

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: EVIDENCE

(1) At trial, the defense calls Peter to testify concerning what he observed with regard to Patty's exercise routine following the accident and whether Patty ever complained to Peter about her ankle pain during those weeks. Patty wishes to keep all such information out. Explain what objections Patty might make on grounds of privilege and whether her objections will be successful. (40)

Evidentiary privileges bar the use, in court proceedings, of certain information gained or observed by spouses. Where evidentiary privileges are involved, 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).

Two types of privileges exist between a husband and wife under Evidence Rule 505. Under 505(a), "(a) husband shall not be examined for or against his wife, without his consent, nor a wife for or against her husband, without her consent." The privilege to testify or not testify thus belongs to the witness spouse. The general policy behind the husband-wife privilege is to promote family peace and harmony by not having one spouse testify against another. *Daniels v. State*, 681 P.2d 341, 345 (Alaska App. 1984))

The second type of privilege between a husband and wife under Evidence Rule 505 relates to communications made between spouses during the marriage. Rule 505(b) states the general rule that "(n)either during the marriage nor afterwards shall either spouse be examined as to any confidential communications made by one spouse to the other during the marriage, without the consent of the other spouse."

Patty wishes to keep all of Peter's testimony out. With regard to Peter's testimony concerning Patty's physical activity after her fall, the choice would belong to Peter, not Patty, as the witness spouse. The witness spouse may waive the privilege and testify (for or against the spouse) if he so chooses. However, under this fact pattern, Peter does not have the choice because Patty and Peter are now divorced. Spousal immunity under 505(a) protects only *spouses*, and Patty and Peter no longer fall into that category. The fact that they were married at the time Peter made the observations that are the subject of the testimony is irrelevant to the testimonial privilege under 505(a). Neither Patty nor Peter may use the privilege of spousal immunity to keep Peter from testifying about how Patty continued dancing and working out on her twisted ankle.

With regard to statements that Patty may have made to Peter regarding the pain in her ankle, Patty should object on grounds of Evidence Rule 505(b), and her objection should be successful. Under this marital privilege, it is irrelevant whether the persons seeking to apply the privilege are no longer married. As nothing in the fact pattern suggests that the statements were made in front of others (and thus not confidential), Patty's objection on this ground should be successful.

(2) Prior to trial, Patty asks the court to take judicial notice that snow on the stairs caused them to be slippery, and says to the judge, "You shop at that store – you know that their steps are always treacherous when it's snowing!" Should the court grant her request? Explain. (25)

Under Evidence Rule 201, a court may take judicial notice of facts. This means that the court may make an "on-the-record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact." Patty is asking the court to declare that the snow made the steps slippery, and she is also asserting that the judge should take judicial notice because he personally knows that snow on those particular steps result in slipperiness.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 201(b). Judicial notice may be taken at any stage of the proceeding. Rule 203(b).

Whether or not snow made the steps slippery is subject to reasonable dispute and would neither be a generally known principal nor capable of accurate and ready determination through any source. Patty's assertion that the judge should take judicial notice because he is personally familiar with the steps is incorrect. Judicial notice of facts that are not generally known, even if they are within the judge's personal knowledge or belief, is improper. *See, e.g., State v. Grogan*, 628 P.2d 570, 573 n. 4 (Alaska 1981) (trial court judge "may have improperly taken judicial notice of facts within his personal knowledge"). It is the role of the jury as fact finder to decide this issue.

(3) Patty wants to call the records custodian from Ace Investigators to testify concerning statements in the Ace Accident Report. The original investigator no longer works for the company. Explain whether Patty's statements in the report will be allowed into evidence. (35)

The statements in the accident investigation report are hearsay: statements, other than ones made by the declarant while testifying, offered to prove the truth of the matter asserted. Evidence Rule 801(c). But hearsay statements may come under various exceptions to the rule.

The exception posed by this question concerns the business records exception to the hearsay rule of Evidence Rule 803(6). The business records exception to the hearsay rule allows the admission of hearsay evidence that is:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Evidence Rule 803(6). The facts indicate that the report is one that is kept in the regularly conducted business of Ace Investigators. It is of no consequence that the original investigator is not available; all Patty needs to do to present the report is to call the records custodian or another “qualified witness”. Nothing suggests a lack of trustworthiness in the report.

But the report is an investigative report containing the hearsay statements of someone else: Patty. Even though the *investigator* was acting within the regular course of business in preparing the report, no indication exists that *Patty* was acting within the regular course of any business or possessed the accompanying goal of accuracy and truthfulness in her statements. In fact, the opposite is true: Patty had every reason to make self-serving statements in order to benefit any award from the store; she was careful to emphasize that the steps had snow on them and that she “was very careful” as she descended them. As the commentary to Rule 803(6) notes:

Sources of information present no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, are acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail.

Because Patty, as supplier of the information, was under no duty of accuracy to any employer or business, her statements contained in the report will not be allowed under the business records exception to the hearsay rule.

Some examinees might take this opportunity to discuss the “prior consistent statement” of Evidence Rule 801(d)(1)(B), that a statement that would otherwise be barred by the hearsay rule is admissible if it is “consistent with the declarant's testimony and is offered to rebut an express or implied charge ... of recent fabrication or improper influence or motive.” However, although it may be assumed that Patty would testify, examinees should not receive credit for discussion of this rule as nothing in the fact pattern suggests that Patty has recently fabricated her testimony or has been improperly influenced or motivated.