ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

One afternoon, Vinny went for his daily run in a park near his home. As Vinny jogged through the park, a large dog approached him. Vinny slowed to pet the dog, but as he reached down, the dog attacked, knocking Vinny to the ground. Vinny cracked his elbow on the pavement as he fell.

Wanda was standing nearby. Wanda ran over and grabbed the dog by its collar. As she did so, Wanda noticed a dog license, issued by the city animal-control office, with the number "AK 239" engraved on it. By municipal ordinance, the animal-control office is charged with licensing dogs and maintaining records of the owners of dogs registered pursuant to that licensing authority.

The dog escaped Wanda's grasp and ran. But Wanda gave the license information to the animal-control officer who arrived a few minutes later to investigate. The animal-control officer, Officer Clark, went back to his office where he looked up the records for license number "AK 239" in the animal-control database and printed out the results of that search. Those records indicated that the dog was owned by Daniel Fox.

Vinny sued Daniel, claiming that Daniel negligently failed to control his dog and that he, Vinny, was injured as a result. In his answer, Daniel denied that he owned a dog.

At trial, Wanda testified about seeing the dog's license number and giving that number to Officer Clark. Vinny then called Officer Clark. Officer Clark testifies that Wanda gave him the license number. He further testified that he looked up the license number ("AK 239") on the animal-control database. Officer Clark then identified the computer printout that he generated from the animal-control records. That printout showed that Daniel Fox is the registered owner of the dog with that license number. Vinny offered the printout as an exhibit at trial. Daniel objected to the admission of the printout, arguing that the evidence is inadmissible hearsay and that the printout was not the best evidence and had not been properly authenticated. The trial court permited the admission of the printout.

In his defense, Daniel called a dog-behavior expert, Sally, to testify that this particular breed of dog is not known to be aggressive and that, after spending several hours with the dog, it was her opinion that the dog would not have attacked Vinny unless Vinny had provoked the dog. Sally stated that, in her opinion, there was no significant risk in allowing the dog to walk off leash. On cross-examination, Vinny's attorney asked Sally whether her opinion would change if she knew that, in the past several months, this dog had attacked

several other strangers without provocation. Daniel did not dispute that the attacks occurred but he objected to this cross-examination. The trial court sustained the objection and precluded Vinny from asking the expert about the prior attacks.

Daniel also challenged Vinny's claim of damages for pain and suffering. On rebuttal Vinny recalled Wanda to testify to her observations of Vinny's pain and suffering during the attack. Wanda testifed that when she pulled the dog away, Vinny was crying out, his face was contorted, and, in her opinion, he appeared to be in severe pain. Daniel objected, arguing that Wanda is not a medical expert, but the trial court allowed the testimony.

1. Discuss whether the trial court was correct when it admitted as an exhibit the printout generated by Officer Clark from the animal-control office's database.

2. Discuss whether the trial court was correct when it precluded Vinny from impeaching Sally, the dog-behavior expert, by cross-examining her about her knowledge of prior attacks by this dog in order to impeach her testimony.

3. Discuss whether the trial court was correct when it allowed Wanda to give her opinion about the severity of the pain suffered by Vinny.

GRADERS GUIDE

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

SUBJECT: EVIDENCE

1. Discuss whether the trial court was correct when it admitted as an exhibit the printout generated by Officer Clark from the animal-control office's database. (40 points)

Daniel objects to the admission of the printout on the grounds that the information is inadmissible hearsay, the printout is not the best evidence, and the printout has not been properly authenticated.

In general, hearsay is a statement made outside of the trial that is offered to prove the truth of the matter asserted. *See* Alaska R. Evid. 801(c). Hearsay includes both oral and written statements. *See* Alaska R. Evid. 801(a). Hearsay is inadmissible unless it falls within an exception to the hearsay rule. *See* Alaska R. Evid. 802.

Here, the registration information on the printout would qualify as a statement made outside of the trial and it is offered to prove the truth of the matter asserted – namely, that Daniel Fox is the registered owner of the dog that attacked Vinny. But city animal-control records would likely fall within the public-records exception to the hearsay rule. That exception applies to

> records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

Alaska R. Evid. 803(8)(a). "The special trustworthiness of official written statements is found in the declarant's official duty and the high probability that the duty to make an accurate report has been performed." 2 Kenneth S. Broun et al., McCormick on Evidence § 295, at 327 (6th ed. 2006).

Here, the facts state that the dog license was issued by the city animal-control office whose official duties include licensing dogs and maintaining records of registered dog owners. Given these duties, the animal-control office's registration records would qualify as "records" or "data compilations" of a "public office or agency" and they "set[ ] forth [the animal-control office's] regularly conducted and regularly recorded activities." Alaska R. Evid. 803(8)(a).

(Evidence Rule 803(8)(b) creates several exclusions from the public-records exception, relating primarily to investigative reports and factual findings. *See* Alaska R. Evid. 803(b)(i) – (iv). These exclusions would not likely apply to animal-control registration records.)

Applicants may also argue that the animal-control records would fall within the business records exception to the hearsay rule. That exception applies to "business records," which are defined to include

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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.

Alaska R. Evid. 803(6). One could argue that the city animal-control office qualifies as a business, which is defined broadly to include a "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." *Id.* And one could further argue that the registration records were acquired in the course of the office's regularly conducted activity and as a part of its regular practice. But to admit a document under the business records exception, Vinny would have to present the testimony of the custodian of records or other qualified witness. *See* Alaska R. Evid. 803(6). Officer Clark is employed by the animal-control office and therefore might qualify as a custodian of records. But even if he is not the custodian of records for the animal-control office, he might be considered an "other qualified witness" if he has sufficient personal knowledge of the process by which animal-control records are compiled and maintained. There is not sufficient information in the question to make this determination.

In summary, the printout should withstand a hearsay objection. But Daniel also raised objections based on authentication and admissibility of writings (the "best evidence" rule).

The "best evidence" rule states a preference that a party introduce the "original" of a "writing, recording, or photograph" in order to prove its contents. *See* Alaska R. Evid. 1002. A writing includes any letters, words, or numbers set down in any form, including in relevant part, "data stored in a computer or similar device." *See* Alaska R. Evid. 1001(1), (3). When the writing consists of data stored in a computer, "any printout or other output readable by sight, shown to reflect that data accurately, is an original." Alaska R. Evid. 1001(3). Thus, the animal-control printout would qualify as an original and would satisfy the "best evidence" rule.

There is still the question of authentication, however. Under Evidence Rule 1005, the contents of an official record, including data compilations, if otherwise admissible, may be proved by copy, certified as correct in accordance with Evidence Rule 902 or testified to be correct by a witness who has compared it with the original. Under Evidence Rule 902, public records may be self-authenticated if they are certified by a custodian or other person authorized to make the certification or bear an official seal and signature of attestation or execution. The facts do not indicate whether the printout was certified as correct or otherwise under seal. But this omission is not fatal. As noted in the facts, Officer Clark personally reviewed the animal-control records and can likely testify that the printout correctly reflects that information. This testimony would be sufficient to authenticate the printout.

Examinees may also discuss authentication of the printout as a business record. To the extent that the court admitted the printout as a record of a regularly conducted business activity, the document can be self-authenticated if the custodian of the record or another qualified person under penalty of perjury certifies that the document

> (i) was made at or near the time of the occurrence of the matter set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) or kept in the course of regularly conducted activity and (iii) was made by the regularly conducted activity as a regular practice, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

See Alaska R. Evid. 902(11). As noted above, the facts do not indicate whether the printout was certified as required by this rule. But this omission is not fatal. Officer Clark will likely be able to testify to the facts required to authenticate the record as a business record. This testimony would be sufficient to authenticate the printout.

2. Discuss whether the trial court was correct when it precluded Vinny from impeaching Sally, the dog-behavior expert, by cross-examining her about her knowledge of prior attacks by this dog. (30 points)

Sally testified as an expert witness. Expert testimony, including cross-examination of an expert, is governed by Evidence Rules 702 through 706.

In forming an opinion, an expert may rely on facts or data "perceived by or made known to the expert at or before the hearing," including facts or data that would not otherwise be admissible, as long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Alaska R. Evid. 703. Under Evidence Rule

705(a), an expert may disclose on direct examination or may be forced to disclose on cross-examination the underlying facts or data upon which she relied. *See* Alaska R. Evid. 705(a). But admission of underlying facts or data that would otherwise be inadmissible is subject to control by the trial judge:

> When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Alaska R. Evid. 705(c). The commentary to Evidence Rule 705 clarifies that this rule does not ban hypothetical questions. *See* Commentary to Evidence Rule 705(a), third paragraph. Indeed, the commentary notes that an adverse party may cross-examine an expert with respect to facts or data casting doubt upon the reliability of the expert's opinion. *Id.* at fifth paragraph. As one treatise writer notes, "the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect the expert's opinion." J. Strong, *McCormick on Evidence*, § 13, p. 56 (4th ed. 1992).

In *Jansen v. State*, 764 P.2d 308, 310-11 (Alaska App. 1988), the court of appeals confirmed that cross-examination of an expert witness may include hypothetical questions concerning facts of which the expert was not aware in forming his opinion. In *Jansen*, for example, a defense expert testified that he found no evidence of aggressive tendencies, impulses, or recklessness in Jansen's background that might have contributed to a head-on collision that occurred when Jansen unsafely attempted to pass several vehicles. *Jansen*, 764 P.2d at 309-10. The trial court permitted the prosecution to cross-examine the expert concerning his knowledge of Jansen's two prior convictions for drunk driving. *Id.* On appeal, the court affirmed this ruling, holding that although evidence of Jansen's prior convictions would not ordinarily have been admissible, the evidence was properly admitted on cross-examination to impeach the expert's opinion. *Id.* at 310. *See also Nelson v. State*, 874 P.2d 298, 306-07 (Alaska App. 1994) (permitting prosecution to cross-examine defendant's expert psychiatrist as to defendant's prior attempts to bomb plane, after expert testified as to the defendant's capacity to act with intent to kill).

Under these rules, it is permissible for Vinny to cross-examine Sally about facts the existence of which might affect her opinion concerning the dog's aggressive tendencies and the risk of allowing the dog to walk off leash. Moreover, Vinny may do so in the form of a hypothetical question, asking

whether Sally's opinion would change if she were aware of prior attacks by this dog.

But the trial judge must first determine whether the danger that the jury may use the evidence of the dog's prior attacks improperly outweighs the impeachment value of that evidence. *See* Alaska R. Evid. 705(c). In this case, as in *Jansen* and *Nelson*, the impeachment value of the information likely outweighs the danger of improper use since it goes directly to the heart of Sally's opinion. Therefore, the trial judge probably erred in precluding this cross-examination. But if the cross-examination were allowed, Daniel would be entitled to a jury instruction limiting the jury to using the evidence solely for impeachment purposes.

Note: Examiners should not be given credit for discussing character evidence (i.e. Evidence Rule 404). Character evidence only applies to witnesses and parties.

3. Discuss whether the trial court was correct when it allowed Wanda to give her opinion about the severity of the pain suffered by Vinny. (30 points)

The trial court allowed Wanda to give her opinion about the severity of Vinny's pain during the attack. There is nothing in the facts to suggest that Wanda has a medical background or other expertise that would qualify her as an expert on physical injuries or the pain and suffering that such injuries might cause. Therefore, if Wanda may testify, she may do so only as a lay witness.

A lay witness may testify to opinions and inferences which are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Alaska R. Evid. 701. Pursuant to this rule, Alaska courts have allowed lay opinions on a variety of issues. *See, e.g., Callahan v. State*, 769 P.2d 444 (Alaska App. 1989) (allowing a lay opinion on the extent of a person's injuries); *Loof v. Sanders*, 686 P.2d 1205, 1212-13 (Alaska 1984) (allowing a lay opinion on a person's intoxication); *Smithart v. State*, 946 P.2d 1264, 1274-75 (Alaska App. 1997) (allowing a lay opinion on a defendant's unusual interest in a murder investigation); *Markgraf v. State*, 12 P.3d 197, 199-200 (Alaska App. 2000) (allowing a lay opinion that a person seemed scared).

Of particular relevance to this case, Alaska courts have allowed lay opinions on the nature of a person's mental state or physical health. For example, in *Callahan*, the friend of a defendant charged with refusal to take a breath test was permitted to testify to her opinion that the defendant's physical injuries, which the friend observed shortly after defendant's arrest, prevented

the defendant from complying with the breath test procedures. *Callahan*, 769 P.2d at 446. The court held that the testimony was admissible because the friend's testimony about the defendant's injuries "was based on her own observations" and it therefore constituted "relevant circumstantial evidence of the possibility that [the defendant's] injuries prevented him from taking the Intoximeter test. *Id.* at 446.

Here, Wanda's testimony concerning Vinny's appearance of suffering during the attack was clearly relevant and helpful to the jury in determining the extent of Vinny's pain and suffering for purposes of calculating damages. And like the friend's testimony in *Callahan*, Wanda's opinion was based on what she personally observed – Vinny's cries and facial contortions. Because Wanda's testimony was based on her own observations – *i.e.*, it was "rationally based on the perception of the witness" – and it was helpful to "the determination of a fact in issue" – *i.e.*, the severity of Vinny's pain – the trial court correctly ruled that the testimony was admissible under Evidence Rule 701.