

A defendant is on trial for bribing a government procurement officer by providing the officer with free vacation facilities. When the defendant was approached by an FBI investigator, the defendant stated that her invitation to the procurement officer to spend his vacation in the defendant's mountain cabin was a favor to a friend, unrelated to his government office. The defendant also said to the investigator that she would reveal some "hot" information on a large-scale fraud in exchange for the investigator's promise to "stop worrying about a little vacation."

Is the investigator's testimony about the defendant's offer to give information admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the defendant made the offer in a negotiation for settlement of a criminal investigation.
- C. Yes, as a matter observed and reported by the investigator pursuant to a duty imposed by law.
- D. Yes, as a statement of an opposing party.

## 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, out-of-court statements offered to prove the truth of the matter asserted therein are generally inadmissible. But under Federal Rule of Evidence (FRE) 801, some out-of-court statements being offered for their truth are *excluded* from this rule and therefore are nonhearsay. One **hearsay exclusion** applies to **statements made by and offered against an opposing party**. As a result, the defendant's offer to give information to the FBI investigator is admissible as a statement of an opposing party **(Choice A)**.

**(Choice B)** Under FRE 408 and 410, statements made during settlement or plea negotiations are generally inadmissible because public policy encourages the settlement of disputes. But for these rules to apply, both parties must intend to enter settlement negotiations (not seen here). Additionally, in a criminal case, the statements must be made to a prosecuting attorney—not a law enforcement agent (as seen here).

**(Choice C)** The public records *exception* to the hearsay rule applies to a public office's records or statements that set out (1) office activities, (2) matters observed by an office representative while under a legal duty to report, and (3) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation. But this exception is inapplicable here since the defendant's statement is nonhearsay.

**Educational objective:**

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

**References**

Fed. R. Evid. 801(d)(2) (opposing party's statement is not hearsay).

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