therefore, he was not under the stress or excitement of an event.

- *Present State of Mind*

A statement describing a person's present state of mind (usually statements like "I intend" or "I plan") are admissible as hearsay exceptions regardless of the declarant's availability. Here, the first part of the statement may also qualify under the present state of mind exception because it is demonstrating that David intends to end the

affair. Nonetheless, the declaration against interest exception is the best fit for this statement.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony "Our affair is over" is admissible as a declaration against interest. The second half of the testimony "you need to get on with your life" may be admissible only if it is being offered to show the effect on the listener, Pam.