

ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

Pam lives in a small town in Alaska. She often rode her mountain bike on a trail near her house. This trail is open to both motorized and non-motorized users, but motorized vehicles such as all-terrain vehicles (ATVs) are prohibited on the trail between May 1st and September 15th. Signs are supposed to be posted at the entrances to the trail notifying potential users of this seasonal prohibition on motorized use.

One day in late August as Pam biked on the trail, she was injured when an ATV driven by Dina suddenly came around a corner of the trail and hit her. Pam sustained a number of injuries that were treated at the emergency room. While investigating Pam's accident, the police found the sign at the location where Dina's ATV had entered the trail lying in the weeds face down off the path. The police were unable to determine when the sign was knocked down.

Pam sued Dina for her injuries, alleging that Dina was negligent in operating her ATV on the trail when the trail was closed to motorized users. Dina denied the allegation, asserting in her answer that she had no notice that the area where she had been driving her ATV was off-limits to such vehicles at that time. Dina also asserted that Pam was contributorily negligent because Pam was listening to loud music on a portable music player while riding her bike that day, preventing her from hearing the ATV approach.

At trial during her case-in-chief, Pam testified that she never heard anything before the ATV hit her, was taken by surprise when the ATV came around the corner, and had no time to get off the trail. Pam admitted to having her portable music player with her that day, but said that it was not working so she was not using it.

Dina cross-examined Pam about Pam's claim that the portable music player was not working the day of the accident. Pam insisted that the portable music player was not working that day. Dina then asked Pam if she had talked to a co-worker named George about the accident. Pam agreed that she worked with George, but said that she had not talked with him about the accident. Dina did not ask Pam any more questions about George.

Pam then called Officer Joe to testify that he had ticketed Dina twice about three years ago in early September for driving her ATV on the same trail where the accident occurred and that the sign at the entrance to the trail was in place both times Dina was ticketed. Dina objected before Officer Joe began his testimony, arguing that Officer Joe's testimony was inadmissible character evidence under Alaska Evidence Rule 404(b)(1). The trial judge agreed and Officer Joe's testimony was not admitted.

During the defense case, Dina testified that when the accident occurred, she had not known she was on a trail that was closed to motorized vehicles at that time and that she ran into Pam accidentally.

Dina's next witness was George, Pam's co-worker. Dina established that George worked with Pam and that, when Pam returned to work, he talked to her about the accident. Over Pam's hearsay objection, the judge ruled that George could testify that Pam had told him that because she had had her music blasting loudly at the time of the accident, she had not been able to hear the noise of the ATV's engine before it came around the corner.

In her rebuttal case, Pam called her husband to testify what she had told him on the way home from the emergency room about whether she had been wearing any earphones when the accident occurred. Dina objected on hearsay grounds and the trial court judge sustained Dina's objection. Pam's husband was therefore prevented from testifying that Pam had told him that, even though she had her personal music player with her, she had not been using it at the time of the accident because the battery was dead.

1. Discuss whether George's testimony about what Pam said to him was properly admitted as:
 - a. a prior inconsistent statement
 - b. an admission.
2. Discuss whether the trial court ruling that prevented Pam from presenting Officer Joe's testimony was correct and explain why or why not. Discuss whether the ruling would be different if the testimony had been offered by Pam during her rebuttal case.
3. Discuss whether the trial judge's ruling that prevented Pam from presenting her husband's testimony was correct and explain why or why not.

GRADER'S GUIDE

***** QUESTION NO. 1 *****

SUBJECT: EVIDENCE

Question 1: Discuss whether George's testimony about what Pam had said to him was properly admitted as: (a) a prior inconsistent statement; (b) an admission. [30 points]

Generally speaking, when a party attempts to introduce evidence of an out-of-court statement for the truth of the matter asserted in the statement, the out-of-court statement is hearsay, see Alaska R. Evid. 801(c). But if the statement is either considered non-hearsay or falls within an exception to the hearsay rule, see Alaska R.Evid. 801 (non-hearsay) and 803-804 (hearsay exceptions), it is admissible. The issue presented is whether George's testimony falls within either of the two nonhearsay exceptions. Prior out-of-court statements may become admissible as non-hearsay under two circumstances, either as a prior statement or as an admission of party-opponent, see Alaska R. Evid. 801(d)(1)(A) and(d) (2).

Prior inconsistent statement [15 points]

A prior out-of-court statement inconsistent with the witness's in-court testimony is admissible as non-hearsay, but only if the party first complies with certain procedural requirements. The procedural requirements of ARE 801(d)(1)(A) are that the party seeking to introduce the statement first ask the witness who is the maker of the statement before the witness has been excused from testifying and while the witness is testifying about the statement and give the witness an opportunity to explain or deny the statement. ARE 801(d)(1)(A)(i)-(ii).

Here Dina did not comply with these procedural requirements. Dina was attempting to introduce an out-of-court statement made by Pam to George through George's testimony. Thus, the statement attributed to Pam is hearsay (a statement made other than by the witness while testifying, see Alaska R. Evid. 801(a), (b), and (c)). The out-of-court statement attributed to Pam by George would be inconsistent with Pam's in-court testimony. But in order to have George's testimony about what Pam told him properly admitted as a prior inconsistent statement of Pam's under Alaska R. Evid. 801(d)(1)(A) (and therefore non-hearsay), Dina was first required to ask Pam during Dina's examination of Pam about whether she made the statement. More specifically, Dina was required by Evidence Rule 801(d)(1)(A) to give Pam, while she was testifying, an opportunity to explain or deny making the statement. Since Dina did not do so, the statement cannot be considered non-hearsay under Evidence Rule 801(d)(1)(A). See *Nitz v. State*, 720 P.2d 55 (Alaska App. 1986).

Thus, the trial judge's ruling allowing the statement to be admitted as a prior inconsistent statement would be incorrect.

Admission of a party-opponent [15 points]

The second subsection of ARE 801(d) allows as non-hearsay any admission by a party-opponent. See Alaska R. Evid. 801(d)(2)(A). Under this rule, an out-of-court statement made by a party to a lawsuit can be offered against that party. See *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (Alaska 1999). Since the statement that Dina was seeking to introduce is a statement that George said was made by Pam and since she is the plaintiff in the lawsuit, the statement could be admitted under Evidence Rule 801(d)(2)(A). This rule does not have the same procedural requirements as required for prior inconsistent statements. Therefore Dina would not have had to first confront Pam with the statement and give her an opportunity to explain or deny the statement. In fact, Dina could introduce Pam's out-of-court statement through George's testimony under this subsection of the rule even if Pam did not testify. Thus, the trial court's ruling allowing the statement to be admitted as an admission of a party-opponent would be correct.

Question 2: Discuss whether the trial court ruling that prevented Pam from presenting Officer Joe's testimony was correct and explain why or why not. Discuss whether the ruling would be different if the testimony had been offered by Pam during her rebuttal case. [35 points]

The trial judge ruled that evidence that Dina had previously been ticketed for improper use of the trail was not admissible as it was improper character evidence (or propensity evidence), i.e., being used by Pam to show that Dina had a propensity to engage in improper behavior. Bad act evidence is generally not permitted to be introduced at a trial if the purpose of doing so is to suggest that the person has a propensity for acting in the same wrongful manner on the day at issue as she had in the past. See Alaska R. Evid. 404(b)(1); *Wickwire v. Arctic Circle Air Services*, 722 P.2d 930 (Alaska 1986); *Calapp v. State*, 959 P.2d 385 (Alaska App. 1998). ARE 404(b)(1) prohibits a party from using evidence of other "crimes, wrongs, or acts" if the sole purpose for offering the evidence "is to prove the character of the person in order to show that the person acted in conformity therewith."

But the evidence could be admissible for some other purpose. Alaska R. Evid. 404(b)(1) allows bad act evidence to be admitted if it is relevant to any of the following issues: motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Disputed issues in the case included whether the situation was an unavoidable accident and whether Dina

was mistakenly on a trail not knowing that motorized vehicles were prohibited on it at that time of year. Thus, Pam could argue that the prior incidents were relevant to show that Dina was familiar with the fact that this trail was only available to motorized vehicles in certain months which did not include August and that Dina was familiar with the rule about prohibited use such that Dina did not need to have the notice provided by the fallen sign. Pam could argue that the evidence was relevant to the issues of mistake or accident or knowledge. Thus, in light of these arguments and the fact that a core issue in the case is whether the incident that occurred was a result of a mistake or accident or without Dina's knowledge of the prohibition regarding motorized vehicles on the trail, the trial judge's ruling excluding the evidence would likely be incorrect.

Pam had an even stronger argument that the evidence was admissible in her rebuttal case as Dina's testimony made it even clearer that the issue of mistake, accident and lack of knowledge was one of the central issues in the case. See *Morrow v. State*, 80 P.3d 262 (Alaska App. 2003)(evidence that the defendant missed other court dates and had absconded out of state was relevant to the issue created by his claim when he testified that he had missed the court hearing in question because he was mistaken about when he was supposed to go to court and therefore properly admitted in the prosecution's rebuttal case).

There could be discussion that the trial court's ruling excluding the evidence was correct because, even if the evidence was relevant under Evidence Rule 404(b)(1) as to mistake or accident or knowledge, the evidence was more prejudicial than probative. See Alaska Rule 403(even relevant evidence can be excluded if its probative value is outweighed by the danger of unfair prejudice). However, given that Dina was not charged criminally, but only received a ticket, and given the probative strength of the evidence as relevant to contested issues such as mistake, accident and knowledge, the trial court judge should rule that the evidence is admissible as the probative value outweighs any prejudicial effect.

Question 3: Discuss whether the trial judge's ruling that prevented Pam from presenting her husband's testimony was correct and explain why or why not. [35 points]

Although testimony by Pam's husband about an out-of-court statement made by Pam would normally be hearsay, see Alaska R. Evid. 801(c), the testimony could have been admissible under two different legal theories. First, under Alaska R. Evid. 801(d)(1)(B), an out-of-court statement is considered non-hearsay if it is a statement that is consistent with the testimony of the declarant (Pam) and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper motive. Alaska appellate courts

also read into the rule a requirement that the statement was made before improper influence or motive arose as this requirement is found in the comparable federal rule. See *Tome v. United States*, 513 U.S. 150 (1995); *Nitz v. State*, 720 P.2d 55, 64 (Alaska App. 1986). But the decision as to when the improper influence or motive arose is made on a case-by-case basis by the trial judge. *Id.*

Here Dina's cross-examination of Pam created at the least an implied charge of fabrication as to the issue of whether Pam had been listening to her portable music player while cycling. But the issue remains as to when Pam first had a motive to make such a favorable statement, which must be decided on a case-by-case basis. *Id.* Pam could argue that her motive to fabricate a statement about not using the personal music player only arose after she filed the lawsuit or even only after Dina included that claim in her answer. Thus Pam could argue that her statement to her husband occurred at a time when she had no motive to fabricate about the personal music player. But Dina could argue that Pam's motive to fabricate came into existence as soon as the accident happened.

Thus, the judge could rule either way as to whether Pam could properly introduce her earlier statement which was consistent with her in-court testimony to rebut this claim under Evidence Rule 801(d)(1)(B) depending on when the judge determined that Pam first had a motive to fabricate. See *Nitz v. State*, 720 P.2d 55 (Alaska App. 1986).

But even if Dina were to argue that Pam's motive to lie about whether she was wearing the headphones arose at the moment the accident happened, Pam could argue that her earlier statement could still be admitted to rehabilitate her credibility since Pam's credibility was attacked by Dina during cross-examination. See Alaska R. Evid. 607; Evidence Rule 801(d)(1)(B); *Nitz v. State*, 720 P.2d 55 (Alaska App. 1986); *Jonas v. State*, 773 P.2d 960 (Alaska App. 1989). ARE 607(b) allows a party to present evidence to support the credibility of a witness "to meet an attack on the witness' credibility." And Alaska courts have allowed such evidence under ARE 801(d)(1)(B), but with a limitation on how it is to be used by a jury.

There is a difference as to how the jury must treat the evidence depending on whether it is admitted as non-hearsay evidence under Evidence Rule 801(d)(1)(B) or as evidence to rehabilitate Pam's credibility. See *Nitz*, 720 P.2d at 64. If the evidence is admitted under 801(d)(1)(B) as a prior consistent statement that is not considered hearsay, then the jury may consider the evidence as substantive evidence, i.e., may consider it for the truth of the matter asserted. See *Sheldon v. State*, 796 P.2d 831 (Alaska App. 1990). But if the evidence is admitted to rehabilitate Pam's credibility, then the evidence cannot be considered by the jury as a substantive evidence, but only as it is

relevant to the credibility of Pam's in-court testimony. *See Jonas v. State*, 733 P.2d 960 (Alaska App. 1989).

Thus, the trial judge likely erred in completely excluding the prior consistent statement, but it is less clear whether the statement should come in as substantive evidence or only as evidence relevant to Pam's credibility.

Pam would not be able to argue successfully that the statement fell within any hearsay exception such as "present sense impression," or "excited utterance," see ARE 803, as the statement was not made at the time of or immediately after the event and temporal proximity is a requirement for these exceptions to apply. *See e.g., Balentine v. State*, 707 P.2d 922 (Alaska App. 1985); *Brandon v. State*, 778 P.2d 221 (Alaska App. 1989). Thus, the trial court would be correct in rejecting this arguments.

001003

FOR OFFICE USE ONLY

Benchmark
1

Alaska Bar Examination

**JULY
2005**

This Book is for your answer to

*Question **No. 1** Only*

Be Sure to Write in the Proper Book

1/9

Discussion of ER 401, 402, 403 at end of essay.
1

When is a defendant's prior inconsistent statement not hearsay, and, therefore, admissible?

Hearsay is an out of court statement made by someone other than the declarant testifying at trial, and offered for the truth of the matter asserted.

1A) A prior inconsistent statement allegedly made by defendant, under oath, and in contradiction of defendant's direct trial testimony is not hearsay. Similarly, a prior

Judicial discretion exists for the admission of prior inconsistent statements not made under oath, but w/ sufficient indicia of reliability at the time they were made based on all the circumstances.

Similarly, a defendant's prior consistent statement is also admissible as a rebuttal to prosecution.

Here, Pam has made an in-court statement, under oath, that she did not discuss the

accident with George. Dina did not lay a proper foundation to, nor, allege a prior inconsistent statement. She should have elicited further testimony from Pam. Had she done so, she may have achieved the necessary foundation. Admissibility as a prior inconsistent statement probably fails. However, if it succeeds, Pam

should, however, raise a hearsay objection and preserve it on the record or her objection will be deemed waived and not available for review on appeal.

1B When is evidence admissible as an admission by a party opponent?

Admissions by party opponents are not hearsay. An admission is made affirmatively, by adoption, or by omission by a party to an action (in some cases, through an agent) and against the interest of the party making the admission. "Admission" is a term of art and the plain meaning of admission is "statement". A litigant may not offer, as evidence, his own prior admission to advance his interest at trial.

Here, Georges testimony could properly be admitted as an admission to a party opponent as opponent would extend to witnesses called by and in favor of the opposing party.

2 When are evidence of prior bad or criminal acts admissible to show conformity therewith on a particular occasion?

- ① Only in a criminal proceeding, when the specific acts are so germane or intertwined as to show motive, intent, pattern, or other integral variable (judicial discretion),
- ② when

brought into issue, first, by the party against whom the prior acts are being raised, ~~admission~~ or ③ as part of opposing party's rebuttal when evidence of "good character" has been raised and the prior acts are in contradiction. When character evidence is deemed admissible, generally, it may be offered only through opinion and reputation testimony.

Under Alaska rules, evidence of prior criminal acts (assuming traffic tickets), may be argued

as such) would not be admissible unless the convictions were not set aside or pardoned, of the same or similar criminal act and not over 5 years old.

Officer Jois testimony was likely properly excluded, but may have been admissible under other exceptions such as "habit evidence."

3. Admissibility

when is a litigant's out of court statement / admission to a third party, not hearsay, and deemed admissible?

Only when such a statement is a prior consistent or non-

sistent statement, made under oath or with other sufficient indicia of reliability or other narrow exception or when an admission by a party opponent, generally.

However, judges hold great discretion on evidence ~~determinations~~ admissibility and there are threshold requirements:

- 1) To be admissible, evidence must be relevant
- 2) Evidence must tend to show some material fact more likely than not.
- 3) the probative value of evidence must be balanced against

The danger of unfair prejudice as well as confusion of the jury/trier of fact, and judicial economy. Admissibility also turns on the overarching issues (judge's discretion) of fair and equitable.

001002

FOR OFFICE USE ONLY

**Benchmark
2**

Alaska Bar Examination

**JULY
2005**

This Book is for your answer to

*Question **No. 1** Only*

Be Sure to Write in the Proper Book

1/4

ISSUE # 1: Was George's testimony about what Pam said to him properly admitted as: a) a prior inconsistent statement
b) an admission

Generally, evidence must be relevant to be admissible. Here, in a case involving negligence, evidence establishing or relating the participants' standard of care is relevant. Specifically, whether or not Pam was loudly listening to music at the time of the accident is relevant to establish if she ~~was~~ was behaving as a reasonable person under the circumstances.

Hearsay is an out-of-court statement offered in court for the truth of the matter asserted. Generally, hearsay is inadmissible as evidence. The court recognizes several exceptions to this general prohibition against hearsay.

Prior inconsistent statements are admissible on cross examination to provide evidence of bias, bad character for truth or veracity or improper influence and motive.

George's statement that Pam told him that because she had ~~been~~ had her music blasting loudly at the time of the accident and had been unable to hear is evidence of a ~~of~~ statement made by Pam inconsistent with her testimony at trial. This hearsay evidence, however, was not offered on cross-examination of Pam. In fact, when Dina asked Pam if Pam talked to George about the accident, Pam agreed that she worked with him but said that she had not talked about the accident. Dina is required by evidentiary rules to accept this answer.

~~George's testimony states that it charges of a person~~

So, while George's testimony may be an exception to the hearsay prohibition, ~~as~~ it is improperly admitted as it was not offered on cross examination.

There also exists a hearsay exception for statements made against the declarant's interest. As with any evidence, the judge must still evaluate the probative value of the testimony balanced against the likelihood of undue prejudice. ~~George's~~

George's ~~to~~ testimony relates a statement made ~~against~~ by Pam against her own interests, Admitting that she was not acting reasonably and contributed to the ~~acc~~ accident. The judge will likely admit this evidence as ~~George is available~~ Pam may rebut the charges and challenge George on cross examination. George's testimony could properly be admitted as an admission of a party opponent against her interests.

Issue #2: discuss whether the trial court ruling that prevented Pam from presenting Officer Joe's testimony was correct, and would it have been different if offered during her rebuttal.

Again, the first consideration of evidentiary ~~and~~ analysis is ~~where~~ whether the admitted evidence is relevant. ~~Test~~ Testimony concerning what Dina knew is relevant to establishing a reasonable duty of care and whether she met that standard.

Evidence of prior acts may not be offered as circumstantial evidence of character in conformity therewith. ~~Test~~

Testimony by Officer Joe that he had ticketed Dina twice about three years ago in September cannot be offered to circumstantially prove that if she were recklessly or illegally driving then that she must have been doing so in the present case. On this basis, the testimony is properly excluded.

However, hearsay ^{evidence} ~~testimony~~ may be offered if it provides circumstantial evidence of the defendant's motive, intent, Absence of Mistake, etc. In this case, Dina testified that she did not know about the regulations concerning the trail. (Whether a mistake of law is a defense is outside of the call of this question). Officer Joe's testimony might meet the hearsay exception as circumstantial evidence of an absence of mistake on Dina's part. From this position, then, Officer ~~is~~ Joe's testimony was improperly ~~withheld~~ withheld.

The ruling ^{could} ~~should~~ have been different if Officer Joe's testimony had been offered by Pam during rebuttal. Prior inconsistent statements may be offered to show evidence of bias, incompetency or improper influence or motive. Pam may have introduced Officer ~~is~~ Joe's testimony to impeach Dina's testimony that she had no notice that the area was closed to ATVs. In this situation, Officer Joe's testimony should be ~~admit~~ admissible.

4/4

ISSUE #3: was the trial judge's ruling that prevented Pam from presenting her husband's testimony correct?

Again, evidence must be relevant to be considered. Whether or not Pam was listening to loud music at the time of the accident is relevant.

A hearsay exception exists for an excited utterance. An excited utterance is one made by declarant concerning a startling ^{immediate} event or occurrence while the declarant is still under the ~~stress~~ stress of the event or occurrence.

If the court finds/could find that Pam's statement was an excited utterance, it should admit Pam's husband's testimony. Pam's statement concerned the circumstances of her accident, certainly a startling event as it landed her in the emergency room. The ~~at~~ call came to her husband while Pam was on the way home from the emergency room. Whether this is sufficiently "immediate" to the stress is an important consideration. It seems likely that Pam's statement was immediately related to the event, and therefore ~~her~~ her husband's testimony relating the call should have been admissible under the excited utterance exception.

1)

402

Relevant evidence is presumed admissible.

Evidence is relevant if it tends to prove or disprove any material fact.

403

Relevant evidence can be excluded if the judge finds that its probative value is outweighed by its prejudicial value, waste of time, or that it will confuse the jury. All evidence is subject to the 403 balancing test

Before evidence of character, impeachment etc is admitted, the party offering it must first make an offer of proof before the judge, out of the presence of the jury and get a ruling on relevancy/admissibility/ prejudice. Once the judge says it is admissible, they can offer it in front of the jury.

Hearsay is any out of court statement offered in court to prove the truth of the matter asserted.

Hearsay is not admissible unless there is an exception.

1. a. Prior Inconsistent Statement

Under Ak Rules Evid 801 A prior inconsistent statement is not hearsay. Alaska differs from the FRE in that the prior inconsistent statement did not have to be given under oath. Prior Inconsistent Statements are admissible as substantive evidence, to prove the truth of the matter asserted, and can be proven extrinsically. They can be used to impeach so long as the Witness is given an opportunity to explain the prior statement, usually BEFORE but the judge may allow the

opportunity AFTER.

Here, George's testimony is extrinsic evidence, being used to impeach Pam's testimony. Pam denied talking to George, so D can call George to testify they did talk, thereby impeaching P. The jury can consider George's statement it for its truth. The only question is whether Pam had a chance to explain the prior statement to George. It is not required that Pam be given the chance BEFORE George testified, but usually that is proper. In any event, D can argue that she did give P a chance to explain or deny any prior statement, P asked D if she had talked with George about the accident and P denied it by saying no. It should not be admitted as character evidence to show P's untruthfulness.

Even though George has knowledge of relevant information because it pertains to the injury and it is unlikely that the testimony is more prejudicial than probative it is still subject to rule 403 balancing test and is up to the judge to decide if it is admissible.

1. b. Admission Against Party Opponent

Under Ak Rules Evid 803 an admission by a party opponent is an exception to the hearsay rule. Any statement is considered an admission, it does not have to be related to guilt or liability. It does not have to be agasint one's interest. An admission can be made directly or by adoption, vicarious (employer/employee) or made by co-conspirator. Admissions can be proved extrinsically.

Here, P's prior statement to George can be considered an admission. It does not matter that at the time she made it it was not agasint any penal or financial interest. George's testimony is extrinsic evidence used to impeach P's testimony earlier. It should not be admitted as character evidence to show P's untruthfulness. This is relevant evidence but can be excluded if the judge

finds that its probative value is outweighed by its prejudicial value, waste of time, or that it will confuse the jury. All evidence is subject to the 403 balancing test

2. Prior Acts:

Under Ak Rules Evid a prior bad act cannot be admitted as character evidence in a civil trial. Prior convictions for any crime of dishonesty can be used to show character in criminal trials. It may be admitted if it can be shown to relate to anything but the propensity of the person to act in conformity therewith such as motive, intent, knowledge, opportunity, absence of mistake, state of mind, common plan or scheme etc. The list is not exclusive, if the evidence can be shown to be offered for any reason other than propensity it can be admitted. Prior bad acts cannot be proved extrinsically, but on cross examination can be inquired into when relevant but not to show propensity. If the W denies the prior act, you have to leave it alone, cannot call another W or otherwise prove by extrinsic means.

Here, the trial court's ruling barring Officer Joe's testimony may have been correct but it also may not have, it depends on what it was being offered to prove and then subject to 403 balancing. P cannot use Joe's testimony to show propensity or likelihood that because D acted a certain way in the past, she did so again on this occasion. If P wants to use bad acts, she has to first make an offer of proof before the judge, out of the presence of the jury and get a ruling on relevancy/admissibility/ prejudice because it is highly prejudicial as the jury may think that because D had tickets before she was doing the same bad behavior this time. P should offer the prior act as something other than propensity, like knowledge that the sign was there before, that she was familiar with the trail route and so knew or should have known of the rules, or perhaps absence of mistake. Even so, P will have to wait for cross examination and then can only ask D about it, cannot prove by calling Officer Joe.

Even though this evidence is relevant, it can be excluded if the judge finds that its probative value is outweighed by its prejudicial value, waste of time, or that it will confuse the jury. All evidence is subject to the 403 balancing test

The ruling may have been different if P had found a valid reason, other than propensity to offer it. She also could have waited until rebuttal and asked D about it. P still cannot use Officer Joe to get the evidence in because it is extrinsic and bad acts cannot be proven extrinsically.

3.

The evidence offered by P's husband is relevant, and therefore presumed admissible but subject to 403 balancing probative/prejudice.

It is likely that the trial court was correct in not admitting this evidence because it is hearsay not covered by any exception. Hearsay is out of court statement offered in court to prove truth of the matter asserted.

P's statement was made in the car, on the way home, and is presumably being offered to prove the truth, that the music player wasn't working.

Excited Utterance

Depending on the timing and how P was feeling, it may be admissible as an excited utterance.

Excited Utterance must relate to the act, be made while under stress/excitement of the event.

No set time but usually within a half hour. Depending on how long at hospital it may be she was still stressed out and made it while talking to her husband.

Even though not likely to succeed, P should have offered the testimony to show state of mind or knowledge or offer it under the catch all rule so long as she can show indicia of reliability and no other better evidence. At the time P made the statement to H there was no motive for her to lie, her statement is trustworthy.

(Question 1 continued)

001069

FOR OFFICE USE ONLY

Benchmark
4

Alaska Bar Examination

**JULY
2005**

This Book is for your answer to

*Question **No. 1** Only*

Be Sure to Write in the Proper Book

1)

QUESTION 1:

Issue: Was George's testimony properly admitted as a prior inconsistent statement?

Evidence is generally admissible when it tends to make an issue more or less probable. However, there are some restrictions on the admission of relevant evidence, including a restriction on the admissibility of hearsay evidence. Hearsay is an out of court statement introduced for the truth of the matter asserted. Hearsay is generally inadmissible, however, there are several exceptions to the hearsay rule that make otherwise inadmissible evidence admissible. Additionally, there are a few categories of statements that are exempted from the hearsay rule and are considered non-hearsay. Finally, some statements that would be hearsay if admitted for their truth, are admissible when introduced for another purpose.

In Alaska, before contested evidence is admitted, even if it is otherwise admissible, the judge must make use of a balancing test and determine whether the probative value of the evidence is outweighed by the risk of prejudice or harm. This is different than the federal approach which requires that the probative value of evidence be substantially outweighed by the risk of harm or prejudice. The balancing test can render inadmissible otherwise properly admissible evidence and should always be considered by the judge.

In this case, the contested testimony is that of George, relating that Pam told him that she could not hear the approach of the ATV because her music was playing too loudly at the time of the accident. This statement, if admitted for its truth, is clearly hearsay. If this statement is introduced as evidence that Pam was listening to loud music at the time of the evidence, the only way it can be admitted is if it falls within one of the hearsay exceptions or it is introduced for another purpose.

However, if the statement is meant to be a prior inconsistent statement introduced to impeach Pam, then it is not hearsay. Evidence that is otherwise inadmissible hearsay, can be admitted to impeach a witness. One way of impeaching a witness is through the introduction of a prior inconsistent statement. The inconsistent statement is not evidence that Pam's music was playing loudly at the time of the accident, only that the jury could find Pam to be lying because she has made contradicting statements. Generally, before an inconsistent statement can be made, the person seeking the introduction of the evidence must give the speaker an opportunity to conform their testimony to the inconsistent statement. Here, Dina asked Pam if she spoke to George about the accident, and Pam denied it, but no specific mention was made about the inconsistent statement. Pam could argue that the proper foundation was not laid before the testimony was admitted. However, the rule states only that the speaker get a chance, it makes no mention of when that chance must be given. If it is possible that Pam could be called back to the stand before the end of the case, then there was no violation made for failure to lay a proper foundation, and the testimony was properly admitted.

Issue: Was George's testimony properly admitted as an admission?

There is a hearsay exception for an admission of a party opponent. The admission must be made by a party to an action, and must be against penal or fiduciary interests or must subject the speaker to tort liability or affect the speaker's interest in a tort proceeding. In this case, the statement - that she was listening to loud music at the time of the accident and so could not hear the approach of the ATV - does have some impact on her fiduciary interests, as well as an impact on her interests in a tort case. Alaska is a pure contributory negligence state. This means that a plaintiff's recovery is limited to the amount of damages that they are not negligent for. If the court finds that listening to loud music made Pam contributorily negligent, then she would not be able to recover her full amount of damages, she could only the

recover the amount that Dina was negligent for. This may have a significant impact on Pam's recovery depending on the allocation of negligence in the case. This testimony was properly admitted under the admission of a party opponent exception to hearsay.

Issue: Was the trial court's ruling preventing Officer Joe's testimony correct?

Officer Joe intended to testify that he had given Dina a ticket three years ago (in early September) for driving her ATV on the same trail as the accident, and that a sign warning of the date restrictions for ATV use on the trail was at the entrance of the trail at the time. Dina objected to his testimony arguing that it was improper character evidence and so inadmissible. The trial court agreed with Dina and Officer Joe was not permitted to testify. Generally, character evidence can only be admitted by the plaintiff when the defendant places his/her character at issue. Once the defendant places his/her character at issue, then the plaintiff can introduce reputation or opinion evidence to contradict that character evidence offered by the defendant. However, character evidence is not admissible when it is offered to show that a party acted in conformity with past acts. If that is what the evidence is introduced for, then the ruling preventing Officer Joe from testifying was correct. Additionally specific prior bad acts are generally inadmissible as character evidence unless they meet some narrow exceptions, none of which apply in this case.

However, this evidence may be admissible if it is introduced for another purpose. In this case, Pam could argue that Officer Joe's testimony was intended to be admitted to show knowledge on the part of the defendant - that Dina knew that ATV's were prohibited from using the trails at that particular time. This evidence shows both that Dina had seen the sign explaining the restrictions, and that she received a ticket for riding her ATV on the trails at a prohibited time - she was well aware of the prohibition. If this is the purpose for Officer Joe's testimony, rather than as character evidence. It could be admissible and the court's ruling may

have been incorrect. Before the judge can admit this testimony, he must apply a balancing test to be sure that the probative value of the evidence is not outweighed by the risk of prejudice or harm to the defendant. In this case, it seems that the evidence is particularly probative and very important to Pam's case, and that while it is prejudicial to the defendant, that risk potentially does not outweigh the probative evidence.

Issue: Would the ruling as to the admissibility of Officer Joe's testimony been different had the testimony been offered during Pam's rebuttal case?

The ruling preventing Officer Joe from testifying may have been different if it had been offered by Pam's rebuttal case. At the time Pam attempted to introduce Officer Joe's testimony, there had been no mention in the trial that Dina was unaware of the restrictions of ATV use on the trail. Because Dina had not asserted yet in the trial that she didn't have knowledge of the restriction, the judge may have decided that the risk of prejudice because of Officer Joe's testimony outweighed the probative value. However, after Dina herself testified, the issue of her knowledge became even more important to the case. At that time the probative value may be outweighed the risk of prejudice and the testimony would be more properly admitted.

Issue: Was the trial judge's ruling preventing Pam's husband's testimony correct?

Pam intended to introduce the testimony of her husband relaying a statement from Pam that she was not listening to her music at the time of the accident because the batteries in her personal music player were dead. Dina objected to this testimony on the grounds of hearsay and the judge sustained the objection and Pam's husband was not permitted to testify. This statement is an out of court statement, and it was most likely admitted for its truth - to prove that she was not listening to music at the time of the accident. It does not appear that the statement falls into any hearsay exceptions, so the only way this testimony could have been

properly admitted is if it was intended to be introduced for a purpose other than its truth. The facts do not appear to demonstrate that there was any other purpose for the testimony, so it is likely that the judge's ruling in this instance was correct.

001033

FOR OFFICE USE ONLY

Benchmark

5

Alaska Bar Examination

**JULY
2005**

This Book is for your answer to

Question **No. 1** *Only*

Be Sure to Write in the Proper Book

1. George's testimony about Pam

a. Prior inconsistent statement

A prior inconsistent statement can sometimes be admitted as being exempt from the definition of hearsay in ARE 801, and sometimes as impeachment evidence. Here, the court overruled Pam's hearsay objection.

Hearsay is any statement other than one made by the declarant while testifying at ~~the~~ ^{the} trial or hearing, offered in evidence to prove the truth of the matter asserted. ~~Evide 80~~ ARE 801 also provides that

A ^{prior} statement is not hearsay if it is inconsistent with the declarant's testimony at trial, but the inconsistent statement will be excluded unless the declarant had an opportunity to deny or explain the inconsistency while testifying, or has not been dismissed from giving

further testimony in the case. Here, although Dina cross-examined Pam

about ~~the~~ talking to George, Dina never gave her an opportunity

to explain or deny making the statement. Additionally, Pam's case is ~~the~~ ^{the} chief

has finished. Pam may not have another opportunity to testify, and so the statement probably is not admissible under ARE 801.

Yes will the statement be admissible as impeachment evidence.
~~The statement might be admissible as impeachment evidence, though.~~

Prior inconsistent statements, as well as evidence of bias or interest of a witness, are admissible for impeachment purposes, but before extrinsic evidence of the prior inconsistent statement will be admitted, the witness must have an opportunity. Attorney seeking to admit the statement must lay the foundation by giving the witness an opportunity to explain or deny the statement. Although unintentional failure to lay the foundation, or intentional failure with good cause, may permit the attorney to recall the witness as long as the witness has not been excused from giving further testimony, there is no indication of whether prior Dora's failure to lay the foundation by confronting Pam about her statement to Geese. This is probably not admissible as impeachment evidence either.

b. Admissibility

A statement is not hearsay if the statement is offered AGAINST A PARTY and the party AGAINST whom it is offered made the statement in AN individual OR representative capacity. Here George testified that Pam made the statement to him. The statement is one made in an individual capacity. ~~It~~ The ruling probably was correct this sound.

herself

2. Officer Joe's testimony

~~ARE 404(b)(1) provides that evidence of other crimes, wrongs or acts~~

here the question is whether the judge properly barred the officer Joe's testimony based on ARE 404(b)(2). ARE 404(b)(1) provides that evidence of other crimes, wrongs or acts is not admissible to prove action in conformity therewith, but it may be admissible to prove other purposes, such as intent, motive, scheme, lack of absence of mistake or accident, opportunity, and here, Pam ~~has a~~ should ^{have} alleged

that she was offering the evidence to prove that DINA had notice that of the sign's prohibition on ATVs. Officer Joe would have testified that the sign had been in place when time DINA had been riding there. This given the evidence a non-character purpose for admission. ~~The judge probably erred on this ruling.~~

~~If Pam had offered this evidence~~

However, ARE 405 provides that any ~~and~~ evidence ~~is~~ admissible for any purpose under ARE 404 must be in the form of opinion or reputation, except that inquiry into specific instances of ~~error~~ conduct is allowed on cross-exam. So, although the judge probably erred by barring it under 404(C)(1), the evidence may still have not been allowed under 405.

If Pam had offered this evidence in rebuttal, she could have tried to set it in AS evidence of a prior conviction of a crime. However, to be admissible then, the ~~evidence~~ ^{crime} was to be one of involving dishonesty or false statement, and

speeding tickets seem not to be that.

3. Husband's Testimony

Here, Pam should have challenged the trial judge's ruling on the grounds that it was a prior consistent statement. A statement is not hearsay if it is a prior consistent statement offered to rebut a charge of recent fabrication or improper motive or undue influence. Pam stated the statement is consistent with Pam's earlier statement that she had her music player with her, but it did not work. George's testimony that Pam had not been able to hear because of the music blasting implies that Pam fabricated her earlier statement. The judge probably should have permitted the husband's testimony.