

## **ESSAY QUESTION NO. 8**

### **Answer this question in booklet No. 8**

Raintown is an Alaska port along the Marine Highway, the ferry system that connects maritime communities in Alaska with each other and with gateway ports to the south. The Marine Highway schedule is such that thousands of summer tourists have a layover of a few hours in Raintown on their way north.

For many years, Raintown Vans (VANS) has run a profitable business that entails meeting the incoming vessels and enticing transit passengers into vans for a quick tour of a local totem pole park. Because VANS is mentioned in popular guidebooks, tourists specifically plan to take VANS tours in Raintown.

In the summer of 2008, TotemTours (Totem) starts a competing tour operation to take Marine Highway passengers to the totem park. To improve its bookings, Totem distributes an information sheet to passengers waiting to board vessels bound for Alaska. The sheet purports to be a directory of services in Raintown. It lists both VANS and Totem as tour operators, and urges passengers to telephone before embarking to make tour reservations. The telephone number listed on the sheet for VANS is 555-4444 - a number that actually goes to a dedicated telephone at the Totem office in Raintown. When passengers call the number, a Totem representative answers "Van tours, may I help you?" and then books them on a Totem tour.

VANS learns of this practice on a Tuesday in early summer. The next Marine Highway vessel will embark for Raintown on Thursday. VANS files a complaint in Superior Court on Wednesday morning. Time being short, the complaint is brief: It alleges that Totem "is taking VANS customers by fraud" and requests injunctive relief and damages. Along with the complaint, VANS files an application for a temporary restraining order (TRO), asking the court to issue a TRO ordering Totem to forward to VANS all reservation calls received on 555-4444. The application consists of (i) a memorandum recounting the facts above and (ii) a proposed order, which reads in totality: "IT IS HEREBY ORDERED that, effective immediately and until this matter may be heard on the merits, TotemTours shall forward all calls from potential customers received on 555-4444 to Raintown Vans." VANS does not serve or otherwise contact Totem regarding the lawsuit.

A Superior Court Judge signs the proposed TRO without a hearing or further explanation at noon on Wednesday, endorsing it with the date and hour of signature. VANS then serves Totem with the complaint, application, and TRO for the first time.

Analyze whether the TRO was properly issued. Do not discuss the underlying legality or illegality of Totem's advertising practices.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 8 \*\*\*

#### SUBJECT: CIVIL PROCEDURE

This question tests basic concepts of injunctive relief, Alaska Rule of Civil Procedure 65, and Alaska Rule of Civil Procedure 9.

A. The Underlying Complaint Fails to State a Claim. (10 points)

A background fact that should play a role in a discussion of the propriety of the TRO is that the underlying suit, as presently framed, is defective. The complaint alleges only that Totem is taking VANS customers by fraud. While Alaska is a notice pleading jurisdiction requiring, in most cases, only that complaints make “a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>1</sup> when there is a claim of fraud “the circumstances constituting fraud . . . shall be stated with particularity.”<sup>2</sup> VANS’s complaint, as presently framed, plainly fails to meet that standard, because it includes only a conclusory allegation of fraud.

B. The Substantive Standards for Relief Were Not Met. (35 points)

A few examinees may contend that a TRO is wholly improper in this context because TROs are “restraining” orders and the order entered here is an affirmative injunction, requiring a party to do something rather than refrain from doing something. This is mistaken: despite the nomenclature, TROs are simply emergency temporary injunctions and they can take any form, positive or negative.<sup>3</sup> The general purpose of most TROs is to preserve the status quo in some manner until the case can be litigated on the merits.<sup>4</sup> The TRO entered in this case fits this pattern: it ensures that customers who sought to contact VANS and therefore would in the ordinary course of events have used VANS will continue, for the time being, to be booked by VANS, and it effectively restrains Totem from diverting VANS customers. Nonetheless, the way the court arrived at the TRO had many defects.

1. *Balancing of Likelihood of Success and Potential Injury*

For any preliminary injunction or temporary restraining order to issue, the court must consider the likelihood that the plaintiff will prevail on the merits, the harm to the plaintiff if wrongful behavior is not enjoined immediately, and the harm that will be suffered by the person enjoined if the injunction turns out to be wrongful. The Alaska Supreme Court has framed two tests for

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<sup>1</sup> Alaska R. Civ. P. 8(a).

<sup>2</sup> Alaska R. Civ. P. 9(b).

<sup>3</sup> See, e.g., *Fairbanks North Star Borough v. Tundra Tours, Inc.*, 719 P.2d 1020, 1024 (Alaska 1986) (TRO requiring provision of services); J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 15.4 (1985).

<sup>4</sup> Friedenthal, *et al.*, *supra*, at § 15.4.

weighing these factors. If the harm from a wrongful injunction is relatively slight in comparison to the threatened harm to the plaintiff, the plaintiff's claims "must raise serious and substantial questions . . . ; that is, the issues raised cannot be 'frivolous or obviously without merit.'"<sup>5</sup> If the potential harm to the defendant from a wrongful injunction is "not inconsiderable and may not be adequately indemnified by a bond," the plaintiff will have to clear a higher hurdle, demonstrating probable success on the merits.<sup>6</sup>

In this case, the court does not appear to have applied either test. Moreover, there are two flaws in the plaintiff's showing that undermine issuance of a TRO if one of the tests were to be applied. First, the application has been supported by no evidence—no testimony, affidavits, or documentation—and therefore there has been no showing upon which the court can judge likelihood of success on the merit or relative harm to the parties. Second, the complaint presently fails to state a claim. Thus, the record before the court presently appears to show no likelihood of success on the merits, making temporary injunctive relief improper under both tests. Only if the application for a TRO included evidence showing that, if amended, the complaint would state a claim and that claim would at least raise serious and substantial questions could preliminary relief be justified.

## 2. *Irreparable Injury*

This TRO was issued without prior notice to the party being enjoined. A TRO can only be issued without notice where the requesting party faces "immediate and irreparable injury."<sup>7</sup> The procedural details of how immediate and irreparable injury must be shown will be addressed in C below. More fundamentally, however, there is a potential substantive defect in the grounds for the TRO with regard to irreparable harm: the harm that VANS faces is, at least arguably, not irreparable.

The Alaska Supreme Court has endorsed the following standard definition of "irreparable injury:"

"Irreparable injury" "includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law."<sup>8</sup>

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<sup>5</sup> *North Kenai Pen. Road Maint. Serv. Area v. Kenai Pen. Borough*, 850 P.2d 636, 639 (Alaska 1993) (quoting prior authority); *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 379 (Alaska 1991).

<sup>6</sup> *Id.*

<sup>7</sup> Alaska R. Civ. P. 65(b).

<sup>8</sup> *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1273 n.5 (Alaska 1992) (quoting Black's Law Dictionary, 6<sup>th</sup> ed.).

Totem could argue that any injury VANS might suffer can easily receive reasonable redress in a court of law through payment of damages. Totem business records could reveal the advance reservations taken as a result of the information sheet, and if the court were to agree that those reservations had been wrongfully diverted from VANS, VANS could be awarded its lost profit per passenger. This criticism of the TRO is viable; temporary equitable relief generally is not available if the court can easily redress any harm to the plaintiff through a collectable damages award.<sup>9</sup> However, courts do interpose temporary injunctions to prevent purely monetary harm in many circumstances, such where the plaintiff faces a loss of unquantifiable customer goodwill, loss of a unique position in the marketplace, or risk of being driven out of business entirely.<sup>10</sup> What is significant for purposes of this question is only that it is arguable that the party seeking the injunction faces no irreparable injury; the question does not present enough facts to determine with certainty whether the injury is irreparable.

C. Notice Was Required But Not Given. (30 points)

A TRO may be granted without notice to the adverse party, but only under strictly limited circumstances. First, the applicant must make it appear from *specific facts* shown *by affidavit* that “immediate and irreparable injury, loss, or damage will occur” before any opposition can be heard.<sup>11</sup> Second, the applicant’s attorney must explain to the court in writing any efforts to notify the other party and the reasons for proceeding without notice.<sup>12</sup> Here, the application has been filed without the required affidavit and without a written explanation of any basis to omit notice. Moreover, the facts of the question suggest no basis to grant the TRO without notice: the application was considered and granted at mid-day Wednesday, while the next departure at which “information sheets” may be distributed is not until Thursday. This should allow time for telephone notice to Totem, so that it can appear and contest the TRO.

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<sup>9</sup> This is a general principle of equitable relief followed in most or all U.S. jurisdictions. *See, e.g., Virginia Petroleum Jobbers Ass’n v. Federal Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“The possibility that adequate compensatory . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”), *cited with approval in Sampson v. Murray*, 415 U.S. 61, 90 (1974). Alaska cases reflecting this general principle, albeit not containing an express holding on the point, include *Jackinsky v. Jackinsky*, 894 P.2d 650, 653 (Alaska 1995), *In re Soldotna Air Crash Litigation*, 835 P.3d 1215, 1218 (Alaska 1992).

<sup>10</sup> *E.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263-65 (10<sup>th</sup> Cir. 2004) (citing many examples); *see also Knaebel v. Heimer*, 663 P.2d 551, 553 (Alaska 1983) (suggesting that where damages would be speculative or the defendant is insolvent there would be no adequate remedy at law).

<sup>11</sup> Alaska R. Civ. P. 65(b).

<sup>12</sup> *Id.*

Notice and an opportunity for hearing are fundamentals of due process.<sup>13</sup> The many procedural safeguards written into Alaska's Rule 65 and the similar provisions in most U.S. jurisdictions are designed to keep the emergency relief afforded by a TRO within constitutional bounds.<sup>14</sup> With those safeguards having been ignored, the granting of the TRO in this case is arguably a violation of Totem's due process rights under the Alaska and U.S. constitutions.

D. The TRO lacks the required detail. (10 points)

Alaska Rules 65(d)<sup>15</sup> and 52(a)<sup>16</sup> require that all injunctive orders set out the findings of fact and conclusions of law that support the relief granted. The Alaska Supreme Court has noted that "There are no exceptions" and that this requirement "should be scrupulously observed."<sup>17</sup> The TRO under the facts given in this question lacks these required elements and is therefore subject to being vacated.<sup>18</sup>

When a TRO is granted without notice, Alaska's Civil Rule 65 requires that it be endorsed with its date and hour of issuance, which has been done. Additionally, however, it must (i) define the anticipated injury, (ii) explain why the injury is irreparable, (iii) note why the TRO was granted without notice, and (iv) set a time of expiry, not to exceed ten days.<sup>19</sup> Under the facts given, the TRO issued in this case was defective in these regards.

E. The TRO's duration is too long. (10 points)

A TRO granted without notice must have an expiration term, which may not exceed ten days.<sup>20</sup> The order in this case has no fixed expiration and therefore violates this limit. However, the Alaska Supreme Court has interpreted the rule's requirement of a stated expiration, not to exceed ten days, as a provision that simply terminates any TRO at ten days if no other expiration is given, rather than as a provision rendering the original TRO invalid.<sup>21</sup>

F. No security has been posted. (5 points)

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<sup>13</sup> See, e.g., *Bowyer v. Indiana Dep't of Natural Resources*, 798 N.E.2d 912, 915 (Indiana App. 2003); cf. *Wright v. Black*, 856 P.2d 477, 480 (Alaska 1993); *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659 (Alaska 1974).

<sup>14</sup> See, e.g., *Bowyer*, 798 N.E.2d at 915-17; *In re Guardianship of Carlsmith*, 151 P.3d 717, 722-23 (Hawaii 2007); *MacDonald v. State*, 997 P.2d 1187, 1189-90 (Alaska 2000).

<sup>15</sup> "Every . . . restraining order shall set forth the reasons for its issuance . . . ."

<sup>16</sup> "[I]n granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its actions."

<sup>17</sup> *Dep't of Fish and Game v. Pinnell*, 461 P.2d 429, 432 (Alaska 1969).

<sup>18</sup> *Id.* (vacating a preliminary injunction that was not in compliance with Rules 52(a) and 65(d)).

<sup>19</sup> *Id.*

<sup>20</sup> Alaska R. Civ. P. 65(b). Extensions for a like duration are possible upon a showing of good cause.

<sup>21</sup> *Ostrow v. Higgins*, 722 P.2d 936, 939 (Alaska 1986); *Spucewood Inv. Corp. v. Alaska Housing Finance Corp.*, 33 P.3d 1156, 1161 (Alaska 2001).

Civil Rule 65(c) provides that no TRO should issue without the posting of security for costs and damages that might be incurred by a party later found to have been enjoined wrongfully. The amount of the bond is within the court's discretion. Here, however, no bond has been offered, considered, or required.