

EXAMINER'S ANALYSIS OF QUESTION NO. 3

1. **Use of former trial testimony at new trial.** Wanda's testimony from the first trial can be used by Phillip in the new trial. Pursuant to MRE 804(b)(1), former testimony is not excluded by the hearsay rule if the declarant is unavailable as a witness and the testimony was:

given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Because Dyna-Rite had the opportunity and similar motive to develop Wanda's testimony during the first trial and because Wanda is now unavailable under MRE 804(a)(5) (proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means), the court should allow Phillip to read to the jury Wanda's testimony from that trial. That Dyna-Rite believes Wanda's trial testimony is not true is a contested issue and not a basis to preclude it.

2. **Use of deposition testimony at new trial.** Dyna-Rite also can read Wanda's deposition into evidence at the new trial. Wanda is currently an unavailable declarant under MRE 804(b)(5)(A), due to her being "at a distance greater than 100 miles from the place of trial or hearing," and the proponent of the statement (Dyna-Rite) was not responsible for procuring her absence. *Id.* Thus, her prior testimony was "given as a witness in a deposition taken in compliance with the law in the course of the same or another proceeding" and the deposition 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). Phillip had and acted on that opportunity here. Additionally, as was the case of Wanda's testimony from the first trial, the declarant would also be considered unavailable under MRE 804(a)(5). The deposition testimony is therefore subject to a hearsay exception and may be used at trial. *Id.*

3. **Wanda's hearing testimony is admissible as an exception to hearsay and as nonhearsay.** Hearsay is defined as "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). Wanda's hearing testimony concerning Phillip's threat, while hearsay, falls squarely within the hearsay

exception for former testimony, "given as a witness at another hearing of the same or a different proceeding," MRE 804(b)(1), i.e., the evidentiary hearing where Wanda was questioned by Dyna-Rite. That Phillip declined to participate did not negate Phillip's opportunity and motive to develop the witness testimony at the evidentiary hearing. See *People v Goldman*, 349 Mich 77, 79 (1957). In addition, Phillip's underlying confession is admissible because it is not hearsay, but rather an admission by a party-opponent, under MRE 801(d)(2).