

## Question 2

Pete was a passenger on ABC Airlines (ABC), and was severely injured when the plane in which he was flying crashed because of a fuel line blockage.

Pete sued ABC in federal court, claiming that its negligent maintenance of the plane was the cause of the crash.

At trial, Pete's counsel called Wayne, a delivery person, who testified that he was in the hangar when the plane was being prepared for flight, and heard Mac, an ABC mechanic, say to Sal, an ABC supervisor: "Hey, the fuel feed reads low, Boss, and I just cleared some gunk from the line. Shouldn't we do a complete systems check of the fuel line and fuel valves?" Wayne further testified that Sal replied: "Don't worry, a little stuff is normal for this fuel and doesn't cause any problems."

On cross-examination, ABC's counsel asked Wayne: "Isn't it true that when you applied for a job you claimed that you had graduated from college when, in fact, you never went to college?" Wayne answered, "Yes."

ABC then called Chuck, its custodian of records, who identified a portion of the plane's maintenance record detailing the relevant preflight inspection. Chuck testified that all of ABC's maintenance records are stored in his office. After asking Chuck about the function of the maintenance records and their method of preparation, ABC offered into evidence the following excerpt: "Preflight completed; all okay. Fuel line strained and all valves cleaned and verified by Mac." Chuck properly authenticated Sal's signature next to the entry.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Admit Wayne's testimony about Mac's question to Sal? Discuss.
2. Admit Wayne's testimony about Sal's answer? Discuss.
3. Permit ABC to ask Wayne about college? Discuss.
4. Admit the excerpt from the maintenance record? Discuss.

Answer according to the Federal Rules of Evidence.

## QUESTION 2: SELECTED ANSWER A

### 1) Wayne's Testimony about Mac's question to Sal

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.

Here the evidence with regard to Wayne's testimony is highly relevant in that it tends to establish that Mac's (M) supervisor Sal (S) had notice of a potential problem with the aircraft prior to flight. Moreover, the second part of the statement shows, the ABC had the opportunity to do a systems check that was part of the routine operation, but ultimately failed to do so. It thus makes it more probable that ABC's employees were negligent in maintaining the aircraft, because S had notice of a problem and took no corrective action.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here ABC will argue that the evidence is highly prejudicial to ABC since it demonstrates that one of its employees noted a problem and stated, that corrective action should be taken. This is unlikely to be well received by the court, since, it is prejudicial, but not unfairly so, since it does not tend to arise the emotions or passions of the jury. Further, the evidence is highly probative in that one of its employees noticed a potential problem and recommended corrective action. As such, the statements about Mac's statements are legally relevant with the probative value not being substantially outweighed by unfair prejudice.

**Hearsay:** hearsay is defined as an out of court statement offered for the truth of the matter asserted. Here the statement by M was made out of the current proceeding in court, thus it was made out of court. The first part of Mac's statement is an assertion

and thus definition be considered a statement. However the second part of the statement with regard to the systems check is actually a question (further explained below), and as such is not an assertion. Accordingly it would fall outside the definition of hearsay as discussed below. Finally, both parts of the statement may be being offered for their truth. That M noticed a problem and cleared out the fuel lines, and that M asked whether they should conduct a full systems check. This would be offered to show that there was actually a problem detected in the aircraft.

Alternatively however, Pete (P) could argue that he is offering this evidence not for its truth, but only for the purpose of showing the effect on the hearer (S). As such, P is only showing that S had notice of a potential problem and failed to take corrective action. If the evidence were offered only for this purpose, it is admissible and not hearsay.

**Assuming that P wants to offer the evidence for its truth (that there actually was a problem detected:**

**a) First part of statement regarding fuel reading and clearing the gunk from the line**

Because the first part of the statement is hearsay, it will be inadmissible unless a hearsay exception applies, or the federal rules deem the statement Non-hearsay under an exemption.

Hearsay within Hearsay - when there are multiple levels of hearsay - each independent level of hearsay must be satisfied either by an exception or exemption.

1st Layer - The reading on the fuel gauge. ABC might try to argue that this is an independent level of hearsay, and is an out of court statement being offered for the truth of the matter asserted. This argument would be unavailing however, since gauges which simply provide readout of data (which is not entered by a human) are not considered statements under the traditional hearsay definition. As such the first layer

with regard to the fuel indicator would be deemed non-hearsay and would be admissible.

## **2nd layer - The statement itself**

A statement that is made by a party opponent is admissible against that party when introduced by an opposing party. Further, within this exception, an employee's statement related to a matter of employment, while within the scope of employment are exempt from the hearsay definition under this exemption. Similarly, the statements by spokespersons or agents for an individual can be admitted under this exemption. In sum, under the FRE, statements under this exemption are deemed non-hearsay and can be offered for the truth of the matter asserted.

Here the statement made by Mac is was made while he was employed with ABC and related directly to matter of his employment - the mechanical evaluation of the plane before flight. As such it would be deemed non-hearsay and admissible.

**Present sense impression** - a statement made while contemporaneously perceiving and event and describing that event may be admissible under the present sense impression exception. Here, the statement involves M relaying what he just read and the actions he took on the line. If it was made right after the observations, which it appears to be, it would also be admissible under the present sense impression hearsay exception.

## **b) Second part of statement with the question regarding the systems check**

Here as indicated above, M is actually asking a question, as to whether they should perform a systems check. As such it would fall outside the hearsay definition regarding. A statement under the hearsay definition requires an assertion. As such a question cannot be considered hearsay, and would be properly admissible.

In sum, the evidence of Mac's question is properly admissible both for its truth and for the effect on the hearer to show negligence.

## 2) Wayne's Testimony about Sal's answer

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.

Here the evidence is clearly logically relevant, it shows that S believed that the gunk wouldn't cause any problems, and more importantly did not take any corrective action upon hearing the findings of Mac.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, there does not seem to be any danger of unfair prejudice, and thus is legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted.

Here the statement is made out of court and is likely being offered for the truth of the matter asserted, namely that as the supervisor, S took no corrective action with regard to the plane.

Because it is hearsay it will be inadmissible unless an exception applies.

Non-hearsay, as statement by party opponent (an employee). As defined above, the statement by S will be deemed a statement of party opponent (ABC) since it related to a matter of employment (inspecting the aircraft) and was made while S was employed with ABC. As such, it will be deemed non-hearsay and is properly admitted.

## 3) ABC inquiry to Wayne about college

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant because it tends to impeach the credibility of

Mac a testifying witness. As such it logically relevant because it may make the jury not believe his testimony, and impact the outcome of the proceeding.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, the jury may give unfair weight to the evidence, and discredit Wayne's (W)'s testimony. However, it is unlikely a court would find this unfair prejudice, and its probative value is high, since it tends to demonstrate W has been untruthful in the past. As such it would be legally relevant.

**Impeachment - prior instances of uncharged conduct - probative of truthfulness -** on cross-examination a party is permitted to inquire in specific instances of uncharged prior bad acts if they are probative of truthfulness. It bears noting however, that counsel is bound by the witnesses answer and may not provide extrinsic evidence to prove up the prior bad act.

Here, ABC's counsel is asking W about a specific instance of uncharged conduct - the lying in the course of a job application. Because the lying on a job application with regard to whether W went to college links directly on W's truthfulness as a witness, it is properly admitted. Additionally, since ABC's counsel did not try to introduce extrinsic evidence of the bad act, its form of introduction into evidence was also proper.

#### **4) Excerpt from the maintenance record**

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant in that it demonstrates that the fuel lines were cleaned and the preflight checks were completed. As such it is relevant, to show that proper care was taken before flight, and less likely ABC was negligent in performing maintenance.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here there are no issues with danger of unfair prejudice; the evidence is also legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted. Here the maintenance records are made out of court; they are a statement and are being introduced for the truth of the matter asserted. Specifically, that the maintenance was in fact performed. As such they will be inadmissible unless a hearsay exception or exemption applies.

- **Hearsay within hearsay:** here there are two levels of hearsay. The first is Mac's entries and the second is the business record itself, each must independently satisfy the hearsay exception.

### **Statement by Party Opponent**

Here the entries by Mac would fall not fall under the statement of party opponent exception because they are being offered by ABC and not P. As such an alternate exception must be used.

**Business Record Exception** - a report that is created within the regular course of business, is recorded contemporaneously or near after the action of the business, and has indications of reliability can be offered under the business record exception. The business records will be inadmissible if they contain entries by a person who is not under a business duty to report, or are completed with anticipation of litigation.

Here, the custodian of records is proffering the business records. The custodian testified how the records were prepared and their method of preparation. Assuming there were no indicators of untrustworthiness the records are properly admitted. It bears mentioning that the custodian can properly authenticate the signature if he was familiar with the handwriting of Sal. Additionally, the hearsay within hearsay problem is

alleviated because the business record exception covers all employees who are creating and contributing to the record who fall under the business duty. As such, M's statements would be properly admitted within the business record.



## QUESTION 2: SELECTED ANSWER B

### 1. Ok to Admit Wayne's testimony about Mac's question to Sal

**Relevance** = The testimony is logically and legally relevant.

For an evidence to be admissible, it must be relevant. To be relevant, the evidence has to have any tendency to make any fact that is of consequence to the determination of the action more or less probable than without the evidence. Here, Wayne's testimony is most likely logically relevant because Mac's question ("Shouldn't we do a complete systems check of the fuel line and fuel valves?") shows that Mac and Sal, both ABC employees, was on notice that Mac thought they should do a complete systems check of the fuel line and fuel valves. Because Mac has stated that he just cleared some gunk from the line, he probably thought more gunk would exist in other parts of the fuel line and valves. If ABC employees thought this way, then this could be relevant to prove that ABC knew that plane had some fuel line blockage problem before operating.

Even if the evidence is relevant, court may not admit the evidence if its probative value is substantially outweighed by unfair prejudice, waste of time, or confusion. Here, ABC would argue that this was only a question by Mac, and it does not indicate whether Mac actually thought there would be Gunk in other parts in the fuel line and valves. ABC would further argue that this question would confuse the jury (if this is a jury trial) to think that the employees actually thought there would be gunk in other places in the fuel lines and valves. However, Wayne's testimony is relevant, and is not substantially outweighed by any unfair prejudice. Although it would prejudice ABC, it is not unfair since opposing party's evidence would most likely be prejudicial to the other party due to nature of the adversarial setting of the trial.

**Hearsay** = The testimony is either not hearsay or falls under an exception

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Statement can be a conduct or question as long as it is intended by the declarant to communicate something. Here, Mac's question was made outside of the court. Pete

would argue that Mac's question is not hearsay because it is a question. However, this question appears to be communicating. Mac stated that he just cleared some gunk from the line, and asked Sal if they should do a complete systems check of the fuel line and valves. Because of his previous statement before the question, Mac's question seems to communicate to Sal that they should be doing some systems check to see if other gunk exists elsewhere. Thus, Pete's argument that this is not hearsay because it is a question will not be too good.

It is not hearsay if the purpose of introducing the statement is not to prove the truth of the matter asserted but to show effect on the listener. Here, this is double-edged sword for Pete. Pete can probably get this in if he argues that this question should be admitted to show the effect on Sal. However, he also wants this question admitted for the truth of the matter asserted to show that Mac most likely thought that gunk existed elsewhere in fuel lines and valves. Thus, Pete can use this argument, but probably is not a good one to make.

The most successful argument would be that this statement falls under a hearsay exemption of statement of party opponent. Statement of party opponent can be admissible even if it is an opinion statement. An employee's statement can be admitted against an employer if the statement was made during the employment and statement describes a matter within the scope of their employment. Here, Mac was employed as an ABC mechanic when he made his question. Also, his statement directly related to his scope of employment as a mechanic because he was talking about doing some system check on the plane. Thus, his question would be admissible as a hearsay exemption of statement against party opponent.

Pete can also use a hearsay exception of present sense impression. A statement describing a condition or event while the declarant is perceiving the condition or event or immediately thereafter is admissible under hearsay exception. Here, Mac stated that he just cleared some gunk from the line, and asking a follow up question to his work. Thus, Pete can argue that Pete was asking that question pursuant to his observation of

his clearing of some gunk. ABC would argue that the question pertains to some future work that Mac is thinking about doing, so it does not relate to Mac's present sense impression of his past work completed. Even if ABC has a better argument here, this statement will pass the hearsay hurdle as a statement against party opponent.

### **Ok to Wayne's testimony about Sal's answer**

**Relevance** = Sal's statement is logically and legally relevant

Here, Sal's statement is logically relevant because it can show negligence of ABC. Sal was notified by Mac that the plane had some gunks, but decided not to do system check because "a little stuff" (i.e., gunks) is normal for this fuel. Pete would argue that ABC knew about the gunks and decided not to clean or do any further systems check. Thus, it bolsters Pete's claim of negligent maintenance of the plane by Mac when he was on notice that the gunk was present in the fuel line. Thus, this is logically relevant.

Additionally, this statement is not substantially outweighed by any unfair prejudice. ABC may argue that little gunks in plane is normal, and this evidence may mislead the jury to think that having little gunk would cause problems.

Although this evidence is prejudicial, this is not unfair because jury can weigh the evidence after it is admitted.

**Hearsay** = this is not a hearsay statement and falls under a hearsay exception

Here, Sal's statement is a hearsay. His statement was made outside of the court; it was intended to communicate to Mac that little gunk is ok and that it would not cause problems; Pete is introducing this statement for the truth that Sal knew about there being some gunk and little gunk would not cause problems. Pete can argue that he is not offering this statement for the truth of the matter asserted but that Sal knew of some gunks and affirmatively decided not to conduct a system check even after being put on notice. In such a case, this statement would be admitted as non-hearsay.

Like Mac's question, Sal's statement would fall under statement against party opponent. Sal made this statement when he was employed by ABC and it was within the scope of his employment as an ABC supervisor. As a supervisor, he would ordinarily make decisions on whether to do a systems check of the fuel line and valves, and his statements regarding decision not to do such check and reasoning behind such decision would be constituted as statement within his scope of employment. Thus, Sal's statement would be not a hearsay statement.

Pete can also argue that Sal's statement is then-existing state of mind hearsay exception. A statement of past mental or physical condition or then existing statement of mind is admissible even if it is a hearsay statement. Here, Sal is telling Mac to not worry because little gunk will not cause any problems. This shows Sal's lack of worry at the time the statement was made with respect to little gunk in the fuel line system. Thus, Sal's statement would also fall under this hearsay exception.

### **3. Ok to permit ABC to ask Wayne about college**

#### **Relevance**

This evidence of Wayne's lying on his job application is relevant because it goes to the credibility of the witness testifying in the court. Here, if Wayne is shown as a liar, it is relevant because then his other testimony cannot be fully trusted. Also, it is not outweighed by unfair prejudice. Jury can determine how much weight to give to a witness who has been impeached.

#### **Leading Question** ok here

Leading question is permitted on direct examination in certain circumstances, but is generally allowed in cross-examination. Here, Wayne is being cross-examined, so it is ok for ABC's counsel to use leading questions.

Character Evidence vs. **Impeachment** = Impeachment with prior misconduct related to lying

Character evidence is almost never allowed in civil cases except for few exceptions. Character evidence is given to prove that the person has acted in conformity with his character. However, under right circumstances this is ok if the purpose is to impeach the witness. A witness can be impeached with his prior misconduct related to lying. This impeachment can only be done on cross-examination and cannot be done with an extrinsic evidence. Here, Wayne is on cross-examination, so it was ok for ABC to ask Wayne about his lying on his job application about graduating from college.

#### **4. Ok to admit the excerpt from the maintenance record**

##### **Relevance**

The maintenance record is relevant because it shows that preflight check was completed with all okays. The record also shows that fuel line strained and all valves were cleaned and verified by Mac. This shows proper maintenance on the part of ABC to counter Pete's negligent maintenance claim. Also, it is not substantially outweighed by any unfair prejudice.

##### **Authentication proper**

When non-testimonial evidence is being introduced, it must be authenticated (i.e., prove the evidence is what it purports to be). This can be done several ways. One way is for a custodian of the record to testify to the creation or how the record gets maintained. Here, the maintenance record has been properly authenticated by Chuck, ABC's custodian of records. He testified that all ABCs maintenance records are stored in his office and discussed about the function of the maintenance records and their method of preparation. Also, facts indicate Chuck properly authenticated Sal's signature next to the entry.

##### **Best Evidence Rule**

When a written document is introduced as an evidence, courts usually allow the original document or its duplicate (photocopy or another method to re-create the original) to be admissible to prove the content of the written document. However, handwritten copy is

not admissible in lieu of an original or a duplicate. Although it is not clear whether the original maintenance record is being introduced, but it would be reasonable to assume that either an original or a duplicate is being introduced.

### **Hearsay**

This maintenance record is hearsay. It is made outside of the court. It was a statement intended to communicate that preflight check was completed, fuel line was strained and all valves were cleaned. ABC is offering this written statement for the truth of matter asserted so that proper maintenance has been conducted. To be admitted, it must fall under a hearsay exception.

ABC would argue that it falls under a hearsay exception of business records. To be a business record exception, it must be (1) a statement of diagnosis, opinion, condition, event, (2) kept at a regularly conducted business activity, (3) made at or near the time matter observed, (4) by personnel who had personal knowledge or gotten the information from someone who had duty to report, and (5) it is regular practice for business to make such record. Here, the maintenance records had statement of plane's condition because the maintenance was completed and the fuel line was strained and all valves were cleaned and verified. Also, it was kept at a regularly conducted business activity because it would be safe to assume that such preflight maintenance records are kept. Although it doesn't say when the record was created, it is reasonable to assume that these records are maintained as Sal and Mac do maintenance checks. Also, Sal as a manager probably has duty to report the maintenance record. Chuck also testified that all ABC's maintenance records are kept in his office, so it would be safe to assume that it is regular practice for ABC to make and keep these types of records. In conclusion, the maintenance records probably fall under business records hearsay exception.