

A defendant is on trial for evading \$100,000 in taxes. The prosecution offers in evidence an anonymous letter to the IRS, identified as being in the defendant's handwriting, saying, "I promised my mother on her deathbed I would try to pay my back taxes. Here is \$10,000. I'll make other payments if you promise not to prosecute. Answer yes by personal ad saying, 'OK on tax deal.'"

Is the letter admissible?

- A. No, because it is an effort to settle a claim.
- B. No, because the probative value is substantially outweighed by the risk of unfair prejudice.
- C. Yes, as a statement of present intention or plan.
- D. Yes, as an admission of a party-opponent.

Explanation:

Nonhearsay statements

(FRE 801(d))

Statement by declarant-witness

Out-of-court statement admissible if witness subject to cross-examination & prior statement:

is inconsistent with current testimony & was made under penalty of perjury

is consistent with current testimony & offered to (1) rebut charge of fabrication/improper influence or (2) rehabilitate witness *or* identifies person witness perceived earlier

Statement by party-opponent

Out-of-court statement admissible if offered against opposing party & statement was:

made or adopted by party

made by person authorized by party

made by party's agent/employee on matter within scope of relationship *or*

made by party's coconspirator during & in furtherance of conspiracy

FRE = Federal Rule of Evidence.

Under the rule against hearsay, an out-of-court statement (eg, the defendant's letter to the IRS) offered to prove the truth of the matter asserted therein (eg, the defendant owed back taxes) is generally inadmissible. But certain statements are excluded from this rule and are therefore considered **nonhearsay**. One exclusion applies to **statements made by** and **offered against** an **opposing party**. As a result, the letter to the IRS written by the defendant and offered against the defendant at trial is admissible.

(Choice A) Statements made during settlement or plea negotiations are generally inadmissible because public policy encourages the settlement of disputes. But for this rule to apply, both parties must intend to enter such negotiations (not seen here). And in a criminal case, the statements must be made to a prosecutor—not a government agency (as seen here).

(Choice B) Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice—eg, that the jury will decide the case based only on emotion. Here, the letter is highly probative because it concerns the central issue in the case—whether the defendant evaded taxes. And since the letter poses no danger of unfair prejudice, this is not a basis for excluding it.

(Choice C) Statements of present intention or plan fall under the [then-existing mental state](#) exception to the rule against hearsay. Here, the defendant's promise was *contingent* upon the IRS promising not to prosecute so it likely is not a statement of plan. But this hearsay exception is unnecessary to admit that statement since it is nonhearsay.

Educational objective:

Statements made by and offered against an opposing party are excluded from the rule against hearsay.

References

Fed. R. Evid. 801(d)(2) (nonhearsay – statement by party-opponent).

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