ANSWER TO QUESTION NO. 6

The complaints and reviews are out-of-court statements. However, Jack's (and Linda) is not offering the evidence for proof of the matter asserted in those out-of-court statements, but rather to allow the jury to understand what information Linda relied upon in deciding to discharge Bob.

The evidence is not to show the truth or falsity of the factual information contained in the complaints and reviews. It is offered to show the content met the requirements Linda had been given for making the discharge decision. Bob has placed in issue Linda's alleged age bias. The information Linda acted on is critical to establishing her non-age based reasons for acting as she did toward Bob. Thus the customer complaints and performance reviews admitted through Linda are not hearsay and Bob's objection that the complaints and reviews are inadmissible hearsay should be overruled.

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). It is settled that an out-of-court statement that is not offered to prove the matter asserted, but rather to prove intent of the declarant or the effect of the out-of-court statement on the declarant is not offered for the proof of the matter asserted, and is therefore not hearsay:

"An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted."

People v Fisher, 449 Mich 441, 449-450 (1995) (quoting 4 Weinstein, Evidence 1801(c) [01], pp 801-94 to 801-96). See also Rosen, Wilder, Young & Cranmer, *Michigan Practice Guide: Civil Trial and Evidence* (2006 Thomson West), §9G:54 Non hearsay distinguished -- Statements offered to show effect on someone else (knowledge, notice, motive, etc.):

"An out-of-court statement is not hearsay if offered to show the effect on the hearer, reader or viewer rather than to prove the truth of the content of the statement; *e.g.,* to show that a party had prior notice or knowledge; that a party was given a warning; or

to prove a party's motive, good faith, fear, etc, where such matters are relevant to an issue in the case."

In *Haddad v Lockheed California Corp,* 720 F2d 1454 (CA 9, 1983), the plaintiff claimed his managers had discriminated against him because of his age. At trial, the plaintiff's management testified, over the plaintiff's hearsay objection, about complaints management had received from others about working with the plaintiff. The Ninth Circuit agreed with the trial court that the manager's testimony was not hearsay at all:

"This testimony was not hearsay: It was not offered to prove the truth of the complaints. See, Fed.R.Evid. 803(c). Instead, this testimony was offered to show that Lockheed management had received complaints regarding Haddad. Such testimony was relevant in demonstrating Lockheed's non-discriminatory intent in its employment practices." *Haddad,* 740 F2d at 1456.

Some test-takers may analyze both the complaints and reviews under MRE 803(6), the hearsay exception for records of regularly conducted activity:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification, unless the course of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

There is not enough information to determine whether the exception would apply. For example, there is no information given as to whether there was testimony or other trustworthy certification as to whether the records were created or maintained in the course of a regularly conducted business activity or whether the complaints were simply submitted ad hoc. And, since the documents are not hearsay in any event, discussion of the exception is not necessary. Still, recognizing and analyzing the possible application of the exception, either as an alternative theory or recognizing there is not enough information to reach a conclusion,

may be worth some minor credit.

It is also possible that some test-takers will treat the complaints and/or reviews as hearsay, but as falling within the present-sense impression exception. MRE 803(1). The evidence would be insufficient to reach that conclusion because there is no evidence that the statements were made "substantially contemporaneous" with the conduct described or with Linda's review of the statements. *People v Hendrickson,* 459 Mich 229, 236 (1998). See MRE 803(1) (a present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter").

As to whether Bob can introduce Jack's discovery that some customer complaints had been fabricated according to Jack's subsequently implemented follow-up process, the court has discretion to admit this evidence. The subsequent remedial measure of following up on customer complaints is not admissible "to prove negligence or culpable conduct" by Linda. MRE 407. It may be admitted under MRE 407 for the purpose of demonstrating the "feasibility of precautionary measures" that would have prevented an injury or for impeachment. Here, where Linda testified it had not been feasible to follow up and thereby possibly determine that one or more complaints concerning Bob had been fabricated, the court could decide to admit the evidence to demonstrate there may have been a feasible precautionary measure or to impeach Linda on that issue. See Robinson & Longhofer, Michigan Court Rules Practice: Evidence (3d ed., West 2009), §267, p 203 (1992) (subsequent remedial measure may be admitted to impeach witness's claim that she did everything she could to prevent the injury).

However, the determination of admissibility under MRE 407 is entrusted to the trial court's decision. *Hadley v Trio Tool Co.,* 143 Mich App 319, 328 (1985). Jack's therefore could argue under MRE 403 that the prejudicial effect of the evidence substantially outweighs its probative value or that the evidence would confuse the jury. Only a small portion of complaints had been fabricated and none of those complaints were about Bob. Coupled with Linda's own observations of Bob, which were not inconsistent with the complaints, it should not be an abuse of discretion to exclude the evidence due to its substantially prejudicial effect. *People v Layher,* 464 Mich 756, 761 (2001) (discretionary call on "close evidentiary questions cannot by definition be an abuse of discretion"). On the other hand, because it is a close question on a discretionary call, it also would not be an abuse of discretion to admit the evidence for impeachment purposes or to demonstrate that a feasible precautionary measure existed.