

A hotel sued a motel for infringement of the hotel's trade name. To establish a likelihood of name confusion, the hotel offers a series of memoranda which it had asked its employees to prepare at the end of each day listing instances during the day in which telephone callers, cab drivers, customers, and others had confused the two names.

Are the memoranda admissible?

- A. No, because they are hearsay not within any exception.
- B. No, because they are more unfairly prejudicial and confusing than probative.
- C. Yes, because they are past recollection recorded.
- D. Yes, because they are records of regularly conducted business activity.

## Explanation:

**Hearsay** is an out-of-court statement (eg, the memoranda) offered to prove the truth of the matter asserted therein (eg, that the motel was often confused with the hotel). Such statements are inadmissible unless **excluded** or **excepted** from the rule against hearsay. One **exception** raised here applies to **records of regularly conducted business activity**—ie, business records that are:

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** in the course of regularly conducted business activities.

But records made in preparation for litigation do not fall under this exception. And since the hotel created the memoranda to later establish a likelihood of name confusion at trial, this exception is inapplicable **(Choice D)**.

Another hearsay exception raised here applies to **past recollection recorded** (ie, **recorded recollection**). Under this exception, a record may be **read into evidence** if:

a witness **once knew** the recorded information **but cannot recall** it at trial

the witness **made or adopted** the record **when the matter was fresh** in his/her mind *and* the record **accurately** reflects the witness's personal knowledge at the time it was made.

Here, there are no facts to support the above requirements, so this exception is also inapplicable **(Choice C)**. And since the memoranda are not otherwise excluded or excepted from hearsay, they are inadmissible.

**(Choice B)** Relevant evidence should be excluded if its probative value is substantially outweighed by certain dangers—including unfair prejudice and confusing the issues. Here, the memoranda are highly probative since they concern the central issue in the case (name confusion) and pose no danger of unfair prejudice or confusion. But the memoranda remain inadmissible as hearsay not within any exception or exclusion.

## Educational objective:

Records made in anticipation of litigation fall outside the business records exception to the hearsay rule. And a record may not be admitted under the recorded recollection exception unless a witness who once knew the recorded information cannot recall it at trial.

## References

Fed. R. Evid. 803(5) (hearsay exception – recorded recollection).

Fed. R. Evid. 803(6) (hearsay exception – business records).

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