GRADER'S GUIDE

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

SUBJECT: EVIDENCE

1. Discuss whether Bob's statements to Attorney 1 will be protected by the rules of attorney/client privilege. 25%

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client . . . and the client's lawyer." Evidence Rule 503(b). A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services. Evidence Rule 503(a)(5). For purposes of the rule, a client is a person "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services." Evidence Rule 503(a)(1). Finally, Evidence Rule 510 mandates that a person who controls a privilege against disclosure waives the privilege if the person "voluntarily discloses or consents to disclosure of any significant party of the matter or communication." The party asserting the privilege bears the burden of proving that the contested communication is protected by the privilege. *See, e.g., Plate v. State*, 925 P.2d 1057, 1066 (Alaska App. 1996) (concerning privileged communications to clergymen).

As the Commentary to Evidence Rule 510 notes,

> [t]he central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality.

In other words, "[o]nce confidentiality is destroyed through voluntary disclosure no subsequent claim of privilege can restore it." Commentary to Evidence Rule 510.

Here, although Attorney 1 didn't officially accept Bob's case until the end of the meeting, it is clear that lawyer/client privilege could apply; Bob is a person who "consult(ed) a lawyer with a view to obtaining professional legal services." Thus, Bob would ordinarily have the right to prevent Attorney 1 from disclosing either of his statements, as his communications were made to Attorney 1 for the purpose of facilitating the rendition of professional legal services. Evidence Rule 503(b). But Bob, as the person asserting the privilege, also has the burden of proving that the contested communication is protected by the privilege. Bob will have problems here. The fact pattern demonstrates that Bob brought along his

friend Doug as he discussed the case with his attorney, and that Doug was present when Bob made the statements to Attorney 1 during that first meeting. Since nothing indicates that disclosure of the statements were made to his friend Doug "in furtherance of the rendition of professional legal services," it is unlikely that they will be seen as "confidential." Evidence Rule 503(a)(5). Nor does Doug hold any relation to Bob – such as a "spouse, parent, business associate, or joint client" – that bestow a right of disclosure within the attorney/client relationship. *See* Commentary to Evidence Rule 503(b) ("the definition allows disclosure to persons to whom disclosure is in furtherance of the rendition of professional legal services to the client, contemplating those in such relation to the client as "spouse, parent, business associate, or joint client"). The same holds true under Evidence Rule 510: Bob, the person who controls the privilege against disclosure, waived the privilege when he voluntarily disclosed the communication with Doug present.

Bob will have an additional problem using attorney/client privilege to keep out his first statement – "I didn't exactly trip on the sea lion – he was in the middle of the street and I went over and kicked him because I hate sea lions." Evidence Rule 503(d)(1) removes any privilege where "the services of the lawyer were . . . used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." The fact pattern indicates that Bob is knowingly perpetrating a fraud and that the services of Attorney 1 would be used to aid in that fraud. Thus, Rule 803(d)(1) provides an additional reason that lawyer/client privilege does not protect Bob's first statement concerning where the sea lion was and how Bob encountered it.

2. Assume Bob's statements to Attorney 1 are not protected by attorney/client privilege. Discuss what other rules of evidence may apply regarding the admissibility of the statements at trial. 25%

Although Bob's statements to Attorney 1 will not be protected by attorney/client privilege, there are still other evidentiary burdens to overcome before they can be admitted.

Bob's first statement (that he didn't trip on the sea lion on bar property) implicates Evidence Rule 801. But Bob's statement nevertheless would be admitted because it is non-hearsay as an "admission by a party-opponent" under 801(d)(2)(A). Evidence Rule 801(d)(2)(A) declares that the admissions of a party-opponent are not hearsay and are admissible for the truth of the matters asserted in those statements. The requirements of that rule are met because it is offered by the defense against Bob and it is Bob's own statement. See 801(d)(2)(A). Bob's statement to his first attorney will not be barred by the hearsay rule of 801.

Bob's statement is also admissible under Evidence Rule 801(d)(1)(A), which declares that a witness's prior inconsistent statements, although out-of-court

statements offered for the truth of the matter asserted, similarly are not hearsay and are admissible for the truth of the matters asserted. Such a statement is not hearsay under 801(d)(1)(A) provided (1) the declarant testifies at the trial and (A) the statement is inconsistent with the declarant's testimony, and provided that (i) the witness was given an opportunity while testifying to explain or to deny the statement. Thus, provided that the defense gives Bob an opportunity to explain or deny the statement, the statement should be admitted.

Finally, because Bob is testifying, the statement could also be used to impeach him under 613. Under 613(a), prior statements of a witness inconsistent with his testimony at trial are admissible for the purpose of impeaching the witness. Bob testified and claimed that he tripped over a sea lion, on the bar's steps, that he was unable to see. His statements to his first attorney could be used to impeach his credibility as a witness. However, before the defense may use the statement to impeach Bob, he must lay a foundation for the statements. Evidence Rule 613(b) states requires that "(b)efore extrinsic evidence of a prior contradictory statement … may be admitted, the examiner shall lay a foundation for [the witness's] impeachment by affording the witness the opportunity, while testifying, to explain or deny any prior statement…." Provided that the defense allows Bob the opportunity to explain the statement made to his first attorney, the evidence may be properly admitted.

As with all evidence, the judge must still evaluate Bob's statement as evidence under the Rule 403 balancing standard. Bob might argue that the statement should be disallowed under 403 because its probative value is outweighed by the danger of unfair prejudice. *See, e.g., Martin v. State*, 797 P.2d 1209 (Alaska App. 1990). The statement *is* highly prejudicial. However, he would likely lose; the defense should point out that the probative value is very high because it bears directly on Bob's credibility, what occurred that evening, and whether the bar is at fault for Bob's injuries.

Bob's second statement – "Man, if I can get some money out of this suit, I'm going to buy my own bar and drink till I'm pickled!" – also raises the issue of hearsay. However, the statement should not be excluded on hearsay grounds. While it is an out-of-court statement, the defense would not be offering it for the truth of the matter asserted (that Bob intends to buy his own bar and get pickled if he prevails) but rather to portray Bob in a bad light. However, as with any evidence, the party seeking to admit the statement must demonstrate its relevance. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence Rule 401. Evidence which is not relevant is not admissible. Evidence Rule 402. The defense would argue that the statement should be allowed for its impeachment value – to show that Bob has a motive to lie. However, it is unlikely that a court would allow it on this ground; any person bringing suit has plans of how to spend money that they might recover. Thus, the probative value of the evidence

is low, and weighed against its prejudicial effect (portraying Bob as an opportunistic drunk) under Evidence Rule 403, a court most likely would not allow it.

3. Discuss whether the defense will be allowed to (1) present Bob's DUI convictions and (2) present evidence that Bob is a drunk who is always intoxicated. 20%

Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. Evidence Rule 404(b)(1). The defense's purpose in introducing Bob's past drunkenness would be to portray Bob as a person who frequently has been drunk in the past and therefore was drunk on the evening in question. Unless the defense can show a purpose for the evidence other than proving the above, the evidence should not be allowed. The defense might argue that three incidents of intoxication in the previous three years should be allowed as evidence of habit or routine practice under Evidence Rule 406: "Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." However, three incidents in three years is unlikely to be seen as a habit, "a person's regular practice of meeting a particular kind of situation with a specific type of conduct . . . [t]he doing of the habitual acts may become semiautomatic." Commentary to Evidence Rules 406.

The defense also will be prohibited from presenting Bob's previous convictions for drunk driving. A person may be impeached with a prior conviction if (1) the prior conviction is for a crime involving dishonesty or false statement; (2) not more than five years have elapsed since the conviction; and (3) if the probative value outweighs its prejudicial effect. Evidence Rule 609(a)-(c).

As a preliminary matter, before a party may impeach a witness with the prior conviction, the party must first advise the court and the court must rule on its admissibility. Evidence Rule 609(c).

The defense will not be able to use the DUI convictions because it is not a crime of dishonesty – it does not involve dishonesty or false statement and is unlike those crimes that have been found to involve dishonesty or false statement (including perjury, fraud, forgery, and false statement). *See, e.g., City of Fairbanks v. Johnson*, 723 P.2d 79, 82 (Alaska 1986). Furthermore, although the DUI convictions are sufficiently recent (within the last 5 years), the fact that Bob has three DUI convictions in the past three years would have a very prejudicial effect on a jury and outweigh its probative value (if any) under Rule 403.

4. Bob's attorney objects to Wendy Barfly testifying that Bob was "drunk," –arguing that Wendy is not qualified as an expert to state such opinion. 20%

(a) Discuss whether Wendy Barfly may testify as to her opinion of Bob's state of sobriety.

(b) May Wendy Barfly testify as to the other bar patron's comment that Bob was "so wasted"?

Under Alaska Rule of Evidence 701, the testimony of a witness not testifying as an expert is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. Wendy should be able to testify not only to what she observed (he was stumbling and had glassy eyes) but also that – rationally based on these perceptions – that Bob was *drunk*. *See, e.g.*, *Loof v. Sanders*, 686 P.2d 1205 (Alaska 1984). Her opinion that Bob was drunk is helpful to the fact finder's evaluation of Bob's memory and perception of events when the acts in question occurred. Concluding that a person is drunk is of sufficiently common experience of a lay person and does not require the testimony of an expert to "assist the trier of fact in understanding the evidence." Alaska Rule of Evidence 701.

The court must still evaluate whether Wendy's testimony and opinion that Bob was drunk has a probative value not outweighed by the danger of unfair prejudice under Rule 403. As above, its probative value is for impeachment – that Bob was intoxicated that evening and thus his recollection of events is suspect. It is unlikely that the possible prejudicial impact of the evidence – that Bob could be seen as a person who drinks to excess – outweighs the very strong probative value of evidence that he was very intoxicated and thus unable to clearly remember what happened that evening.

Finally, Wendy's testimony that she heard another bar patron comment, "Man, you are so wasted!" is hearsay evidence: a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. Evidence Rule 801. But the defense should argue it should come in as an exception to the hearsay doctrine as a "present sense impression:" "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Evidence Rule 803(1). The declarant was describing Bob's intoxicated condition as he observed it, and Wendy's testimony of the statement should be allowed.

The defense might also argue that the statement Wendy overheard should come in as an "excited utterance" under Evidence Rule 803(2). This argument is weak. The defense would have to convince the judge that (a) the statement related to "a startling event or condition" and that (b) the declarant made the statement while "under the stress of excitement caused by the event or

condition." Here, although the bar patron apparently made the statement while under the stress of the "event," it is unlikely that a court would find the putative "event" (seeing an intoxicated person stumbling in a bar) was sufficiently startling to fit within this exception.

5. The bar owner argues that, even if the accident occurred on his property, he cannot be held responsible for unavoidable acts of nature. May Bob present evidence of the sea-lion proof fence? Explain why or why not. 10%

That the bar owner subsequently took steps to avoid a sea lion encounter on the premises is a "subsequent remedial measure" under Rule 407. Under Rule 407, evidence of subsequent measures that "if taken previously, would have made the event less likely to occur" are not admissible to prove negligence in connection with the event. However, because the bar owner's position was that the sea lion accident was an act of nature that "could not have been avoided," evidence of the sea lion fence as a subsequent remedial measure can be used to show that precautionary measures *were* feasible.