EXAMINERS' ANALYSIS OF QUESTION NO. 5

1. Use of deposition testimony at trial: Charlie's deposition can be read into evidence at trial. Charlie is currently an unavailable declarant under, MRE 804(a)(5), because he "is absent from the hearing and the proponent of a statement [Bob] has been unable to procure [Charlie's] attendance . . . by process or other reasonable means." *Id.* If necessary for its determination, the court may determine unavailability through the MRE 104(a) process. Here, Bob made diligent efforts to locate and serve Charlie with a subpoena, which is sufficient to establish unavailability.

Where the declarant is unavailable, his prior "[t]estimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding" can be used as long as the party opposing admission "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(5). If it satisfies MRE 804(b), the former testimony qualifies as an exception to the hearsay rule and may be used at trial. In addition, since it is deposition testimony that is being offered, there is an additional basis for finding Charlie is unavailable - he is presently outside the United States, which also renders him unavailable "unless it appears [his] absence . . . was procured by the party offering the deposition." MRE 804(b)(5)(A). Since Artie, the party opposing the deposition, seemingly procured Charlie's absence with threats, Bob cannot be blamed for the absence and MRE 804(b)(5)(A) provides an additional basis for finding Charlie to be unavailable and for admitting his deposition.

In addition, Artie's attorney received notice of and even attended Charlie's deposition. The fact that he walked out before asking any questions does not negate his opportunity and motive to cross-examine Charlie, so Artie cannot exclude the deposition on this basis. See *People v Goldman,* 349 Mich 77, 79 (1957).

2. Admissibility of Artie's statement: "I know you know I've been stealing money." The statement is admissible as non-hearsay - a party admission. Charlie attributed the statement to Artie, the defendant. Bob is "offer[ing] the statement

against a party [Artie] and [it] is . the party's own statement." MRE 801(d)(2).

The statement is not rendered inadmissible under MRE 408, because it was not made in the context of "compromising or attempting to compromise a claim which was disputed" at the time. MRE 408. Rather, Artie gratuitously made the statement at a time he and Charlie had no dispute. *Ogden v George F Alger Co,* 353 Mich 402 (1958). Any dispute between the two arose later, after Artie fired Charlie.

3. Admissibility of Artie's first offer to pay Charlie for his silence: Artie's initial offer to pay Charlie the $500,000 for disappearing and staying silent also should not be excluded under MRE 408. Although Artie's settlement negotiations with a third party like Charlie may fall under MRE 408, *Windemuller Elec Co v Blodgett Memorial Medical Center,* 130 Mich App 17 (1983), these "negotiations," like Artie's gratuitous statement, occurred before any dispute existed. And even if a dispute had existed, MRE 408 does not protect negotiations evidencing a criminal intent. Artie's offer is also a party admission and so cannot be excluded as hearsay.

4. Admissibility of Artie's second offer to pay Charlie for his silence: The second offer is also admissible and may not be excluded under MRE 408 because of Artie's criminal intent: "this rule . . . does not require exclusion when the evidence is offered for another purpose, such as . . . proving an effort to obstruct a criminal investigation or prosecution." MRE 408. While no prosecution has occurred to date, Artie had admitted to a criminal act and then tried to buy off a witness to that act. In addition, Artie's offer, like the first time he made it, is a party admission and so is admissible non-hearsay.