

A plaintiff sued a defendant for copyright infringement because the defendant's book contained some slightly disguised house plans on which the plaintiff held the copyright. The plaintiff is prepared to testify that he heard the defendant's executive assistant for copyright matters say that the defendant had obtained an advance copy of the plans from the plaintiff's office manager. The defendant's attorney objects.

How should the court rule on the admissibility of the plaintiff's testimony?

- A. The testimony is admissible as a statement of a coconspirator.
- B. The testimony is admissible as a statement of an employee of a party-opponent.
- C. The testimony is inadmissible, because it is hearsay not within any exception
- D. The testimony is inadmissible, because there is no showing that the assistant was authorized to speak for the defendant.

### Explanation:

The **rule against hearsay** generally bars the admission of out-of-court statements offered to prove the truth of the matter asserted therein. However, some statements are **excluded** from the rule (ie, are **nonhearsay**) and can be offered for their asserted truth. This includes out-of-court statements **offered against a party-opponent** that were:

made or adopted by the party-opponent

made by a person authorized by the party-opponent to make a statement on the subject

made by the **party-opponent's agent or employee** about a matter **within the scope** of that agency or employment **relationship** *or*

made by the party-opponent's coconspirator during and in furtherance of the conspiracy.

Here, the plaintiff seeks to testify against the defendant (party-opponent) about an out-of-court statement made by the defendant's executive assistant for copyright matters (employee). This statement asserts that the defendant had obtained an advance copy of the plaintiff's house plans—a copyright matter within the scope of the assistant's employment. As a result, the plaintiff's testimony is admissible as a statement of a party-opponent's employee **(Choices A & D)**.

**(Choice C)** Since the assistant's out-of-court statement constitutes *nonhearsay*, it does not require a **hearsay exception** to be admissible.

### Educational objective:

An out-of-court statement offered against a party-opponent for its truth is nonhearsay if it was (1) made or adopted by the party-opponent, (2) made by a person the party-opponent authorized to make such a statement, (3) made by the party-opponent's agent or employee about a matter within the scope of that relationship, or (4) made by the party-opponent's coconspirator during and in furtherance of the conspiracy.

### References

Fed. R. Evid. 801(d)(2) (nonhearsay statements by a party-opponent).

Copyright © 1995 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## Nonhearsay statements by party-opponent

### Party's own or adopted statement

#### Party's own statement



#### Party's adopted statement



### Statements attributed to party

#### Authorized person's statement



#### Agent/employee's statement



#### Coconspirator's statement

