

QUESTION 3 THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK I OR IN EXAMPLIFY ANSWER SCREEN 3

Phillip claims that his coworkers at Dyna-Rite Drugs subjected him to a hostile work environment because of his race. Phillip brought suit against Dyna-Rite in a Michigan circuit court, but his first trial ended in a mistrial. A retrial is scheduled for next month.

In the first trial, Phillip testified that he endured numerous racial slurs by his coworkers, which he claimed he reported under Dyna-Rite's anti-harassment policy. Dyna-Rite countered that (1) the policy required a written statement and neither Phillip nor Dyna-Rite has evidence any such statement was submitted; and (2) the Dyna-Rite facility is an open workspace, and no coworker witnessed any racial slur.

One coworker, Wanda, testified during the first trial to having heard an alleged racial slur. Wanda, however, recanted her trial testimony in a post-trial deposition in which counsel for both parties questioned her. Shortly after the deposition, Wanda resigned from Dyna-Rite, explaining that Phillip had contacted her to confess that Dyna-Rite had never treated him in a racially hostile manner, but he feared being exposed as a liar. Dyna-Rite notified the court of the alleged contact and an evidentiary hearing was held. Dyna-Rite appeared at the evidentiary hearing and examined Wanda, who testified that Phillip expressed despair over having his false claim exposed and she agonized over having contributed to his false claim. She further testified that she had pleaded with him to drop his claim, but he refused. Phillip's counsel declined to attend the evidentiary hearing, claiming Wanda's newfound story was a farce. Wanda subsequently moved to Florida.

At the final pretrial conference, Phillip announced that despite diligent efforts to locate and serve Wanda with a trial subpoena, he had been unsuccessful in procuring her attendance at the new trial. Phillip wants to read to the jury Wanda's testimony from the first trial pursuant to MRE 804(b)(1). Dyna-Rite, acknowledging it also could not serve Wanda, objected to the trial testimony, arguing Phillip should be estopped from using admittedly false testimony. Dyna-Rite then moved to allow use of Wanda's post-

****THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK I OR IN EXAMPLIFY ANSWER SCREEN 3****

trial deposition testimony and her evidentiary hearing testimony pursuant to MRE 804(b)(5)(B) and MRE 804(b)(1), respectively, to offset the false trial testimony and to explain Wanda's current reluctance to be found. Phillip objected to the deposition testimony and hearing testimony because Wanda's deposition testimony and her claim concerning Phillip's alleged confession were both hearsay. Phillip also asserted that Dyna-Rite could not rely on MRE 804(b)(1) for the hearing testimony because his counsel did not cross-examine Wanda at the hearing.

Answer the following questions:

1. How should the court rule on whether Wanda's former trial testimony should be admitted under MRE 804(b)(1)? Explain why.
2. How should the court rule on whether Wanda's deposition testimony should be admitted under MRE 804(b)(5)? Explain why.
3. How should the court rule on whether Wanda's evidentiary hearing testimony should be admitted under MRE 804(b)(1)? Explain why.