

ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

On February 15 in a small Alaskan town, witnesses observed a white pickup truck strike a pedestrian and drive away. The pickup was known to belong to Doris Donnelly. The site of the accident was between the town's only bar and Doris's house. A man contacted police and told them that, although he didn't see the accident, he did see Doris drinking that night at the local bar.

The police figured Doris might know something. Doris, however, told police that if her old truck was in an accident on February 15, she was not driving it. She sold the truck on February 10 to someone who had since moved to Utah. Doris also denied drinking in the bar that night. After further investigation, the district attorney charged Doris with Leaving the Scene of an Accident and Driving Under the Influence of alcohol (DUI).

At Doris's trial, the prosecutor intends to call Sue, the secretary for Doris's All Farm insurance agent. Sue will testify that she remembers Doris coming into the office and telling Sue that she wanted to cancel the insurance on her white pickup. Sue does not recall the exact date this occurred, but Doris filled out All Farm's form to cancel the policy at the time they spoke. She knows that she date-stamped the cancellation form pursuant to All Farm procedure. Sue, who is also the records custodian for the office, will testify that the date reflected on the form is February 16. The prosecutor intends to introduce the date-stamped cancellation form.

In her defense, Doris intends to call Pastor Paul to testify that Doris has a reputation in the community for always being a sober person.

1. At trial, Doris raises a hearsay objection to Sue's testimony that Doris told her to cancel the insurance. Doris also objects to the introduction of the form showing the date, arguing that it is hearsay and not relevant because it proves nothing with regard to when Doris actually sold the truck. Discuss the merits of these arguments.
2. The prosecutor objects to Pastor Paul's proposed testimony about Doris's sober reputation. Explain why this testimony will or will not be allowed.
3. Assuming the court allows Pastor Paul's testimony, explain whether the court should allow the prosecution to cross-examine Pastor Paul:
 - (a) about his own conviction for forgery nine years ago, for which he received two years probation;
 - (b) about whether he is aware that Doris was convicted of drunk driving last year.

GRADER'S GUIDE

*** QUESTION NO. 8 ***

SUBJECT: EVIDENCE

I. At trial, Doris raises a hearsay objection to Sue's proposed testimony that Doris told her to cancel the insurance. Doris also objects to the introduction of the form showing the date, arguing that it is hearsay and not relevant because it proves nothing with regard to when Doris actually sold the truck. Discuss the merits of these arguments. (40 Points)

Doris's statements to Sue are statements of a party opponent, and Evidence Rule 801(d)(2) provides that such admissions are admissible as non-hearsay. A statement may be considered the admission of a party-opponent when it "is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity." 801(d)(2). See, e.g., *State v. McDonald*, 872 P.2d 627, 646 (Alaska App. 1994); *Miller v. State*, 778 P.2d 593, 596 (Alaska App. 1989). Here, the prosecution is offering Doris's own statements against Doris. The statements pose no hearsay problem. The court must still weigh their probative value against their prejudicial effect; however, nothing about the proffered testimony appears to be sufficiently prejudicial so as to outweigh its probativeness, and the statements should come in. See Alaska R.Evid. 403.

The notation in the forms concerning the date, however, is hearsay: a statement, other than one made by the declarant while testifying, offered to prove the truth of the matter asserted. Evidence Rule 801(c). But the statement may come in under various exceptions to the rule.

The statement concerning the date could be admissible under Evidence Rule 803(6), the business records exception to the hearsay rule, which states:

"A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

In this case, because Sue recorded it in the regular course of her business as a secretary to an insurance agent, and was qualified to testify as the records custodian, the prosecutor can introduce the form showing the date.

Sue may also testify as to the date stamp under 803(5), the recorded recollection exception to the hearsay rule. The date stamp qualifies as a record “concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.” Note that under this rule, the record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Finally, the evidence is relevant. Evidence Rule 401 defines relevant evidence as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” While the date that Doris cancelled the policy is not determinative of when she sold the pickup, it does tend to make it more probable that she didn’t sell it much earlier than February 16, as people typically cancel insurance immediately after they have sold their vehicle. That in turn makes it more probable that she still owned the vehicle on the night of the accident.

II. The prosecutor objects to Pastor Paul’s proposed testimony. Explain why this testimony will or will not be allowed. (20 points)

As a general rule, evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Evidence Rule 404 (a). However, an exception to this general rule exists under Evidence Rule 404(a)(1), which allows such character evidence where the relevant trait of character is offered by the accused. Here, Doris, as the accused, has offered evidence of her sobriety. Testimony about Doris’s reputation for sobriety in the community would tend to establish a relevant trait of her character, within the meaning of ER 404(a); her reputation for sobriety is very relevant to a charge of DUI. See *Quinto v. City and Borough of Juneau*, 664 P.2d 630 (Alaska App. 1983), *rev’d on other grounds, City and Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984). The testimony should be allowed.

- III. Assuming the court allows Pastor Paul’s testimony, explain whether the court should allow the prosecution to cross-examine Pastor Paul:**
- a. about his own conviction for forgery nine years ago, for which he received two years probation; (20 points)**
 - b. about whether he is aware that Doris was convicted of drunk driving last year. (20 points)**

Under Alaska Rule of Evidence 609, a person may be impeached with a prior conviction if (1) the prior conviction is for a crime involving dishonesty or false statement; (2) not more than five years have elapsed since the conviction; and (3) if the probative value outweighs its prejudicial effect. Evidence Rule 609(a)-(c). Note that the Alaska rule is narrower than the federal rule concerning impeachment by evidence of a conviction in that the federal rule permits impeachment by any crime punishable by death or imprisonment of more than one year.

The prosecution most likely will not be able to use Pastor Paul's forgery conviction to impeach Pastor Paul's credibility. While Alaska courts consider forgery a crime of dishonesty, *see, e.g., Clifton v. State*, 751 P.2d 27 (Alaska 1988), Alaska limits the relevant time period for past convictions to five years (unlike the Federal Rules of Evidence, which allow ten). However, even the general five-year time limit under Alaska Rule 609 may be abrogated pursuant to 609(b), which states that the court *may* allow evidence of a conviction more than five years old if (a) the witness is *not* the accused and (b) the case is a criminal proceeding. Evidence Rule 609(b) ("The court may, however, allow evidence of the conviction of the witness other than the accused in a criminal case after more than five years have elapsed if the court is satisfied that admission in evidence is necessary for a fair determination of the case.") The Alaska Supreme Court has held that a trial court should relax the five-year limitation and admit an old conviction under 609 "only in rare circumstances." *Clifton*, 751 P.2d at 30 (Alaska 1988). Here, the fact that the conviction is substantially older than five years, that there was only one conviction, and that Pastor Paul's testimony (that Doris has a reputation for sobriety) is not particularly important to the case, all make it unlikely that the admission of the forgery conviction is "necessary for a fair determination of the case." (Even if the court made all of the above findings, it would still have to find that its probative value was not outweighed by its prejudicial effect before the court could admit the conviction.)

As to whether the court will allow the prosecutor to question Pastor Paul as to his knowledge of Doris's conviction for DUI, the general rule concerning evidence of other crimes, wrongs, or acts is that it is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. Evidence Rule 404(b)(1). However, by putting Doris's reputation for sobriety directly at issue through Pastor Paul's testimony, Doris opened Pastor Paul up to cross-examination about the basis for his opinion. *See Jansen v. State*, 764 P.2d 308 (Alaska App. 1988) (defense psychiatrist opened door for state to impeach his testimony by reference to defendant's two prior drunk driving convictions after psychiatrist testified on direct that nothing in defendant's background suggested recklessness). The prosecution should be allowed to impeach the

witness's testimony on cross-examination on the subject matter of the direct examination and on matters affecting the credibility of the witness. See Evidence Rule 611(b) (providing in part: "(c)cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness").

However, before allowing the evidence, the court still would need to find that the evidence of the conviction is not outweighed by the danger of unfair prejudice pursuant to Rule 403. Doris, being tried for DUI, has a strong argument that the prejudice that might result from allowing the jury to hear that she committed the identical offense on a prior occasion is too great. *Cf. Ostlund v. State*, 51 P.3d 938 (Alaska App. 2002)(court held that bifurcation of felony DUI trial necessary to avoid unfair prejudice regarding the introduction of prior DUIs in a DUI trial). However, the prosecution also has a strong argument for the conviction to come in: Doris made her prior offense relevant for impeachment purposes when she introduced Pastor Paul's testimony that she was "always a sober person." It necessarily follows that Doris's recent prior instance of driving while under the influence was an indication of non-sober behavior and "highly material to the accuracy and credibility" of Pastor Paul's opinion that Doris was always a sober person. See *Jansen*, 764 P.2d at 311. For these reasons and those noted above, the court would likely allow the prosecutor to question Pastor Paul as to his awareness of Doris's previous conviction for DUI.

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Alaska Bar Examination

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For everything related to Evidence First it must be relevant to the case being heard. That means that it must concern the case. Then material in that it will tend to prove or disprove an item it is admitted for and then hearsay

1. It appears relevant. It is material. Is it hearsay? Hearsay is an out of court statement purporting to prove or disprove the matter to which it is asking to be admitted. Any statement out of court or not under oath is hearsay but then does it come under some type of exception. Here Sue is asked about something Doris did and Actions are not hearsay. The conversation might be hearsay but exception is that this just shows that the truck was insured by this agency not anything about the accident.

Alaska statute states that any regular (day to day) records are admissible under business records exception. Business records exception says that any records normally kept in operation of records are admissible in court. So records come in. As records custodian Sue can testify. She can also testify as to what normal office practices are for recording cancellation and if it is done that way all the time then the date could be inferred by the stamp on the documents. These come in and the jury can make their own determination as to what the date actually was.

2. The prosecutor can object to since this is criminal trial. Character evidence can be testified as to what the normal habits or communities reputation for the defendant. Pastor can talk about her general community reputation but he cannot testify to specific incidents as to her

character. The testimony will probably be allowed for the purpose of character. Again the Pastor cannot state what her condition was that night unless he has direct personal knowledge.

3. If the prosecution wants to impeach the pastor testimony then they can do that by showing past behavior that reflects the pastor's truthfulness. Any hearing on this would be first held outside the jury's presence. The prosecution must be bringing this forward in good faith it can't just be a fishing expedition. Prosecution can usually ask the question but here two problems. First it was nine years ago and while the court only looks back 10 years there is also the problem that it may have been a misdemeanor. While felonies can come in if this was just a misdemeanor meaning that he could have only received a fine or less than one year in jail then it probably won't come in. The test is does the weight of the evidence outweigh the prejudicial consequences of allowing the testimony in.

Pastor Paul testifies and on cross the prosecution can ask about Pastor's forgery conviction by way of impeachment. Prosecution is allowed to in good faith raise questions about the Pastor's character. Forgery deals with his reliability and truthfulness. The defense can say it is too old and not important enough. Prosecution will probably win since it is about this truthfulness.

(B) Again it is judged by whether it is outweighed by the prejudice, wasting court time. This question will be allowed because it goes to how well the Pastor knows Doris. But the prosecutor had to have a good faith basis for asking the question so if Doris was not arrested last year questions will be out.

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Evidence

1) The objection by Doris as to Sue's testimony that Doris told her to cancel the insurance will likely be overruled. Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Normally this statement by Sue (about what Doris told her) would be Hearsay, but there is an exception for party statements or adopted statements of a party when it is against their interest. Here the statement would be against Doris' interest because it could be used as circumstantial evidence that she still owned the truck on Feb. 16.

Doris' objection as to the introduction of the form will also likely be denied. Again -

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the ~~stat~~ firm would be asserted for its truth and it is an out of court statement, but there is a hearsay exception for business records. The prosecutor must lay a valid foundation and show that the date-stamp on the firm was done in the ordinary course of business and that she likely followed the business procedure with this document.

As to Doris's relevancy argument on the document, a piece of evidence is relevant if it tends to ~~make~~ make an issue at trial more or less probable. ~~As a~~, This would make the evidence logically relevant, then there must be no policy reason to excuse the evidence and stifle its relevancy. Here the document makes it more likely that Doris actually

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owned the car at the time. There is a policy against showing insurance information generally, but it would not apply here because the proof of insurance is being used to show ~~the~~ ownership rather than an ability or inability to pay damages. If the judge decides that this evidence is probative and does not constitute unfair prejudice, then ~~it~~ it will be relevant and admitted. Here - it's likely the court will admit the evidence.

2) While character traits can be shown or rebutted in some instances, Doris's sober reputation is not a character trait the court is likely to allow.

If this were a case involving violence, the violent or peaceful nature of a Δ or victim could be inquired

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opm. However, in this case, ~~to~~ Doris is trying to get character evidence in about reputation as a sober person for the impermissible inference that Doris is usually a sober person so she was sober here in this case. That is just as wrong/improper as a Prosecutor bringing in a prior DUI to show that she drove drunk before so we could infer she drove drunk here.

You can't bring in character evidence simply to show a defendant or witness acted in conformity with that characteristic.

3) If Pastor Paul's testimony was allowed,
 a) the court should allow the prosecution to cross-examine Paul about his forgery conviction. Whenever a witness takes the stand, their credibility is at issue.

A previous conviction regarding a crime or dishonesty

(Such as forgery) could be brought in to impeach the credibility of the witness. The crime must have been within 10 years, and here the forgery was 9 years ago, so it can come in.

b) On cross-examination, a witness can be ^{asked} ~~asked~~ about knowledge of specific acts by the ^{of misconduct} defendant, whether they were convictions or not.

If Paul were to testify about Doris having a reputation in the community for always being a sober person, it would be a proper cross exam question to inquire if Paul is aware that Doris was convicted of drunk driving last year. HOWEVER - the court would likely sustain a defense objection to the question on the grounds that

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The drunk driving conviction would be too prejudicial to the jury and outweigh its probative value. Since Doris is now on trial for a DUI.

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(8) (1) Generally, hearsay is an out of court statement made by a declarant to show the truth of the matter asserted. Usually, this type of evidence will not be permitted unless it falls under a specific exception, or a judge generally determines that its probative value outweighs its prejudicial impact. Sue's testimony is hearsay in this case. It is an out of court statement being asserted to prove Doris owned her car at the time of the accident. As such, it is relevant. But, public policy may prohibit its introduction. Generally, proof of insurance is not permitted to prove ~~a~~ a material fact (other than control) because courts ~~wish to encourage~~ don't want to discourage insurance coverage. However, the exclusion may not apply in this case because P wishes to show cancellation, not coverage. The judge must balance

The probativeness of this fact versus public policy.

As hearing, the statement will probably be excluded because it does not fall under any of the exceptions. A statement may be allowed if it is deemed an admission by a party opponent or a statement against interest. The latter is only available if the declarant is unavailable. But, the court could deem this an admission. However, a 403 analysis must still be conducted.

The fact that Sue can not remember the date may make the statement prejudicial. But, Sue may be permitted to refresh her recollection using the form. While it will not be

~~As for the form, this may be included based on the business record exception.~~

admitted into evidence. If this method, Sue's testimony could be admitted if she is able to recall the date & conversation.

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The form is also considered hearsay. However, it may be admitted under the business record exception if it was created under a legal duty in the normal course of business & memory was retained.

(2) Pastor Paul's testimony will be admitted if it is relevant & its probative value outweighs its prejudicial impact under 403. Paul's testimony is character evidence. Generally, it is not permitted to show a D is more likely to commit a crime by acting in conformity w/ her character. However, a defendant is generally allowed to offer evidence of reputation for a good character trait. Again, the judge must determine if it is relevant & whether its probative value

outweighs prejudice. Here, it will probably be admitted.

(3) Once the defense opens the door to character, the P may be able to rebut. Further, the P may be able to impeach the credibility of the character witness. Generally, prior conviction / past crimes based on truth/lying are admissible for impeachment. However, ~~they~~ in Ark, they must have occurred w/in the past 5 yrs. In this case, the conviction was too long removed.

As for Paris' DUI, it may be admitted to impeach ~~the~~ Pastor Paul (challenge his awareness of the trait involved). However, because it is a prior bad act of the defendant being introduced by a witness, it may not be used as character evidence against the D. This may make it difficult to admit even as impeachment based on 403. Since it can

only be used to impeach Pastor Paul, the judge needs to decide whether it will prejudice the D. Because it is a DUI, the same crime, it will be highly prejudicial. A judge may exclude it.

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1.

"Cancel the Insurance"

Hearsay

Hearsay is an out of court statement that is being offered for the truth of the matter asserted. This evidence is inadmissible absent the showing that it falls within one of the firmly rooted exceptions in order to satisfy the Sixth Amendment confrontation clause.

The prosecutor should argue that the statement "cancel the insurance" is not hearsay because it is being offered as a legally operative fact, and not for the truth of the matter insurance. That statement was being offered to show that Doris no longer intended to have the contract in effect.

If this was not a legally operative fact, then the prosecutor should try to offer it as an admission of a party opponent in that Doris admitted that she owned the car. An admission of a party opponent is a statement that the opponent makes that is against their interest. Here, Doris, the party opponent made a statement "cancel the contract" that was against her interest since she was trying to prove that she did not own the car after the accident occurred.

Relevance

The court will also have to weigh whether the statement is relevant and not inadmissible on policy grounds. A statement is relevant if it tends to prove or disprove a material fact. Evidence that a defendant had insurance is usually inadmissible on policy grounds. However, the

prosecutor should point out that they are not offering it for the fact that the defendant had insurance, but rather to prove ownership or control, which is an acceptable means to admit insurance.

The court will likely admit this evidence.

Date Stamped Document

Business Record

A document is also hearsay in that its contents (statements) were created out of court and it therefore cannot be offered for the truth unless one of the exceptions applies. A business record can be applied, if properly authenticated by a custodian of records, that its contents were created in the normal course of business according to the business rules. Here, the prosecutor should argue that there is no problem with reliability and this should be admitted as a business record because Sue was the records custodian for the office and was testifying. Furthermore, she stated that she date-stamped the form pursuant to procedure in the normal course of business. The prosecutor will need to point out that this insurance form was not created for the purposes of litigation, nor at the direction of the attorney of the insurance agency. Therefore, it is reliable because it was created in the normal course of business pursuant to regular office policy.

This business record will likely be admitted.

Relevance

A piece of evidence is relevant if it tends to prove or disprove a material fact at issue. It does not have to be dispositive of the issue. Furthermore, it cannot be prejudicial by confusing the jury, being a collateral matter. The prosecutor should argue that the evidence of the cancellation of the agreement is some evidence regarding ownership or control of the vehicle and is therefore not a collateral matter. Furthermore, the defense attorney can cross examine the witness to prove their point that this was not conclusive evidence of ownership and therefore will not confuse the jury.

This will likely be admitted.

2. Doris's Sober Reputation

Character Evidence

In a criminal trial, a defendant's character cannot be used to prove their propensity to commit the crime. However, relevant character traits can be offered when the defendant "opens the door" to the issue. The defendant may open the door by offering reputation or opinion evidence of a relevant character trait. The prosecution can then cross examine the witness by using specific acts of the defendant.

Here, the defense is attempting to offer testimony of Doris's sober reputation in the community. This is relevant because she has been charged with drunk driving. The defense has properly opened the door by offering evidence of his reputation. However, Pastor Paul must have a proper basis for testifying as a lay witness. He must have personal knowledge of Doris's reputation in the community in order to testify. This is not hard to prove since reputation does

not involve having a personal relationship with the defendant.

There is no evidence of a violation of a privilege absent evidence of a confidential communication between Doris and the Pastor. Furthermore, Doris could waive this privilege.

The prosecution can try to argue that the use of a Pastor is more prejudicial than probative because jurors are more likely to believe a pastor. The court will likely deny this

3.

(a) Conviction of Forgery

The prosecution may impeach a witness's credibility by offering evidence of a conviction of a crime involving dishonesty within 5 years of the trial. The court has the discretion to offer older convictions in the interest of justice, so long as it is not being offered against a testifying defendant. The crime of forgery is an enumerated crime involving dishonesty or false statement.

Here, the prosecution will argue that, while the conviction is more than 5 years old, it should be offered in the interest of justice because it bears on the credibility of the pastor whom the jury might find to be presumptively truthful because of his job.

The court will likely not let this evidence in in the interest of justice because it is 4 years too old. The fact that he was on probation has no bearing since he was not pardoned due to factual innocence or rehabilitation.

(b) Doris's Conviction of Drunk Driving

As noted above, the prosecution can offer evidence of specific acts on cross examination of a witness testifying regarding the defendant's reputation or opinion. Here, impeachment rule of conviction does not apply.

The defense will argue that this is more prejudicial than probative because it bears on the exact same crime that the defendant is being tried for. However, the court will likely find that this is relevant for this purpose and can issue a limiting instruction that it is only to be considered in light of Paul's testimony in order to reduce any prejudice.

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Part 1.

Normally, evidence that a party has insurance is inadmissible on public policy grounds. However, proof of insurance may be admitted to prove ownership. Here Doris is objecting to both Sue's testimony and the cancellation form on both hearsay and relevance grounds. Under ARE 402 irrelevant information will not be admitted into evidence. Relevant evidence is that which makes a material proposition of the case more or less likely. Here Doris' defense is in part that she did not own the truck at the time of the accident. Proof of insurance or when insurance was cancelled is circumstantial evidence of ownership and thus the court would overrule the objection on relevance grounds.

As to hearsay, which is inadmissible out of court statements offered to prove the truth of the matter asserted, Sue's testimony about Doris' statements saying she wanted to cancel her insurance policy is an admission of a party and thus admissible over a hearsay objection.

Further, the cancellation form could qualify as a business record and would thus be admissible upon a hearsay objection. A business record must be one kept in the normal course of business by an employee of the business. Here the cancellation form would qualify as such.

Part 2.

A defendant may present evidence pertaining to their character in a criminal prosecution against them. The character sought to be proved must be relevant to the crime charged. In a

case of DWI, sobriety clearly is relevant. Further, a defendant may prove character by opinion or reputation testimony, but not specific acts. Here Paul's testimony as to Doris' reputation is relevant under 401 and would be admissible form of character evidence under 405.

Part 3.

The prosecution may cross-examine Paul as to matters that relate to his testimony, his credibility and his basis of knowledge. In Alaska, a witness may be impeached by crimes involving false statements or dishonesty. Here forgery would qualify as a crime of false statement or dishonesty. However, unlike the federal rules, the conviction can not be more than five years ago. However, the strict five year requirement is only strictly enforced against testimony against the defendant not a general witness, and thus the court could allow the prosecutor to cross even though the crime was nine years ago.

As to the conviction of Doris for drunk driving, this would be admissible because it would test Paul's knowledge of Doris' reputation, a matter to which he has testified. For that purpose it would be admissible.

In both of these ruling the court would have to make a determination under ARE 403 that the probative value of the evidence was not outweighed by its prejudicial affect, or confusion of the issues or undue delay. Here, Paul's conviction would likely be admissible under 403, but Dori's conviction for drunk driving would be very prejudicial.