ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

In the summer of 2006, Drew was speeding across Big Lake in his motor boat with his friend Karl as a passenger. Pat was paddling a kayak along the shore. As Drew neared the shore, he saw Pat but did not slow down. Drew intended to miss Pat and only scare him, but he hit the front of the kayak instead. As a result of the collision, Pat capsized and suffered a back injury. Karl fell to the bottom of the boat and broke his nose. Wanda was on shore and saw the incident. Wanda saw Karl fall and heard him yell at Drew, "Man, you were going way too fast!"

A month after the accident Drew and Karl were telling their friend Jack what happened. Jack, who also knew Pat, said to Drew "Wow, you were driving too fast!" Drew grinned and nodded in response.

Pat sued Drew claiming his negligence caused the damages resulting from the accident. The case proceeded to a jury trial.

1. Pat's attorney called Wanda as a witness and asked her what she heard Karl say. Drew's attorney objected. Discuss any theories supporting the admissibility of Wanda's testimony about Karl's statement.

2. Pat's attorney called Jack as a witness and asked him what he said to Drew after hearing about the accident and what Drew's response was. Drew's attorney objected. Should the court allow Jack's testimony? Explain.

3. Drew's attorney called Karl as a witness. On cross examination, Pat's attorney asked Karl if Drew paid Karl's medical bills for his broken nose. Drew's attorney objected. Should the court allow Karl's testimony? Explain.

4. After Drew testified, Pat's attorney asked the court for permission to impeach Drew with evidence of his 2004 conviction for robbery. Is the conviction admissible? Explain.

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: EVIDENCE

1. Karl's statement heard by Wanda-Admissibility Theories (25 points)

A. Hearsay Exceptions (general).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." AK. R. Evid. 801(c).

Karl's statement, if offered to prove the truth of the matter asserted - that Drew was going too fast - is hearsay. As such, the statement would only be admissible if it falls within a hearsay exception. The examinee should note that if the court finds the statement is not offered to prove the matter asserted, but is offered for some other relevant purpose, then it would not be hearsay and would be admissible. In this case, it would appear that the statement is probably being offered to prove the matter asserted.

B. Present Sense Impression – Rule 803(1).

A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." AK. R. Evid. 803(1).

The underlying theory of the present sense impression is that the substantial contemporaneity of the event and statement negate the likelihood of deliberate or conscious misrepresentation. *See* Commentary to Evidence Rule 803(1) and (2). In this case, the court will probably allow Wanda's testimony about Karl's statement. Karl's statement was contemporaneous with the collision between the motor boat and the kayak and would probably qualify as a present sense impression.

C. Excited Utterance – Rule 802(2).

An excited utterance is "a statement relating to a startling event or conditions made while the declarant was under stress or excitement caused by the event or condition." AK. R. Evid. 803(2). The commentary to the Alaska Rules of Evidence 803(1) and (2) explains that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." In this case, Karl's spontaneous exclamation after Drew collided with Pat and caused Karl to fall and break his nose would likely qualify as an excited utterance.

D. Unfair Prejudice – Rule 403.

Examinees may mention Rule 403, which provides that the court may exclude relevant evidence based on the danger of unfair prejudice. Examinees should weight the probative value of Karl's statement versus the prejudicial impact of admitting the statement. *See e.g. Martin v. State*, 797 P.2d 1209, 1215 (Alaska App. 1990); AK. Rule of Evid. 403.

Note – An argument that the statement should be admitted under Rule 803(3) – to show Karl's then existing state of mind or emotion is weak. Karl's state of mind at the time of the accident is not particularly relevant to whether Drew's actions were negligent and caused Pat's injuries. No points should be given for this argument.

2. <u>Jack's statement to Drew and Drew's response – Rule 801(d)(2), 403. (25 points)</u>

The court will probably admit Jack's testimony about his interaction with Drew.

Examinees may note that if the court finds that Jack's statement is not offered to prove the matter asserted, that Drew was driving too fast, but is offered for some other relevant purpose, it would not be hearsay and would be admissible.

Rule 801(d)(2) also provides a way to admit Jack's statement. The rule provides in pertinent part that:

(d) **Statements Which are not Hearsay**. A statement is not hearsay if…

(2) *Admission by a Party-Opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth…"

Here, Jack's statement to Drew, that he was driving too fast, is being offered against a party – Drew. There is a good argument that Drew's reaction to Jack's statement, a nod and a grin, was Drew's adoption of the truth of Jack's statement. Therefore, under Rule 801(d)(2)(B), Jack's statement is not hearsay and the court should overrule the objection.

Examinees could argue that Drew's "nod and grin" is not necessarily an affirmation of Jack's statement. Perhaps Drew was merely embarrassed. The "nod" might have been inadvertent and not necessarily indicating Drew's agreement with what Jack said.

Drew's reaction to Jack's statement, a nod and a grin, is admissible. If Drew's conduct is not a "statement", it is excluded from the definition of hearsay and the description of his reaction is admissible. Rule 801(c). If his conduct is a "statement" then it is admissible under Rule 801(d)(2)(A) as an admission by a party opponent. The "statement" is being offered against Drew and is his own statement.

Conduct can be a "statement" within the meaning of Rule 801 if it is intended to be an assertion. *See Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 250-51 (Alaska 1969). For example, pointing someone out in a lineup is nonverbal conduct that is the equivalent of words. See Alaska Evidence Rules Commentary Rule 801(a).

Again, examinee's should note that admissibility is not automatic and the court considers whether the probative value of the statement is outweighed by its prejudicial impact. *See Zoerb v. Chugach Elec. Assoc. Inc.*, 798 P.2d 1258, 1261 (Alaska 1990).

3. Karl's testimony on payment of medical bills – Rules 409, 613, 403. (25 points).

The court should admit Karl's testimony. The fact that Drew might have paid for Karl's medical expenses is relevant to show that Karl might be biased in his testimony on behalf of Drew. Therefore, the question is permissible under Evidence Rule 613(a) which provides that evidence of bias or interest on the part of a witness is admissible for the purpose of impeaching credibility. Again, examinees should note that Rule 403 requires the probative value of the testimony to be weighed against the danger of unfair prejudice if the statement is admitted.

Evidence Rule 409 provides that "Evidence of furnishing or offering or promising to pay medical, hospital or similar expense occasioned by an injury is not admissible to prove liability for the injury." The Rule 409 Commentary explains that the Rule applies to a payment of medical expenses of an injured party by the opposing party. Karl is not a party to the case. Rule 409 does not apply in this context.

4. Impeachment of Drew with past convictions – Rule 609. (25 points)

Evidence Rule 609(a) allows impeachment of a witness's credibility by evidence of a prior conviction for a crime involving dishonesty or false statement. In general, evidence that a witness has been convicted of a crime is admissible only if the crime involved dishonesty or false statement. A robbery conviction

involves dishonesty or false statement and thus is admissible under Rule 609(a). *See Alexander v. State*, 611 P.2d 469, 475 (Alaska 1980); *Fairbanks v. Johnson*, 723 P.2d 79 (1986).

Under Rule 609(b), the evidence is inadmissible if a period of more than five years has elapsed since the date of the conviction, with a limited exception not applicable here. Here, the conviction occurred less than five years ago, and therefore it is not time-barred.

Examinees should also mention that under Rule 609(c), before allowing the evidence to be admitted, the trial judge is directed to weigh the probative value of the prior conviction against the prejudicial effect. "Prejudicial effect" means the tendency of the evidence to make the jury decide the case on an improper basis, *e.g.*, overmastering hostility toward the defendant, or the feeling that the defendant is a bad person who should be punished regardless of the weight of the evidence in the particular case being litigated. *See Adkinson v. State,* 611 P.2d 528, 532 n.15 and accompanying text (Alaska 1980), *cert. denied* 449 U.S. 876, 66 L. Ed. 2d 97, 101 S. Ct. 219 (1980). *See also* commentary to Alaska R. Evid. 403 n.6. The balancing process is the same as that under Rule 403. *See Fairbanks v. Johnson*, 723 P.2d 79, 83 n.6 (1986).