

EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. MRE 803(6) - Records of regularly conducted activity:

The e-mail memorandum is not within the scope of the "Business Record" exception. While that exception covers "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge," MRE 803(6), the record was a personal memo made and sent by the manager to himself for his personal use. It was not a record "kept in the course of a regularly conducted business activity" nor was it "the regular practice of that business activity to make that memorandum." *Id.* The e-mail memorandum is a non-routine record made by an individual manager for his personal reference rather than the routinely generated records of a business. *Central Fabricators, Inc. v Big Dutchman*, 398 Mich 352 (1976). *Accord, Solomon v Shuell*, 435 Mich 104, 117-121 (1990).

2. Admissibility under MRE 803(24), the "Catch-all Exception": The best argument supporting admissibility is MRE 803(24), the "catch-all" or "residual" hearsay exception. This exception may be applied where the evidence is hearsay not within any recognized exception, provided all of the following criteria are satisfied:

- (1) there are guarantees of trustworthiness equivalent to those in the enumerated exceptions;
- (2) the evidence is proof of one or more material facts;
- (3) the evidence is necessary, meaning it is more probative than any reasonable alternative;
- (4) admission of the evidence serves the interest of justice.

People v. Katt, 468 Mich 272, 279 (2003). In addition, by its terms, the exception requires notice to the opposing party so that the opponent can prepare to properly meet its admission. MRE 803(24). ["However, a statement may not be admitted under

this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particular of it, including the name and address of the declarant." MRE 803(24)]

All of the criteria are satisfied here. Equivalent trustworthiness exists in that the manager attended the meeting, made his original notes contemporaneously during the meeting, and modified the notes into memo format shortly thereafter, allowing little or no time for a memory lapse or fabrication. The circumstances are that he made the notes and memo for his personal use rather than to advance an agenda, as he did not disseminate the memo. The e-mail memo has further been verified as accurate and unchanged by forensic experts who recovered the electronic version. See *Katt*, 468 Mich at 291, n 11 (enumerating totality of the circumstances factors that serve as equivalent guarantees of trustworthiness to include the declarant's personal knowledge, the lapse of time between the event and the statement, the declarant's reputation for honesty, and whether the declarant appeared to carefully consider the statement). Accord, *Stadium Authority v Drinkwater*, 267 Mich App 625, 651-52 (2005).

The e-mail memo will also be used as proof of a material fact that is critical to Welles' case. *Katt*, 468 Mich at 292 (the statement "must be directly relevant to a material fact in the case"). It is also "necessary" in that there is no reasonable alternative for proving the subject matter of the meeting discussions, as no one else recorded this information. *Yd.* at 293 ("essentially . . . a 'best evidence' requirement"). The manager (the declarant) is now deceased and there is no other memorialization of the subject matters covered in the meeting. And admission of the memo will serve the interest of justice, as embodied in MRE 102, by promoting "the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Finally, through discovery and pre-trial procedures, Welles gave notice to Kane of its intent to use the e-mail memo.

The e-mail memo fits no other enumerated exceptions, which makes it the perfect candidate for the catch-all exception.

However, some credit will be given for thorough and thoughtful discussions of other "near miss" exceptions, e.g., "present sense impression" or "recorded recollection."