

A company sued the defendant, its former vice president, for return of \$230,000 that had been embezzled during the previous two years. Called by the company as an adverse witness, the defendant testified that his annual salary had been \$75,000, and he denied the embezzlement.

The company calls a banker as a witness to show that, during the two-year period, the defendant had deposited \$250,000 in his bank account.

Is the banker's testimony admissible?

- A. No, because its prejudicial effect substantially outweighs its probative value.
- B. No, because the deposits could have come from legitimate sources.
- C. Yes, as circumstantial evidence of the defendant's guilt.
- D. Yes, to impeach the defendant.

Explanation:

Evidence is **relevant** if:

it has *any* tendency to make a fact more or less probable than it would be without that evidence (ie, **probative**) *and*

the fact is of consequence to the outcome of the case (ie, **material**).

Here, the plaintiff offers the banker's testimony that the defendant deposited \$250,000 in his bank account over a two-year period—an amount well above his \$75,000 annual salary. This testimony is **circumstantial evidence** that the defendant took another's money, which is a material fact in this embezzlement case. Therefore, the banker's testimony is relevant.

Relevant evidence is **admissible unless** otherwise excluded by law or other rules. One example is Federal Rule of Evidence 403, which excludes relevant evidence if its **prejudicial effect substantially outweighs** its **probative value**. Testimony about the defendant's deposits is *not* unfairly prejudicial because it does not tend to encourage the jury to decide the case on improper grounds (**Choice A**). And since no other ground for exclusion has been raised, the testimony is admissible as circumstantial evidence of the defendant's guilt.

(Choice B) Whether the defendant's deposits could have come from legitimate sources may affect the strength or probative value that the jury assigns to the banker's testimony. But it does not make this testimony inadmissible, because evidence is relevant if it has even the slightest tendency to make a material fact more or less probable.

(Choice D) One **method of impeachment** is to specifically contradict the witness's testimony. But testimony that the defendant deposited \$250,000 in his bank account does not directly contradict the defendant's testimony that he made \$75,000 a year and did not embezzle money.

Educational objective:

Evidence is relevant if it has any tendency to make a material fact more or less probable than it would be without that evidence. Relevant evidence is admissible unless otherwise provided by law or other rules—eg, when its prejudicial effect substantially outweighs its probative value.

References

Fed. R. Evid. 401 (test for relevance).

Fed. R. Evid. 403 (exclusion of relevant evidence for certain dangers).

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**Excluding relevant evidence
(FRE 403)**

