

ANSWER TO QUESTION NO. 12

HELEN: Helen may not testify as to the statements that Rita made concerning Jack's alleged invitations to engage in sexual relations because these are inadmissible hearsay. 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). Hearsay is not admissible unless it falls within one of the exceptions set forth in MRE 803 or 804. MRE 802.

Rita wants Jack's alleged sexual invitations to come into the record to prove the truth of the matter asserted; i.e., that prior to her threats to sue, Jack was pursuing a sexual relationship with Rita. There are no exceptions to the hearsay rule under MRE 803 that would apply. These statements to Helen were all well after the fact and were made without the type of emotion or expediency that might bring them within an exception. They were made not only after Rita had ample time for conscious reflection and contrivance, they were made after Rita had decided to sue and after the alleged conduct had ceased, meaning that she also had a potential motive for fabrication. *People v Jensen*, 222 Mich App 575 (1997). In any event, Helen's repetition of what Rita said Jack said will be cumulative and so should also be excluded under MRE 403. Finally, Jack will be testifying at trial, meaning that the exceptions under MRE 804, which apply when the declarant is unavailable, are not material.

Rita's "that jerk just grabbed me" recitation is a different matter. The court may admit it as an "excited utterance" under MRE 803(2), or alternatively as a "present sense impression" under MRE 803(1). Rita's arm bore fresh physical marks and Rita was agitated, emotionally upset, and then dazed, meaning that, from all appearances, she was still under the stress of the event and had not had an opportunity for conscious reflection or contrivance. *People v Smith*, 456 Mich 543, 551 (1998); *People v Walker*, 265 Mich App 530, 534 (2005). Alternatively, the comment may come in as a "present sense impression," since it was made immediately after and described the fact that Rita had been grabbed. MRE 803(1) (a present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"); *People v Hendrickson*, 459 Mich 229, 236 (1998) (description must be "substantially contemporaneous" with the event). Nevertheless, in light of how uncertain the statement is as to identity of the

"jerk" and the difference in physical conduct described (a physical assault versus the more subtle alleged sexual "brushing" that is the subject of the lawsuit), the court may conclude the utterance is more likely to create jury confusion or undue prejudice against Jack, and exclude it under MRE 403. In any event, Helen should not be able to testify to Rita's after-the-fact explanation about Jack having been the "jerk" for the same reasons that she should not be able to testify to her other after-the-fact conversations with Rita.

RALPH: Ralph should not be able to testify. He is not qualified to offer an expert opinion on the likelihood harassment occurred since his training, experience, and education are in benefits administration, not harassment claims. To testify as an expert, the witness must have "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue," and must be "qualified as an expert by knowledge, skill, experience, training, or education." MRE 702. Even if Ralph could arguably pass this threshold inquiry, his testimony must be based on reliable principles and methods that have been reliably applied to sufficient facts and data in this case. *Id. See also Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783 (2004). His proposal to offer an opinion based solely on rumors he overheard about unproven or untested allegations concerning individuals other than Jack and Rita does not pass the reliability threshold.

Nor should Ralph's testimony be permitted as a lay opinion under MRE 701, because his opinion is based entirely on rumors (hearsay), rather than "rationally based on [Ralph's] perception." MRE 701. Ralph witnessed nothing between Rita and Jack, nor does he have first-hand knowledge of alleged sexual harassment involving them or others. Ralph does not have any rationally based perception on which to offer an opinion. *McCalla v Ellis*, 180 Mich App 372 (1989) (doctor who did not witness alleged sexual advances did not have rational perception as to whether advances were welcome or unwelcome). Nor does Ralph have the personal knowledge of the subject matter requisite to testify as a lay witness. MRE 603 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

FERN: Fern should not be permitted to testify, as her notes are hearsay not within any recognizable exception. MRE 802. The notes should not be admitted under MRE 803(3) because Rita described only what Jack allegedly did. She did not describe for Fern her feelings about what Jack allegedly did, so she was not making a statement of her "then existing state of mind, emotion,

sensation, or physical condition," MRE 803(3), rendering that hearsay exception inapplicable.

MRE 803(4) also is inapplicable. Rita advised Fern up front there would be no therapy or treatment related to what Rita was saying. Rule 803(4) accepts only those "statements made for purposes of medical treatment or diagnosis in connection with treatment." MRE 803(4).

Finally, MRE 803(6) also does not apply. MRE 803(6) provides an exception for records of regularly conducted activity. Even if Fern's note taking could be considered regularly conducted activity where Rita had expressly disclaimed an intention to treat with Fern, the exception applies only if the records have been "kept in the course of regularly conducted business activity." Fern never sought to keep the notes as a business record, having set up no file and kept no copy of them. It could in fact be argued that the notes were created solely for use in litigation.