ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

In the spring of 2010, Paula purchased fertilizer from Dan. Dan assured her that the fertilizer was safe for use around pets. But shortly after Paula applied the fertilizer to her garden, her dog, Max, became violently ill. As a result of Max's illness, an expensive rug in Paula's home was ruined.

Paula met with an attorney, Jim, and his paralegal, Ann, to discuss the possibility that Jim might represent Paula in an action against Dan. The three met in a restaurant because Jim's office was being remodeled. Jim selected a table near the back of the restaurant, somewhat removed from other diners. During the conversation, Paula admitted that Max had a sensitive stomach and often became ill, even before the fertilizer incident. As a result, she could not say with certainty that the fertilizer had caused Max's illness. But she could not afford to replace the rug unless Dan paid for the replacement. Several days later, Jim agreed to represent Paula.

Jim filed a complaint in court on Paula's behalf against Dan to recover damages for the ruined rug. Dan answered, alleging that he had believed the fertilizer was safe and that, in any event, the fertilizer had not caused Max's illness.

At a jury trial to resolve her claims, Paula testified, describing her purchase and use of the fertilizer and Max's subsequent illness. Jim then informed the court that he intended to call 15 witnesses, each of whom would testify that, between 2006 and 2009, they had purchased from Dan the same brand of fertilizer that Paula had purchased. They would each testify that Dan had assured them that the fertilizer was safe for use around pets. The witnesses would further testify that their pets had become ill and that the witnesses had complained to Dan about it. Dan objected to these witnesses, arguing that the testimony (1) included evidence of prior bad acts and as such was impermissible character evidence, (2) included inadmissible hearsay, and (3) was unnecessarily cumulative. The trial court allowed all of the witnesses to testify.

As Paula's final witness, Jim called an insurance agent who was prepared to testify that, several years earlier, Dan had purchased a comprehensive liability policy and that this policy would cover the cost of replacing Paula's rug if, in fact, the fertilizer had caused Max's illness. Dan objected on grounds of relevance. The trial court agreed with Dan and refused to allow the insurance agent to testify.

In defense, Dan called Larry, a waiter at the restaurant where Paula had met with Jim and Ann. Larry was prepared to testify that he had overheard Paula telling Jim that Max was often ill and that the fertilizer might not have caused Max's illness. Jim objected, asserting that these statements were protected by the attorney-client privilege and that the statements were inadmissible hearsay. The trial court agreed with Jim and refused to allow Larry to testify.

1. Discuss whether the trial court erred when it allowed the testimony of the 15 witnesses who had previously purchased fertilizer from Dan.

2. Discuss whether the trial court erred when it refused to allow the insurance agent to testify to Dan's ownership of liability insurance.

3. Discuss whether the trial court erred when it refused to allow Larry to testify concerning the conversation that he overheard in the restaurant.

GRADER'S GUIDE

*****QUESTION NO. 2*****

SUBJECT: EVIDENCE

1. Discuss whether the trial court erred when it allowed the testimony of the 15 witnesses who had previously purchased fertilizer from Dan. (45 points)

Over Dan's objection, the trial court permitted Paula to call the 15 witnesses who had previously purchased fertilizer from Dan. Dan raised three objections to this proposed testimony: (1) that it constituted evidence of prior bad acts introduced as impermissible character evidence, (2) that it included inadmissible hearsay statements, and (3) that it was cumulative. Applicants should discuss each of these objections separately.

a. Evidence of prior bad acts.

In general, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." Alaska R. Evid. 404(a). Here, each of the 15 prior customers intended to testify to a prior incident in which Dan allegedly told them that the fertilizer was safe when, in fact, he appears to have been aware of problems with the fertilizer. Evidence Rule 404(b) precludes such evidence "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." Alaska R. Evid. 404(b)(1). Thus, if this evidence was offered only to show that Dan is an unscrupulous salesman who has lied to customers in the past and therefore is more likely to have lied to Paula, the evidence would be inadmissible under Evidence Rule 404(a) and (b)(1).

But, there are several exceptions to this general rule, one or more of which likely applies here. A key issue in this case was whether Dan knew that the fertilizer was potentially dangerous to pets when he told Paula that it was safe for use around pets. While not admissible to prove propensity, evidence of prior acts is "admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Alaska R. Evid. 404(b)(1). Here, the witnesses' testimony clearly established that Dan had been told of other incidents in which pets had become sick after their owners used the fertilizer. Thus, the evidence tended to establish Dan's knowledge of the dangers of the fertilizer. And to the extent that Dan continued to repeat the assurance to subsequent customers, the evidence might also prove absence of mistake or his intent to defraud. If the evidence was offered for these purposes, it is admissible under Evidence Rule 404(b)(1).

b. Hearsay rule.

Dan also objected to the testimony on hearsay grounds. 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). Here, the proposed testimony of each of the 15 witnesses included two statements that were made outside of the trial and thus potentially fall within this definition: (1) the statement by Dan to each customer that the fertilizer was safe and (2) the subsequent statement by each customer to Dan that the fertilizer had caused the customer's pet to become ill. But these statements likely qualify as non-hearsay under Evidence Rule 801(c) and (d).

First, an out-of-court statement qualifies as hearsay only if it is offered "to prove the truth of the matter asserted." Alaska R. Evid. 801(c). Here, the evidentiary value of the out-of-court statements does not appear to hinge on the truth of those statements. That is, Paula was not offering Dan's statements to prior customers concerning the safety of the fertilizer to prove that the fertilizer was safe. Thus, the statements did not qualify as hearsay.

The prior customers' statements to Dan, warning him that their pets had become ill after the customers had used the fertilizer, present a closer call. To the extent that Paula offered these statements simply to prove that Dan knew that pet illnesses had been associated with the fertilizer in the past, the relevance of the customers' out-of-court statements to Dan did not depend on the truth of those statements. That is, even if the customers lied about their pets becoming ill or were mistaken about the connection between their pets' illnesses and the fertilizer, the evidence may still have been relevant to establish that Dan was aware of the problem and failed to inform Paula of the possibility that the fertilizer was not safe around pets.

Second, Dan's statements to his prior customers likely qualify as non-hearsay under Evidence Rule 801(d)(2), which excludes from the hearsay definition an out-of-court statement that "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, Dan was a party and his statements were being offered against him. Thus, Dan's statements to his prior customers would qualify as admissions of a party opponent and would therefore be admissible non-hearsay.

An applicant might attempt to argue that Dan's statements to his prior customers fall within the exception to the hearsay rule for statements against interest. *See* Alaska R. Evid. 804(b)(3). But this exception applies only to declarants who are "unavailable" and there is no suggestion in the facts that Dan was unavailable as defined by Evidence Rule 804(a). In addition, the exception applies only to a statement

> which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Alaska R. Evid. 804(b)(3). Dan's assurance to prior customers that the fertilizer was safe does not appear to qualify under this definition.

c. Cumulative nature of evidence

Assuming that the testimony is otherwise admissible as discussed above, Dan still had a valid objection to the presentation of 15 witnesses, all of whom essentially testified to the same thing – that Dan told them the fertilizer was safe and that they had subsequently told Dan that their pets had become ill from the fertilizer. Under Evidence Rule 403, relevant evidence may nevertheless be excluded either because "its probative value is outweighed by the danger of unfair prejudice" or "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Alaska R. Evid. 403.

Here, because the testimony of each of the prior customers was essentially identical to the testimony of the others, Dan properly objected that the testimony was needlessly cumulative and a waste of time. Dan could also have argued that he would suffer undue prejudice if essentially the same testimony were repeated over and over again and that this potential prejudice outweighed the probative value of the testimony. In short, unless Paula presented some basis for distinguishing among the 15 witnesses or otherwise explained why the testimony of all 15 witnesses was needed, the trial judge likely should have allowed Paula to present only some, but not all, of these witnesses.

2. Discuss whether the trial court erred when it refused to allow the insurance agent to testify to Dan's ownership of liability insurance. (10 points)

In general, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Alaska R. Evid. 411. Thus, if Paula offered the evidence solely to prove that Dan acted negligently or otherwise wrongfully, then the trial court was correct in excluding the testimony.

However, there are exceptions. Although evidence of liability insurance cannot be offered to prove negligence or wrongdoing, it can be "offered for another purpose, such as proof of agency, ownership, or control, or

bias or prejudice of a witness." Alaska R. Evid. 411. The facts of the question, however, do not suggest that Dan placed any such issues in dispute. Thus, it does not appear that the evidence of liability insurance would have any relevance beyond establishing fault and could unfairly prejudice the jury by suggesting that an insurance company, rather than Dan, will pay for the damages to the rug. *See* Commentary to Evidence Rule 411 (noting risks that jury will misuse information concerning the existence or absence of insurance). For this reason, the trial court properly excluded the testimony.

3. Discuss whether the trial court erred when it refused to allow Larry to testify concerning the conversation that he overheard in the restaurant. (45 points)

a. Attorney-client privilege.

The scope of the attorney-client privilege is governed by Evidence Rule 503. In general, "[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." Alaska R. Evid. 503(b). The facts provided in the question create several issues concerning the applicability of the privilege as defined in Evidence Rule 503.

First, Jim had not yet agreed to represent Paula when she made the statements in question. Nevertheless, Paula qualifies as a "client" under the rule. Evidence Rule 503(a) defines "client" to include "a person . . . who consults a lawyer with a view to obtaining professional legal services." Alaska R. Evid. 503(a)(1). As the commentary to the rule explains, "[t]he definition of 'client' extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result." Commentary to Evidence Rule 503, at paragraph (a)(1). *See also American Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333 (Alaska 1982). Here, the facts of the question make clear that Paula was speaking with Jim "with a view to obtaining professional legal services" – *i.e.*, she was discussing with him the possibility of having him represent her in an action against Dan. Thus, the attorney-client privilege would apply even though Jim had not yet agreed to represent Paula.

Second, the conversation was not solely between Jim and Paula; Jim's paralegal, Ann, was also present during the conversation. This fact, however, does not preclude the application of the attorney-client privilege. Under Evidence Rule 503(b), the attorney-client privilege applies if the communication was made "between the client or the client's representative and the client's lawyer or the lawyer's representative." Alaska R. Evid. 503(b)(1). Under the facts of the question, Jim qualifies as a "lawyer." *See* Alaska R. Evid.

503(a)(3) ("A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."). Although Ann would not qualify as a "lawyer," she would qualify as a "lawyer's representative," which is defined as "one employed to assist the lawyer in the rendition of professional legal services." Alaska R. Evid. 503(a)(4). Therefore, her presence in the conversation would not preclude the application of the attorney-client privilege. *See Manville*, 642 P.2d at 1334 (holding that attorney-client privilege applied to conversation with investigator employed by lawyer).

Third, the conversation was held in a public place. This presents a more difficult question. The privilege applies only to "confidential communications." Alaska R. Evid. 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 to the client or those reasonably necessary for the transmission of the communication." Alaska R. Evid. 503(a)(5). The fact that Paula's conversation with Jim and Ann was held in a public restaurant where people (like Larry the waiter) could overhear creates a question whether her statements qualify as "confidential communications" under this definition. But the location of the conversation is not determinative.

The commentary to Rule 503 explains that "[t]he requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third person can scarcely be considered confidential." Commentary to Evidence Rule 503, at paragraph (a)(5). But the commentary further explains:

> The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent. "Communications which were intended to be confidential but were intercepted despite reasonable precautions remain privileged."

Commentary to Evidence Rule 503, at paragraph (a)(5). Depending on the facts, even a conversation in a public place, with other persons nearby, can qualify as confidential.

For example, in *Blackmon v. State*, 653 P.2d 669 (Alaska App. 1982), a state trooper overheard a conversation between a defendant and his attorney. Although the conversation occurred in a public courtroom, the attorney had directed his client to a far corner of the room, the two had stood with their backs to the rest of the room, and they conducted their conversation in whispers. *Blackmon*, 653 P.2d at 670. The court of appeals held that the trial court erred in allowing the state trooper to testify to the portion of the conversation that he overheard. *Id.* at 671-72. The court explained that, for the

privilege to apply, the client must "reasonably intend his communication with counsel to be confidential." *Id.* at 671. Thus, the privilege will apply against an eavesdropper "where the client and his lawyer intended their communications to be confidential and where precautions to preserve confidentiality were reasonable under the circumstances." *Id.* The court found that this standard had been met in *Blackmon*. *Id.* at 672.

Here, the parties to the conversation appear to have intended the conversation to be confidential. Jim met with Paula in a restaurant only because his office was not available. And the parties selected a table near the back of the restaurant, away from other diners – a reasonable precaution under the circumstances. Finally, the facts of the question do not suggest that Paula, Jim, or Ann was aware that Larry was eavesdropping. On the other hand, one could argue that other, more private locations would certainly have been available, and we are not told what other precautions Jim and Paula may have taken to prevent other persons from overhearing their conversation – such as keeping their voices low or speaking only when the waiter was not nearby. Given these facts, one could argue that the parties' apparent expectation of privacy was not reasonable.

Although the question of confidentiality can be argued either way, the stronger argument appears to be that Paula reasonably intended her conversation with Jim and Ann to be confidential and took reasonable precautions to assure that it remained confidential. Thus, the fact that the conversation was in a restaurant and was overheard by a waiter would not preclude the application of the attorney-client privilege.

Finally, assuming that the attorney-client privilege would otherwise apply, an applicant might argue that Paula's statements are nevertheless admissible under the civil-fraud exception to the privilege. Under Evidence Rule 503(d), the attorney-client privilege does not apply "[i]f the services of the lawyer were sought, obtained or 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." Alaska R. Evid. 503(d)(1). This includes the commission of a civil fraud. *See Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, 195 (Alaska 1989).

Here, Paula's remarks about Max's previous illnesses and her uncertainty about whether the fertilizer caused the illness that damaged the rug could be interpreted as being inconsistent with her claim against Dan – which depends on proof that the fertilizer was the cause of Max's illness. However, the fact that Max had been ill on previous occasions does not negate the claim that the fertilizer caused his illness on *this* occasion. Moreover, the evidence from the 15 other customers appears to confirm that the fertilizer was the cause this time, which presumably resolved Paula's earlier uncertainty.

Thus, given the facts provided, it does not appear that the civil-fraud exception would apply in this case.

b. Hearsay rule.

There is no valid hearsay objection to the introduction of Paula's statements to Jim and Ann. Evidence Rule 801(d)(2) excludes from the hearsay definition an out-of-court statement that "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). There is no question that Paula was a party – the plaintiff – and the statement was being offered by Dan against Paula. Thus, the trial court should have denied this objection.