

## **Essay Question No. 6**

### **Answer question in booklet No. 6**

Early one afternoon, Vick was driving down an Alaskan highway when a moose ran across the road. Vick slammed on his brakes and narrowly avoided the moose. Dora, the driver of the vehicle directly behind Vick's, was unable to stop when Vick braked. She crashed into Vick's vehicle. Dora then panicked and quickly drove away from the scene.

Wanda and Billy were standing at a bus stop along the highway when the collision occurred. Wanda immediately pulled a receipt from her pocket and wrote down Dora's license plate number. Billy took a cell-phone photograph that captured Dora's profile and the side of her car. Based on this information, the police charged Dora with leaving the scene of an accident. Dora denied involvement in the collision.

At trial, the prosecutor called Wanda to testify regarding the license plate number. Wanda recalled writing down the number following the collision, but was unable to recite the number from memory. To refresh Wanda's recollection, the prosecutor offered Wanda a copy of the notes he took at an initial interview with Wanda. Dora's attorney objected, arguing both that Wanda did not author the notes and that the notes were not produced to the defense prior to trial. The judge overruled the objections.

After reviewing the prosecutor's notes, Wanda still had no memory of the number. In response, the prosecutor produced the receipt on which Wanda originally wrote the number and sought to admit it as an exhibit. Wanda stated that she personally saw the license plate and accurately recorded the number on the receipt. Dora's attorney objected on hearsay grounds. The judge overruled the objection and admitted the receipt into evidence as an exhibit.

The prosecutor next showed Wanda the photograph Billy took at the scene. Wanda identified it as a true and accurate representation of the car and driver she saw collide with Vick's vehicle. The prosecutor offered the photograph into evidence. Dora's attorney objected, arguing that Wanda did not take the photograph. The judge admitted the photograph over the objection.

1. Discuss whether the judge erred in allowing Wanda to refer to the prosecutor's notes to refresh her recollection: (1) because Wanda did not author the notes; or (2) because the prosecutor did not disclose the notes to Dora prior to trial. Confine your discussion to the Rules of Evidence.

2. Discuss whether the judge erred in admitting, over the defense attorney's hearsay objection, the original receipt on which Wanda wrote Dora's license plate number.

3. Discuss whether the judge erred in admitting the photograph through Wanda given that Wanda did not take the photograph.

**GRADER'S GUIDE**  
**\*\*\* QUESTION NO. 6 \*\*\***  
**EVIDENCE**

**1. Discuss whether the judge erred in allowing Wanda to refer to the prosecutor's notes to refresh her recollection: (1) because Wanda did not author the notes; or (2) because the prosecutor did not disclose the notes to Dora prior to trial. (30 Points)**

Evidence Rule 612(a) allows the use of writings or other objects to refresh a witness's recollection while testifying. The fact that the offered writing or object might not be admissible as evidence (either because it is inadmissible hearsay or for some other reason) does not preclude its use to refresh a witness's recollection. See *Matomco Oil Co. v. Arctic Mechanical, Inc.*, 796 P.2d 1336, 1342-43 (Alaska 1990); Commentary to Evidence Rule 612(a) ("Rule 612 . . . rejects limitations on the kinds of writings or objects that may be shown to witnesses to refresh recollection . . . [and] makes it clear that anything can be used to refresh the memory of a witness."). Because Rule 612(a) does not place limits on the writings witnesses may review to refresh their recollections, the judge properly overruled the objection based on the fact that Wanda was not the author of the notes.

The judge was similarly correct to overrule the objection Dora made based on the prosecutor's failure to produce his notes in discovery. Even if the notes were discoverable (i.e., even if they were not protected by the attorney work-product doctrine), the prosecutor's failure to produce the notes prior to trial does not preclude Wanda from using the notes to refresh her recollection. See, e.g., *Kenai Chrysler Center, Inc. v. Denison*, 167 P.3d 1240, 1253 (Alaska 2007). Although Rule 612(a) creates a right to inspect a document used to refresh a witness's recollection, that right does not encompass a right to pretrial disclosure. *Id.* In fact, "[b]y expressly granting the right to immediate inspection, [Rule 612(a)] implicitly recognizes the absence of a pretrial duty of disclosure." *Id.*

**2. Discuss whether the judge erred in admitting, over the defense attorney's hearsay objection, the receipt on which Wanda wrote Dora's license plate number. (50 Points)**

Dora objected to the admission of the receipt on the basis that the note was hearsay. 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." Alaska R. Evid. 801(c). Generally speaking, the note appears to fall within this definition. The prosecutor sought to introduce the note to prove the license plate number of the car that rear-ended Vick's vehicle. However, despite the fact that the note seems to meet the hearsay definition, it may nonetheless be admissible if it falls within an exception to the

hearsay rule. See Alaska R. Evid. 803-804 (hearsay exceptions). Here, the recorded license plate number arguably falls into two hearsay exception categories – the exception for recorded recollections and the exception for present sense impressions.

Alaska Evidence Rule 803(5) provides the exception for “memorand[a] or record[s] 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.” This exception recognizes “the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.” Commentary to Evidence Rule 803(5). Rule 803(5) provides that such a record “may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” Alaska R. Evid. 803(5).

Here, the license plate number could come in under the past-recollection-recorded exception because Wanda once had personal knowledge of the number; wrote it down while it was fresh in her memory; was unable to remember the number when she testified; and testified that she accurately recorded the number on the receipt. But Rule 803(5) did not permit admission of the receipt as an actual exhibit. In this instance, the receipt was offered into evidence by the prosecutor, not by Dora. Consequently, under this rule, the judge should only have allowed the license plate number to be read into the record and should not have admitted the receipt as an exhibit.

Wanda’s note might also have been admissible as a present sense impression. Alaska Evidence Rule 803(1) exempts from the hearsay rule “statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition.” Alaska R. Evid. 803(1); see also *Dobos v. Ingersoll*, 9 P.3d 1020, 1024 (Alaska 2000). The rationale for this rule is that “the substantial contemporaneity of the event and statement” reduces “the likelihood of deliberate or conscious misrepresentation.” See Commentary to Evidence Rules 803(1). Here, the present sense impression exception would likely apply because Wanda had personal knowledge of the number and described the number (by writing it down) immediately after perceiving it. Unlike Rule 803(5), Rule 803(1) contains no language limiting a party’s ability to admit a qualifying written statement as an exhibit.

Courts applying the identical federal rule have admitted this type of evidence in a variety of circumstances. See, e.g., *Cargill, Inc. v. Boag Cold Storage Warehouse, Inc.*, 71 F.3d 545, 555-56 (6th Cir. 1995) (holding that notes made contemporaneously during investigation were admissible under the present sense impression exception to the hearsay rule); *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554, 566 (4th Cir.1994) (holding that notes made

during a telephone conversation were admissible under the present sense impression exception to the hearsay rule); *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir.1981), vacated in part on other grounds on rehearing, 686 F.2d 356 (5th Cir.1982) (holding that deceased's written comments to his wife immediately following a telephone conversation with the defendant about what the defendant had said during the conversation were admissible under the present sense impression exception to the hearsay rule); and *United States v. Kehoe*, 562 F.2d 65, 70 (1st Cir.1977) (holding that court reporter's informal notes indicating that the defendant had been sworn in before his grand jury testimony were admissible under the present sense impression exception to the hearsay rule).

Accordingly, under this rule, the judge likely committed no error in admitting the receipt as an exhibit.

**3. Discuss whether the judge erred in admitting Billy's photograph over Dora's objection. (20 Points)**

Dora's attorney objected to the admission of Billy's photograph solely on the basis that Dora was not the photographer. This is not a sufficient basis to bar a photograph's admission provided the foundational requirements are otherwise met. The foundational requirements for photographic evidence are that the photograph must be a faithful representation of whatever it is supposed to depict and must be helpful to the jury. *See, e.g., Johnson v. State*, 636 P.2d 47, 67 (Alaska 1981). There is no requirement that the proponent of the evidence produce the person who actually took the photograph as long as there is another witness who can testify, from personal knowledge, that the photograph is an accurate depiction of what it purports to represent. *See id.*

Here, Wanda testified, from personal knowledge, that the photograph was an accurate depiction of the driver and vehicle that rear-ended Vick's car and then fled the scene. The photograph was helpful to the jury in identifying the car and person involved in the collision. Because the foundational requirements were satisfied, the judge did not err in admitting the photograph over Dora's objection.