

Several defendants, senior executives of a corporation, were charged with securities fraud.

The government called as a witness another executive of the corporation, who had not been charged and who had been given immunity from prosecution, to authenticate handwritten notes that she had made after meetings of the corporation's management team at which the alleged fraud was discussed. The witness testified that she had prepared the notes on her own initiative to help her remember what had happened at the meetings. After this testimony, the government offered the notes into evidence to establish what had happened at the meetings.

Should the witness's notes be admitted?

- A. No, because the notes are hearsay not within any exception.
- B. No, because the witness's immunity agreement with the government makes her notes untrustworthy and thus substantially more prejudicial than probative.
- C. Yes, because they are business records.
- D. Yes, because they are past recollections recorded.

Explanation:

An out-of-court statement (eg, writing) offered for the truth of the matter asserted therein is hearsay and generally inadmissible. However, **business records** are **excepted from the rule against hearsay** if those records were:

made **at or near the time** of the recorded event (or act, condition, opinion, diagnosis)

made by or based on information from someone with **personal knowledge** of that event
and

made and kept as a **regular practice** (eg, routine meeting minutes) in the course of **regularly conducted activities of the business**.

But an individual's *personal* notes (even those made in a business setting) are not the *organization's* regularly kept business records **(Choice C)**. And when offered for the truth asserted, such personal notes are inadmissible hearsay unless another [hearsay exception](#) applies (not seen here).

(Choice B) The witness's immunity from prosecution had no effect on the trustworthiness of her notes because she wrote them *prior* to the immunity agreement. Therefore, the notes are not substantially more prejudicial than probative, and this is not a basis for excluding them.

(Choice D) The [past recollection recorded](#) (ie, recorded recollection) hearsay exception applies to records that (1) concern a matter a witness once knew but cannot recall at trial, (2) were made or adopted by the witness when the matter was fresh in his/her mind, and (3) accurately reflect the witness's knowledge at that time. But here, the witness has not claimed that she has forgotten what happened at the meetings. And even if she had, she could only *read* the notes into evidence since only opposing parties could offer them as an *exhibit*.

Educational objective:

Business records are excepted from hearsay if they were (1) made at or near the time of the recorded event, (2) made by or based on information from someone with personal knowledge, and (3) made and kept as a regular practice in the course of regular activities of the business.

References

Fed. R. Evid. 803(6) (hearsay exception – records of a regularly conducted activity).

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Business records hearsay exception (FRE 803(6))

