ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Dan was driving home with his dog, Bud, when a loud clap of thunder startled the dog. Bud jumped into the driver's seat, causing Dan to drive off the road and into a fence. The fence was substantially damaged as a result of the accident. The fence and the land that it enclosed were owned by Paul. Paul repaired the fence and then sued Dan to recover the costs related to repairing the fence.

Before trial, Dan called Paul to discuss the possibility of settling the case. During the conversation, Paul admitted that he was exaggerating the fence-repair costs, but insisted that Dan should not be concerned because it was Dan's insurance company that would pay. Dan refused to settle under these circumstances.

At trial, Paul testified to the amount of his damages. When he was unable to remember some of the fence-repair costs, his attorney handed him a list that Paul had prepared with the help of his attorney several weeks before trial. The list was an inventory of the costs that Paul had incurred in repairing the fence. Paul's attorney asked him whether this list refreshed his recollection.

Dan, who had not previously seen the list, objected to its being used to refresh Paul's recollection on two grounds: (1) the list was inadmissible hearsay and (2) he had not been given a copy of the list before the trial began. The court overruled the objections. Dan's attorney then requested a copy of the list. Paul's attorney refused on the ground that the list contained attorney work-product. The court ordered Paul to provide a copy of the list to Dan and his attorney. After having reviewed the list, Paul testified to the remaining fence-repair costs. Paul's attorney did not seek to introduce the list as an exhibit.

On cross-examination, Dan's attorney attempted to question Paul on his prior statement to Dan that he (Paul) was exaggerating his damages. Paul's attorney objected, arguing that the statement was hearsay and was made during settlement discussions. The court sustained the objection.

1. Discuss the validity of Dan's objections to allowing Paul to use the list of fence-repair costs to refresh his recollection.

2. Discuss whether the trial court was correct when it ordered Paul to provide a copy of the list to Dan and his attorney.

3. Discuss the validity of Paul's objections to allowing Dan to cross-examine Paul on his prior statement that he was exaggerating his damages.

GRADER'S GUIDE

***** QUESTION NO. 7 *****

SUBJECT: EVIDENCE

1. Discuss the validity of Dan's objections to allowing Paul to use the list of fence-repair costs to refresh his recollection. (30 points)

Evidence Rule 612(a) permits the use of writings or other objects to refresh a witness's recollection while testifying. The fact that the writing itself might not be admissible as evidence – as, for example, when the writing constitutes inadmissible hearsay – does not preclude its use to refresh a witness's recollection. *See Matomco Oil Co. v. Arctic Mechanical, Inc.*, 796 P.2d 1336, 1342-43 (Alaska 1990). This is so because, in general, a writing used to refresh a witness's memory is not considered evidence; it does not have to be admitted and frequently cannot be admitted as evidence in its own right. *See, e.g.*, *Matomco*, 796 P.2d at 1343. Thus, in *Matomco*, the Alaska Supreme Court affirmed a trial court's decision to allow a witness to use a written inventory of his losses to refresh the witness's recollection of those losses even though the trial court had previously held that the list, itself, could not be admitted as evidence because it was inadmissible hearsay. *Id.* at 1342-43.

Note: Whether the list falls within the recorded-recollection exception to the hearsay rule is irrelevant to whether the list can be used to refresh recollection. *See Matomco*, 796 P.2d at 1342-43. Therefore, a discussion of this hearsay exception is not responsive to the call of the question.

The fact that Paul failed to earlier provide a copy of the list to Dan in response to a discovery request does not preclude Paul from using the list to refresh his recollection. *See Kenai Chrysler Center, Inc. v. Denison*, 167 P.3d 1240, 1253 (Alaska 2007). Evidence Rule 612(a) creates a right to inspect a document used to refresh a witness's recollection. But in *Kenai Chrysler*, the court held that that right did not encompass a right to pretrial disclosure. Instead, "[b]y expressly granting the right to immediate inspection, the rule implicitly recognizes the absence of a pretrial duty of disclosure." *Kenai Chrysler*, 167 P.3d at 1253.

2. Discuss whether the trial court was correct when it ordered Paul to provide a copy of the list to Dan and his attorney. (20 points)

The trial court was correct when it ordered Paul to provide a copy of the list to Dan and his attorney. An opposing party has a right to examine any writing used to refresh a witness's testimony. *See* Alaska R. Evid. 612(a). In such cases, the writing must be shown to the opposing party upon request. *Id.*

The fact that the list might qualify as attorney work-product – since the list was prepared with the assistance of Paul's attorney – does not permit Paul to deny Dan access to the document. In general,

> [i]f it is claimed that a writing or object contains matters privileged or not related to the subject matter of the testimony the court shall rule on any claim of privilege raised and examine the writing or object in camera, excise any portions not so related and deliver the remainder to the party entitled thereto.

Alaska R. Evid. 612(c). But this provision does not permit Paul to shield the list from Dan. In general, a party waives any work-product privilege which might otherwise attach to a writing when he uses portions of the writing to refresh recollection. *See, e.g.*, *Lowery v. State*, 762 P.2d 457 (Alaska App. 1988).

3. Discuss the validity of Paul's objections to allowing Dan to cross-examine Paul on his prior statement that he was exaggerating his damages. (50 points)

Paul raised two objections to Dan's cross-examination with respect to his comment to Dan that he was exaggerating his damages: hearsay and the fact that the statement was made during settlement discussions. Although Paul's hearsay objection should fail, the objection relating to settlement discussions is valid. Therefore, the court was correct when it refused to allow Dan to cross-examine Paul on this statement.

a. Hearsay Objection

Paul's statement does not present a hearsay problem. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Alaska R. Evid. 801(c). Although Paul testified at trial, his statement to Dan was made outside of the trial and thus could fall within this definition. But the statement likely qualifies as non-hearsay under Evidence Rule 801(d).

First, Paul's statement likely qualifies as an admission of a party opponent, which would remove the statement from the hearsay rule entirely. A statement qualifies as an admission of a party opponent if it "is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity." Alaska R. Evid. 801(d)(2). Here, the statement is being offered by Dan against Paul, a party opponent, and there is no dispute that this was Paul's own statement.

Second, a prior out-of-court statement that is inconsistent with the witness's in-court testimony is admissible as non-hearsay. *See* Evidence Rule 801(d)(1). To admit evidence of prior inconsistent statements, the witness must first testify inconsistently with the prior statements. The witness must then be examined about the prior statements while testifying and be given an opportunity to explain or deny the statements. *See* Alaska R. Evid. 801(d)(1)(A). Thus, Dan must first question Paul about the prior statement. If Paul denies having made the prior statement, then Dan may present other evidence – such as his own testimony about the statement – to establish Paul's prior inconsistent statements. By attempting to cross-examine Paul about his prior statement, Dan is following the process specifically required by Evidence Rule 801(d)(1)(A).

Note: These requirements are similar to those set forth in Evidence Rule 613, which states that, to impeach a witness based on prior inconsistent statements, the party seeking to introduce the statements must first lay a foundation by affording the witness the opportunity, while testifying, to explain or deny the prior statement. *See* Alaska R. Evid. 613(b). However, to the extent Dan seeks to rely on the prior inconsistent statement not merely to impeach Paul's trial testimony, but also to prove the truth of the matters asserted in the statement, the examinee's analysis should focus on Evidence Rule 801 rather than Evidence Rule 613. An examinee should receive credit for making this distinction.

b. Settlement Discussions

Paul also objected on the grounds that the statement was made in the context of settlement discussions. This is a valid objection. Evidence Rule 408 states that evidence of

> 1. furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Alaska R. Evid. 408. This rule is not limited merely to the actual offer or acceptance, but extends to "[e]vidence of conduct or statements made in compromise negotiations." *Id.*

Paul's comment concerning exaggerating his damages would appear to fall squarely within this prohibition. There are, however, a number of exceptions to the rule. For example, evidence is not excluded when it is offered for another purpose, "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal

investigation or prosecution." Alaska R. Evid. 408. An examinee may attempt to fit Paul's comment into one of these exceptions, but ultimately, Dan is offering the prior statement to impeach Paul's testimony. The rule is very clear that "exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement." *Id.* Thus, the trial court was correct to exclude evidence of Paul's prior statement.