

Evidence

Professor Hardcastle's
SAMPLES - Fall 2017

Question one

because this is a civil case, proposition eight does not apply.1. The e-mail the issue is whether the court properly admitted the e-mail.

Relevance the first question is whether the e-mail was relevant. Under the federal rules of evidence 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. Relevance is in general a low bar. Here, the e-mail 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 of the statement to a third-party. Here, the existence of the e-mail is relevant, although the printing of the e-mail was not necessarily or 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 e-mail itself should be admitted rather than mere testimony as to its contents (second semester issue)

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 on fair; 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 e-mail would be found to be unfairly prejudicial.

Authentication/foundation the next question is whether the e-mail was properly authenticated and whether a proper foundation for introduction of the e-mail was made. Here, the e-mail has likely been properly authenticated. Ed testified that he has personal knowledge of the e-mail – he received it. Moreover, his testimony that he had received hundreds of other e-mails from David supports a finding that the e-mail 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 e-mail is authentic.

Hearsay next, there could be an argument from David that the e-mail is inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the e-mail is an out-of-court statement made by David. However, it is not being offered for the truth of the matter asserted. The e-mail is not being introduced to prove its contents (Paul is in fact arguing the e-mail was false). The e-mail is of independent legal significance. The fact that the statement was made is relevant to the cause of action. Moreover, even if the e-mail were hearsay, it would be admissible under the exception for the admissions of a party opponent. Under the federal rules, this is not hearsay.

Therefore, the e-mail 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 e-mail were truthful, which is an issue disputed in the case. Her testimony makes it more probable that the e-mail is true – as compared

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 Paul sexually assaulting the intern. Therefore, the proper foundation exists.

Character evidence Paul 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, Paul's character is at issue. His argument is that the e-mail was false. Therefore whether Paul sexually assaulted or not is directly at issue and evidence on sexual assault is relevant and admissible. Therefore Sue's testimony that she had seen Paul sexually assaulting the intern is not inadmissible as character evidence.

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

Paul could further try to attack Sue's testimony that she "accused Paul of sexually assaulting" 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 a good argument that Paul adopted the statement and that therefore it falls under the party opponent statement exception or as nonhearsay. A statement is adopted when a person could reasonably be expected to respond to a statement but does not. Here, David would argue that Paul could reasonably be expected to deny the accusation and that his 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 Paul would adopt a statement that he had sexually assaulted the intern. There could also be an argument that the statement is not hearsay at all does it is not being offered through the content of Sue's statement. For example, it could be argued that the statement is being offered to show its effect on Paul although this argument does not seem particularly strong. It could also be argued that statement goes to effective independent significance, since it shows the fact that sue caught Paul sexually assaulting as is asserted in the e-mail.

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 Paul had adopted Sue's statement, it was a prior inconsistent statement. Paul testified that the e-mail was false and that therefore the statement was admissible under the federal rule of evidence for both

impeachment and to show the truth of the matter asserted. However, as discussed above, the argument that Paul adopted the statement seems likely to succeed.

Overall, the court was likely corrected admitting the testimony

David's Testimony

Paul's statements to Misty: Relevance-as to Paul's statements to Misty, the first issue is relevance. This testimony is relevant because it again goes to whether the contents of the e-mail were true. With the testimony, it is more likely than without the testimony that the e-mails contents about Misty and Paul's relationship is true. Paul could argue that the 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 that 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 below bar. There does not seem to be any unfair prejudice that would substantially outweigh the probative value and relevance of the evidence.

Foundation: the second question is foundation. David testified that he recognized Paul'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 Paul and had previously heard his voice the foundation would likely be sufficient.

Hearsay Paul 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 Paul made that statement to Misty because they were having an affair. But this statement falls into the party exception for hearsay or is nonhearsay.

Moreover, David could argue that the statement is admissible as a prior inconsistent statement. Paul testified that the e-mail was false. David could argue that this statement was a previous inconsistent statement, which under the federal rules of evidence would be admissible for both impeachment purposes and to show the truth of the matter asserted.

Misty's statements to Paul

the next issue is whether the court previously admitted David's testimony about what Misty said to Paul. Relevance: the first question is relevance. As discussed above the question of whether there was an affair is at issue in the case because Paul is arguing falsity of the e-mail. David's testimony about Misty's statements makes it more likely that the e-mail 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. Misty statement is even more clearly relevant than Paul 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 Paul may argue that David lacked the foundation to testify on only hearing the voices rather than actually seeing the argument. Without any testimony as to how David knew that Misty was speaking, the proper foundation is probably lacking but

if David were able to testify he had previously heard Misty's voice, there would be a proper foundation. Moreover, the fact that the conversation was overheard from Misty's office would support the identification of Misty. Again, it need not be conclusively proven that it was Misty's voice. It just needs to be enough to support a verdict

opinion evidence – a second semester topic

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 Misty. And it is likely being offered for the truth of the matter asserted – that there was an affair. Therefore the, the question is whether falls under any federal rule exceptions. 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 exception where the statement is against social interest the witness must be unavailable. Here, Mike satisfies the unavailability requirement (see his dad). And the statement could be found to be against social interest. Mike 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. This is a second semester topic

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 is not clear that David state of mind is relevant. If Sue and/or Misty were public figures or if the matter were one of public interest, then David state of mind would be relevant since fault would need to be shown. But if all 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 structure likely would be given.

David could also attempt to argue against inadmissibility by arguing that this statement is being used for impeachment purposes, since Paul 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. It seems that the testimony was very likely properly admitted

Evidence Professor Hardcastle Fall 2017

Question 2 midterm 2017 Essay Issue analysis

Vick testimony RE: false report; relevance, Character evidence of Vick (CEC 1103), impeachment, 352/403

Vick testimony re Vick Burglary: impeachment with felony conduct v. conviction, staleness, 352/403.

Nick testimony re: previous day's robbery: character evidence, admission for non-character purpose: common plan, intent, identity, etc, 352/403.

Monica's testimony re: Doc's character trait of honesty and statement he recovered it from a thief.

Bill's testimony about Monica's character for peacefulness (not relevant trait) and truthfulness (prior to any attack)

Paul testimony about Monica saying Vick broke up with her—for truthfulness of statement or to show bias?

Larry's testimony that Monica does not tell truth

Cross- Exam of Larry== see pages 269 and 274 of Casebook

- A. Inadmissible: Drunken rage during college and trashing dorm room. Not probative for truthfulness or untruthfulness so will be kept out even under Prop 8 with 352 balancing test
- B. Admissible: lying on law school application will probably be admitted under Prop 8 as probative of truthfulness