ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Each December, the mayor of New Town, Alaska, has a holiday party at her personal home. Attendance is by invitation only. Several days before the party, Dan told his friend, Wayne, that he planned to attend even though he did not receive an invitation. Dan described for Wayne his plan to sneak into the party through a window at the back of the home.

During the party, the mayor's secretary, Angela, saw Dan and realized that he was not an invited guest. Angela confronted Dan, who claimed that he entered as a guest through the front door. He then apologized and left. The next day, a police officer noticed that a back window in the home had been pried open.

Dan was charged with second-degree criminal trespass, which required proof that he entered or remained in the home in reckless disregard of the fact that he did not have the right to do so. It was undisputed that Dan did not receive an invitation to the party.

At trial, the prosecutor called Angela to testify that Dan could not have entered the home through the front door without an invitation. Angela admitted that she does not remember this particular party. At this point, Dan objected to any further testimony, but the trial judge allowed Angela to testify. Angela stated that she worked at numerous parties at the mayor's home and was responsible for greeting guests at the front door. Angela explained that when attendance is by invitation only, she asks to see the guest's invitation and some form of identification. Angela asserted that she would have followed this practice on the night of the mayor's party and, pursuant to this practice; she would not have allowed Dan to enter the home without an invitation.

At trial, Dan testified that he did not realize he was not permitted to attend the party. Dan claimed that he entered through the home's front door where he was greeted and invited in by an employee of the mayor's office. Dan also testified that he left the home as soon as he was asked to do so.

In rebuttal, the prosecutor called Wayne. In an offer of proof, the prosecutor stated that Wayne will testify that Dan had a plan for entering the home through a back window. Dan objects on hearsay grounds. The trial judge allows Wayne to testify.

1. Discuss whether the trial court erred when it allowed Angela to testify.

2. Discuss whether the trial court erred when it allowed Wayne to describe Dan's plan to enter the mayor's home through a back window.

GRADERS GUIDE

***** QUESTION NO. 8 *****

SUBJECT: EVIDENCE

1. Discuss whether the trial court erred when it allowed Angela to testify. (45 points)

In general, a witness may testify only to matters for which she has personal knowledge. *See* Alaska R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Angela admits that she does not remember this particular party and thus arguably does not have personal knowledge as to how Dan entered the mayor's home.

But Angela did not testify as to how Dan entered the mayor's home on the night of the party. Rather, she testified to her standard practice, from which the jury could infer that Dan had not entered the home through the front door. Evidence Rule 406 permits "[e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, . . . to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." *See* Alaska R. Evid. 406.

A "habit" is defined in the commentary to the rule as a "person's regular practice of meeting a particular kind of situation with a specific type of conduct." Commentary to Evidence Rule 406 (quoting McCormick on Evidence (2d ed.) § 195, at 462). The frequency of an action, however, is not enough to establish a habit. "A significant factor in the determination of habit 'is the degree of volition required for the activity; the more thought and planning required for the act, the less likely it will be found to be a habit; the more reflexive and automatic the conduct, the more likely it will be found to be habit.'" *Wacker v. State*, 171 P.3d 1164, 1169 (Alaska App. 2007) (holding that acts of drunk driving, although repeated, were volitional and thus not "habit" for purposes of Evidence Rule 406). *See also Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 845 (Alaska 2001) (requiring that evidence of habit be sufficiently regular and uniform and the circumstances sufficiently similar to outweigh the danger of prejudice or confusion). Examples of habit are "the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving." Commentary to Evidence Rule 406 (quoting McCormick on Evidence (2d ed.) § 195, at 462).

Like evidence of a person's habit, evidence of an organization's routine practice may be admissible. To be admissible, the person offering the evidence must establish "that the routine specifically describe a particular organization's manner of daily operation." Commentary to Evidence Rule 406. Thus, in *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1049 (Alaska 1986), the Alaska Supreme Court held that evidence that a bar routinely served persons who were intoxicated was admissible under Evidence Rule 406.

In Dan's case, one can argue that evidence of Angela's practice in greeting guests is either a habit of Angela or a routine practice of the mayor's office. Whether the practice is a habit is a close call. The prior conduct is not necessarily what one thinks of as a "habit"; it is not something that would be considered a semi-automatic response. But, to the extent Angela is acting in her capacity as an employee of the mayor's office, her practice in greeting guests at official functions of the mayor's office would likely qualify as a routine practice of the mayor's office. Thus, like the evidence of a bar's practice of serving intoxicated customers, the evidence of Angela's practice of refusing admittance to persons who cannot produce an invitation – which Dan admittedly could not – was admissible under Evidence Rule 406.

2. Discuss whether the trial court erred when it allowed Wayne to describe Dan's plan to enter the mayor's home through a back window. (55 points)

Dan objected on hearsay grounds to the admission of his statement to Wayne. But Wayne's testimony about Dan's statement does not present a hearsay problem. Hearsay is 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." Alaska R. Evid. 801(c). Dan's statement to Wayne was made outside of the trial and thus potentially falls within this definition. But the statement likely qualifies as non-hearsay under Evidence Rule 801(d).

First, under Evidence Rule 801(d)(2), a statement that qualifies as an admission of a party opponent is removed from the hearsay rule entirely. A statement qualifies as an admission of a party opponent if it "is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity." Alaska R. Evid. 801(d)(2). Here, the statement is being offered by the prosecution against Dan, a party opponent, and there is no dispute that it was Dan's statement. Thus, it is admissible as non-hearsay.

Second, Dan chose to testify at trial. Under Evidence Rule 801(d)(1), a witness's prior inconsistent statement qualifies as non-hearsay. *See* Alaska R. Evid. 801(d)(1)(A). To the extent Dan testified that he did not realize he was not permitted to attend, his prior statement to Wayne, describing his plan to sneak into the party without an invitation, is clearly inconsistent. But this exception

applies only if the witness has been questioned about the statement during his testimony and has been given an opportunity to explain or deny the statement. *See* Alaska R. Evid. 801(d)(1)(A)(i) and (ii). The facts do not indicate that the prosecutor questioned Dan about his statement to Wayne. Thus, the hearsay provision for prior inconsistent statements may not apply.

Third, an examinee might argue that Dan's statement to Wayne about his plan for entering the home, combined with his statement that he did not receive an invitation to the party, are not hearsay because they are not offered to prove the truth of the matter asserted. *See* Alaska R. Evid. 801(c). For example, Dan's statements, whether true or false, tend to establish that he was aware that the party was by invitation only and he knew or should have known that he was not entitled to attend. This fact would be relevant to establishing the requisite *mens rea* of the offense – *i.e.*, that Dan acted with reckless disregard of the fact that he was not entitled to attend.

However, even if this statement qualified as hearsay, it is likely admissible under one or more exceptions to the hearsay rule. First, the statement may qualify under Evidence Rule 803(3), which allows statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's present condition or future action." Alaska R. Evid. 803(3). To the extent that the state is offering Dan's statement of his plan to prove Dan's future action – namely, that he put the plan into action by sneaking into the party through a back window – the statement would likely be considered admissible under this hearsay exception.

There is also an argument that Dan's statement might fall within the hearsay exception set forth in Evidence Rule 804(b)(3), which allows as an exception to the hearsay rule a statement:

> which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Alaska R. Evid. 804(b)(3). For this exception to apply, however, the declarant must be unavailable. *See* Alaska R. Evid. 804(a). A declarant is unavailable when "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Alaska R. Evid. 804(a)(1). Here, Dan has a constitutional right not to testify, but he arguably waived that privilege when he chose to take the stand and testify. Thus, although there is nothing in the question to suggest that the court issued an order exempting Dan from testifying, one could persuasively argue that he is

available given his waiver of the privilege. (Note: this exception is not ordinarily used when the declarant is a party. Thus, examinees should not be penalized for failing to mention Evidence Rule 804(b)(3) as an alternative.)