

ANSWER TO QUESTION 14

The question whether Donna can testify to what Wilma told her Harry was saying raises several connected hearsay issues. Hearsay "is a statement, other than the 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). Hearsay is not admissible unless it comes with an exception. MRE 802. MRE 803 enumerates a variety of circumstances in which statements or documents are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness. MRE 804 states additional exceptions that may apply when the declarant is unavailable.

The purpose of Donna's proposed testimony is to place before the jury Harry's contemporaneous tentative identification of Dirk as Victor's attacker. Because Donna did not hear this directly from Harry but only heard Wilma's statement about what Harry was saying, this is an instance of "hearsay within hearsay." To be admissible, each level of hearsay must fall within an exception to the hearsay rule. MRE 805; *Merrow v Bofferding*, 458 Mich 617 (1998).

Wilma's statement to Donna is admissible under MRE 803(2) as an excited utterance: 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." Having her husband shouting that their neighbor was being severely beaten is certainly a "startling event or condition," and Donna can testify that her mother, Wilma, was excited and under stress at the time she made her statement. Harry's statement within Wilma's statement must also be admissible for Wilma's statement to have any value, and it is. Harry's simultaneous description of what he saw happening next door is admissible both under MRE 803(2) as an excited utterance and under MRE 803(1) as a statement of present sense impression--a description of an event or condition made while the declarant, Harry, was perceiving the event.

Note: Some examinees may raise the issue of whether the statements of Harry and Wilma, who are not testifying at the trial, should be excluded under the Sixth Amendment confrontation clause analysis of *Crawford v Washington* because Dirk did not have a prior opportunity to cross-examine them. This question does not present such an issue because the statements of Harry and Wilma are not "testimonial statements," e.g. statements given at a prior trial or

hearing or during a police interrogation.

The purpose of introducing John Jones' testimony about a completely different incident is to show that Dirk attempted a similar assault on another "customer" of Lloyd's, and it is thus more probable that Dirk committed the assault on Victor. The obstacle to introducing John's testimony is MRE 404(b) (1); "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But such "other acts evidence" may be admissible for other purposes, such as "proof of motive [or] scheme, plan or system (surprising the victim from behind and disabling him with a flurry of blows).

If the proponent of "other acts" evidence articulates a reason for its introduction beyond just showing a party's propensity for certain conduct (which is not enough), the court conducts a further analysis to determine its admissibility. *People v Vandervliet*, 444 Mich 52 (1993). The evidence must be relevant and its probative value cannot be substantially outweighed by the danger of undue prejudice, in light of other means of proof for the proposition in question. (The court may also take into account whether a limiting instruction would be effective in cushioning the unfairly prejudicial impact of the evidence.) Here, the evidence tends to establish Dirk's identity as Victor's attacker, but one can argue about how strongly it does this. The court will probably find that the evidence fails the balancing test. The method used in the two assaults is similar, but it is not strikingly unique. Because John will give eyewitness testimony that Dirk recently committed an assault other than the one with which he is charged, there is a strong risk that the jury will in effect convict him of that offense rather than the charged offense. It is doubtful that a limiting instruction can sufficiently cure this risk. [This is the recommended analysis, but it is possible to argue the other side of any of the factors in this paragraph, and appropriate credit should be given for any logically framed position that balances relevance and unfair prejudice.]