**1A.06D LIMITING INSTRUCTION – VICARIOUS ADMISSION**

 You have heard evidence that (name or description of declarant) made a statement that (insert description). [It is for you to decide whether the statement was made. If you decide that it was,] [Y]ou may consider the statement only against (insert names of declarant and principal). The party who made the statement is responsible for what they said. You may also consider the statement against (name of principal) since (there is evidence that) [insert description of relationship--e.g., (name of declarant) worked for (name of principal)] when the statement was made. You are not required to believe the statement. It is for you to decide what weight, if any, to give it. But it may be used as evidence only against (names of parties).

 [The fact that you may consider this statement against (name of principal) does not mean that you are required to, or that you should, find that [insert questioned relationship--e.g., that (name of declarant) actually worked for (name of principal)]. That is for you to decide on the basis of all the evidence.]

 Use Note

 This instruction should be given when vicarious admissions are offered against the declarant and another person, referred to in the parenthesis as the principal. If only the principal is used, there is no need for such an instruction. If the principal and another defendant, but not the declarant, are used, the instruction should be modified to indicate that the admission can only come in against the principal.

 The bracketed second sentence in the first paragraph, should be given when there is a dispute as to whether a statement was made. The words "there is evidence that" which are set off in parentheses, and the second paragraph should be given when the existence of a relationship is in dispute. If the relationship is undisputed or irrelevant to the merits of the case, then this material should be deleted.

 Comments

 Alaska R. Evid. 801(d) (2) provides for five kinds of admissions. Three are vicarious admissions. Alaska R. Evid. 801(d)(2)(C), (D), (E). This instruction explains to the jury why admissions may be used not only against the person who made them, but also against a principal. Implicit in the instruction is a differentiation of these two defendants from all other defendants, and the instruction explicitly tells the jury that admissions cannot be used against the other defendants.

 The trial judge must decide whether a statement qualifies under Alaska R. Evid. 801(d)(2). Generally, a preponderance of the evidence standard is used by the judge called upon to make evidence rulings that involve fact finding. See, Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271 (1975). If the trial judge is satisfied that the conditions of the rule have been met, the admission may come in against a principal.

 In some cases, the evidence question for the judge is the same as one of the key jury issues. For example, in a case in which an agent is sued for negligence, the principal is joined as a defendant, and the principal contests the existence of the agency relationship, one key question for the jury will be whether such a relationship existed. This same question will be addressed by the judge in deciding whether to let statements by the agent in as vicarious admissions. If the judge finds agency for purposes of making an evidence decision, the judge will admit the statements. If the only defendants are the agent and the principal, the judge need not say anything to the jury after admitting the evidence, since the absence of a limiting instruction will result in the jury's considering the evidence against both defendants, as it is entitled to. But if third parties have also been named as defendants, the judge will have to tell the jury against whom it can use the statements. Some courts simply say to the jury “you can use the evidence against A and B, but not against C and D." The trouble with this is that the jury has no understanding of why it should not use the evidence against C and D and may not be as careful in following the instruction as it would be if it understood the difference between the parties. Thus, Instruction 1A.06D explains to the jury why evidence can come in against some, but not all, defendants. The final paragraph makes clear that the judge is not suggesting to the jury that it should find agency when that is a disputed question. The judge only states that there is evidence ofagency involving some but not all defendants, and that the law treats defendants differently depending on whether or not agencyis a possibility.