

A plaintiff sued the defendant for dissolution of their yearlong partnership. One issue concerned the amount of money the plaintiff had received in cash. It was customary for the defendant to give the plaintiff money from the cash register as the plaintiff needed it for personal expenses. The plaintiff testified that, as he received money, he jotted down the amounts in the partnership ledger. Although the defendant had access to the ledger, she made no changes in it.

The ledger was admitted into evidence. The defendant seeks to testify to her memory of much larger amounts she had given the plaintiff.

Is the defendant's testimony admissible or inadmissible?

- A. Admissible, because it is based on the defendant's firsthand knowledge.
- B. Admissible, because the ledger entries offered by a party-opponent opened the door.
- C. Inadmissible, because the defendant's failure to challenge the accuracy of the ledger constituted an adoptive admission.
- D. Inadmissible, because the ledger is the best evidence of the amounts the plaintiff received.

## Explanation:

### Witness testimony

	Fact testimony	Opinion testimony
<b>Lay witness</b>	Personal knowledge of factual matter	Prohibited unless common-sense impression that:  is rationally based on witness's perception helps clarify witness's testimony or fact issue <i>and</i> is not based on scientific/technical/specialized knowledge
<b>Expert witness</b>		Admissible from qualified* expert who:  testifies based on sufficient facts or data acquired by reliable principles & methods has reasonable degree of certainty in opinion <i>and</i> helps trier of fact understand evidence or fact issue

\*Has knowledge, skill, experience, training, or education in substantive area.

A **lay witness** can generally **testify** to any relevant matter based on his/her **personal knowledge**. This includes both:

factual matters that the witness **perceived firsthand**—eg, "I saw a man holding a beer bottle and slurring his words" *and*

**common-sense impressions** that are rationally based on those perceptions—eg, "The man was drunk."

Here, the defendant seeks to testify that the plaintiff received much larger amounts of cash than those recorded in a ledger. And since this testimony is based on the defendant's firsthand knowledge—her memory of the cash amounts she gave—it is admissible.

**(Choice B)** The defendant's testimony is admissible—regardless of whether the ledger had been offered by the plaintiff (the party-opponent)—because that testimony is relevant and based on her personal knowledge.

**(Choice C)** An adoptive admission is a hearsay exception that allows the admission of another's statement that a party-opponent has adopted as his/her own. Therefore, the defendant's failure to challenge the accuracy of the ledger may constitute an adoptive admission if a reasonable person would have done so. But this rule does not preclude the defendant's testimony rebutting the ledger's contents.

**(Choice D)** The **best evidence rule** generally requires that an original writing, recording, or photograph (eg, the ledger) be admitted to *prove* its contents. But this rule does not affect the admissibility of the defendant's testimony to *rebut* the ledger's contents.

**Educational objective:**

A lay witness can generally testify to any relevant matter based on the witness's personal knowledge or a common-sense impression that is rationally based on such knowledge.

**References**

Fed. R. Evid. 602 (personal knowledge requirement).

Fed. R. Evid. 701 (opinion testimony by lay witnesses).

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