

## ANSWER TO QUESTION 15

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A "statement" can be a written or oral assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. The "declarant" is a person who makes a statement. MRE 801(b). Hearsay is not admissible unless it comes within an exception. MRE 802.

Not all out-of-court statements offered to prove the truth of the matter asserted are hearsay. In particular, a statement is not hearsay if it is offered against a party and is one of which the party has manifested an adoption or belief in its truth. MRE 801(d) (2) (B).

A prior statement is excepted from the hearsay rule if the declarant is unavailable to testify at trial, and the statement is "offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b) (6). One way that a declarant may be "unavailable" is if the declarant is absent from the hearing and the proponent of the testimony has been unable to procure the declarant's attendance by process or other reasonable means. MRE 804(a) (5).

Additionally, all admissible evidence must be relevant. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. And, finally, relevant evidence can always be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or because it would confuse the issues, waste time, etc. MRE 403.

The initial question is whether the content of Diane's first statement can be attributed to Mr. Smith, i.e., whether Mr. Smith manifested an adoption or belief in its truth. MRE 801(d) (2) (B). "An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the part of a party which manifests circumstantially that party's assent in the truth of a statement made by another. . . . In order to find adoptive approval of the other's statement the circumstances surrounding the other's declaration must be examined." *Shemman v American Steamship Co*, 89

Mich App 656, 673 (1979), quoting *Durbin v K-K-M Corp*, 54 Mich App 38, 50 (1974). Here, Mr. Smith's conduct in nodding his head affirmatively, coupled with his simultaneously hugging her and commencing his statement with "I know about all that," is sufficient to manifest his belief in the truth of Diane's statement. Mr. Smith's gestures and statement are all affirmative acts or statements reflecting his agreement to what Diane just stated, especially considering the context of the conversation. Thus, the better conclusion is that this is an adoptive admission by Smith and can be admitted through Clark, who witnessed it. However, an applicant could also correctly recognize that Mr. Smith's conduct was somewhat ambiguous, because nodding of the head and hugging do not tell us much about what he was thinking, and it is not necessarily clear what part of Diane's statement his "I know about all that" was directed to. An applicant with that perspective could legitimately argue that the circumstances were not sufficiently clear to establish an adoptive admission.

Diane's second statement to Mr. Smith ("I can't believe you are doing this to me") would also be admissible. Although this second statement meets the definition of hearsay as it is an out-of-court statement offered to prove the truth of the matter asserted, i.e., that Diane was in love with Mr. Smith and they had been having an affair, it arguably falls within two hearsay exceptions.

The first is the exception stated in MRE 804(b)(6). To gain admission under MRE 804(b)(6), the proponent must show that (1) defendant engaged in or encouraged wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. *People v Jones*, 270 Mich App 208, 217 (2006). Clearly, the statement is being offered against Mr. Smith, and evidence suggests that Mr. Smith engaged in wrongdoing to prevent Diane from testifying. The facts suggest that Mr. Smith's threat to Diane about testifying to the truth at trial is what led to her leaving the country. The threat also led to Mrs. Smith not being able to subpoena Diane for trial, i.e., to Diane being unavailable under the rules of evidence. MRE 804(a)(5). Thus, the statement would be admissible.

Another exception under which Diane's second statement likely could be admitted is MRE 803(2), the so-called "excited utterance" exception. MRE 803(2) allows admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." According to the facts, Diane was "furious and frightened" at the time because she had just been threatened by Mr. Smith. This arguably qualifies as a "startling event or condition" (though much

of the case law involves statements made in the wake of crimes and accidents) and Diane's statement related to that startling event.

The applicant should also briefly discuss the relevancy of the evidence, and whether it is otherwise excluded because of the criteria within MRE 403. As already noted, it is relevant and not excluded under MRE 403 as Diane's statement goes to the heart of the issue at trial.