

EXAMINERS' ANALYSIS OF QUESTION NO. 2

1. Defense counsel will lose the hearsay objection regarding Bobby quoting Clarence's statement. Under MRE 801(c), hearsay is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Clarence's statement would seem to fit the definition of hearsay and would be inadmissible under MRE 802.

However, MRE 801(d)(2)(A) provides that a statement is not hearsay if the statement is offered against a party and is the party's own statement. If a statement is not hearsay, MRE 802's ban does not come into play.

Here the statement is sought to be introduced against Clarence (after all, Clarence's counsel is trying to keep it out of the trial) and Clarence is a party to the action. Because the statement satisfies both components of MRE 801(D)(2)(A), it is not hearsay and defense counsel's request will be rejected.

2. Sam's statement to Constable presents a closer question. It appears Sam's statement is sought to be introduced for the truth of its content (it would be hard to see any other relevance) and, therefore, is hearsay because the statement was not made at the trial or hearing. Moreover, in contrast to Clarence's statement, none of the exclusions found in MRE 801(D)(1) or (2) would apply. Therefore, being hearsay, the statement may gain admissibility only if an exception to the hearsay rule applies. (MRE 802 states, "Hearsay is not admissible except as provided by these rules.")

Plaintiff's counsel has offered present sense impression under MRE 803(1) as a justification for admission of Sam's statement. That rule states:

The following are not excluded by the hearsay rule even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

As with most hearsay exceptions, admission of the statement without the test of cross-examination is tolerated because certain statements are thought to be reliable and/or trustworthy. The hallmark of the present sense impression exception is that the statement is made contemporaneously with the observation or immediately thereafter before the mind has time to fabricate. Coming hard apace after the event ensures, as best as possible, that the statement is an unvarnished description of the events, leaving no time for reflection or for calculated misstatements.

On the facts as presented, it is clear a couple of the exceptions' requirements are met. The accident is clearly an event and the statement describes the event. However, the 55-minute delay in making the statement to Constable is problematic. While the language of the rule, "or immediately thereafter", does not mean "instantly thereafter", see *Berryman v Kmart Corp*, 193 Mich App 88 (1992), the passage of 30 minutes between event and statement has been found to be too long. *Hewitt v Grand Trunk W Railroad, Co*, 123 Mich App 309 (1983). Sam's statement that "it's about time someone talked to me" further indicates enough time to fabricate or consider his statement.

Defense counsel's position is likely to prevail.

3. Defense counsel should prevail on keeping the deposition from being read at trial. The reason proffered by John for reading the deposition of Homer rather than presenting him is insufficient to allow the deposition to be read. The Michigan rules of evidence countenance the use of deposition testimony at trial. (MRE 804(b)(5), Deposition Testimony) However, the witness previously deposed must be "unavailable" for trial. MRE 804(a)(1)-(5). Relatedly MRE 801(d)(1), Prior Statement of Witness, allows the use of deposition testimony as well, if the deponent testifies at the trial or hearing.

The instant facts do not establish any of the prerequisites for usage of Homer's deposition at trial. He is not unavailable, but rather able and willing to testify. Moreover, John is not seeking to put him on the stand but rather to keep him off the stand. The threshold for admission of the deposition testimony - that the witness testifies at trial about the prior statement - is not established. No basis exists to have Homer's deposition read in lieu of his live testimony. Defendant's position should be sustained.

In sum, defense counsel will not prevail on Clarence's statement, will prevail on Sam's statement, and will prevail on disallowing use of Homer's deposition testimony.