GRADER'S GUIDE

***** QUESTION #9 *****

SUBJECT: EVIDENCE

1. Discuss what claim(s) of privilege Delores might assert with respect to Pastor Ray's proposed rebuttal testimony and whether the claim(s) will be successful. (55 points)

Evidentiary privileges "bar the use, in court proceedings, of certain information obtained by a professional during the course of treatment." *See Walstad v. State*, 818 P.2d 695, 699 n.3 (Alaska App. 1991) (citation omitted). The party asserting the privilege bears the burden of proving that the contested communication is protected by the privilege. *Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996).

Under Evidence Rule 504(b), covering physician and psychotherapist-patient privilege, a patient has a privilege to refuse to disclose – and to prevent any other person from disclosing – confidential communications "made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions." Rule 504 includes alcohol or drug addiction within the patient's "physical, mental or emotional conditions."

A patient is a person who consults or is examined or interviewed by a physician or psychotherapist. For purposes of the rule, Alaska defines psychotherapist quite broadly. Specifically, a psychotherapist includes not only persons authorized to practice medicine (including treatment of alcohol addiction as a mental/emotional condition) but also persons licensed as a professional counselor or reasonably believed by the patient so to be, while similarly engaged. *See also In re D.D.S.*, 869 P.2d 160, 166 n.5 (Alaska 1998) (concluding that the legislature intended the alcohol treatment privilege to be treated similarly to other evidentiary privileges, and under Rule 504(a)(3)(B), the term "psychotherapist" is defined to include licensed or certified psychologists engaged in the diagnosis or treatment of alcohol addiction).

A privilege also exists under Evidence Rule 506, which covers communications to members of the clergy. Rule 506(b) dictates that a person has a privilege to refuse to disclose – and to prevent another from disclosing – a confidential communication by the person to a member of the clergy. The communication must be made to the clergy "in that individual's professional character as spiritual adviser." A member of the clergy is broadly defined as a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

For both Rule 504 and 506, the privilege belongs to the person seeking the consultation with a doctor or clergyman. *See Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996).

Delores might claim a privilege under either 504 or 506.

Regarding Rule 504, the facts indicate that Pastor Ray facilitates the alcohol support group and is very involved in other rehabilitation programs. Nothing states that Pastor Ray is licensed as a professional counselor or in the treatment of alcohol addiction. But Delores could certainly argue, based upon his prominent role in the alcohol support group, his active involvement in other local programs, and the fact that people call him "Dr. Ray," that she reasonably believed Pastor Ray to be a licensed therapist or a doctor or psychotherapist engaged in the treatment of alcohol addition. *See Plate*, 925 P.2d at 1066 (communication is privileged if the person seeking the consultation reasonably believed that the person he or she was talking to was a lawyer, physician, or clergyman).

The problem with Delores' claim of privilege under Rule 504, however, is that she would also need to show that the communication was confidential. Under 504(a)(4), "a communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview." Delores would likely have difficulty convincing the court that a support group session was a "consultation, examination or interview" in the sense of the rule, and that all others in the group session were "present to further the interest of the patient." But assuming Delores overcomes that hurdle, it is unlikely that statements made in a setting as public as a busy restaurant could be seen as intended to be confidential.

Regarding Delores' potential claim of privilege for communications to clergymen under Rule 506, Delores would similarly have problems convincing the court of her statements' confidentiality. Rule 506(a)(2) states that a communication is confidential "if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." The person consulting the clergyman must believe that the conversation is to remain private, and the person's belief in the privacy of the conversation must be reasonable. *Plate*, 925 P.2d at 1066. Thus, Delores would again have to show that the others present in the group session were "present in furtherance of the purpose of the communication," and that the statements were made "privately." Due to the very public nature of "a busy local restaurant," it is unlikely that a court would find that the statements were intended to be confidential or that Delores' "belief" that the conversation was private was reasonable. Delores has yet another problem with privilege under Rule 506: While there would be little question that Pastor Ray was a member of the clergy, the statement must have been made to Pastor Ray in

"professional character as spiritual advisor." Delores would need to show that was consulting with Pastor Ray as a spiritual advisor.

It is unlikely that Delores' claims of privilege under Rule 504 and 506 will be successful.

2. Delores' defense attorney has objected to the admission of evidence of Delores' prior violent incidents and argues that they are only being used as propensity evidence against Delores. Discuss fully whether the incident involving her ex-husband or the incident involving her mother should be admitted into evidence and the reasons for your conclusion. (45 points)

Alaska Rule of Evidence 404(b) describes circumstances when evidence of prior bad acts is admissible. Rule 404(b)(4) provides in part:

> In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible.

A "crime involving domestic violence" is an offense or an attempt to commit an offense, by a household member against another household member, and includes crimes against the person under AS 11.41 and violating a domestic violence order. AS 18.66.990. Thus, both crimes described in the fact pattern – violating a domestic violence order and assault (a crime against the person under AS 11.41) – fit into Rule 404(b)(4).

In terms of victims, the Alaska legislature defined "household members" for purposes of domestic violence laws broadly, and includes not only those who are married but also adults "who live together or who have lived together," "who are dating or who have dated," and "who are engaged in or who have engaged in a sexual relationship." Under these definitions, Delores and Victor would certainly qualify as household members as would Delores and her ex-husband. Alaska law also includes in its definition of a household member "adults or minors who are related to each other up to the fourth degree of consanguinity," meaning that Delores' 68-year-old mother would also fit into Rule 404(b)(4).

Finally, under all sections of 404(b), Alaska courts have not required proof that a prior bad act resulted in a criminal conviction in order to admit evidence of the relevant prior bad act. *State v. Bingamen,* 991 P.2d 227, 229-30 (Alaska 1999) (holding that the legislature intended to authorize the courts to admit evidence of relevant prior acts by defendants which constitute "crimes involving domestic violence," as defined in AS 18.66.990(3) and not just those

that resulted in a criminal conviction). Despite the fact that the prosecution eventually dropped the assault charge against Delores for hitting her mother, evidence of the incident may still be admitted under 404(b)(4).

Before admitting evidence of prior acts of domestic violence under this rule, trial courts must apply Evidence Rule 403 and exclude the evidence if its probative value is outweighed by its potential for unfair prejudice. Under 403, relevant evidence

> may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Delores' recent incidents of violence against other family members are relevant. Although the prior incidents do show Delores' propensity to commit acts of domestic violence, under Rule 404(b)(4) the evidence's tendency to show a defendant's criminal propensity is not a reason to deem it unfair prejudice and exclude under 403. *Fuzzard v. State*, 13 P.3d 1163, 1166-67 (Alaska App. 2001). Alaska courts have held that, because trial judges retain the authority under Rule 403 to exclude evidence that is more prejudicial than probative, Rule 404(b)(4), even if used to show propensity, does not violate the guarantee of due process. *Fuzzard*, 13 P.3d at 1166-67. Nothing in the fact pattern indicates that Delores' prior incidents demonstrate unfair prejudice that would outweigh their probative value. Thus, both prior incidents should be allowed.