ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Paul owns a pest control business. After seeing a news story about bed bugs, Paul decides to expand his business by purchasing a dog trained to detect bed-bug infestations. Paul buys a dog named Ruff from Dave, a breeder who specializes in training scent-detection dogs. Dave assures Paul that Ruff is fully trained in bed-bug detection, but he cautions that Paul will need to practice daily with Ruff to maintain Ruff's skills.

Ruff initially performs well. After several months, however, Ruff begins making mistakes and business drops off. Paul contacts Dave, asking him to either retrain Ruff or take him back and return Paul's money. Dave refuses, claiming that Paul has not maintained Ruff's skills through daily practice. Paul then sues Dave, claiming that Dave misrepresented Ruff's abilities and breached his agreement to provide a dog fully trained in bed-bug detection.

At trial, Paul testifies that he practiced with Ruff every day. On cross-examination, Dave seeks to impeach Paul by asking him about a six-year-old criminal-mischief conviction, which related to property damage caused by a college prank gone awry. Although Paul does not dispute the conviction, he objects to its use at trial. The trial court agrees and refuses to allow Dave to question Paul about the prior conviction.

Paul also calls Ed, an employee of Dave's dog-training business, to testify that after Paul complained to Dave about Ruff, Dave changed his training methods. According to Ed, Dave now includes a more intensive training regimen that has proven to be more effective in maintaining the dogs' skills than the method used to train Ruff. Dave objects. The trial court agrees and refuses to allow Ed to testify.

Dave then calls Paul's ex-wife, Jane, to testify. Paul and Jane finalized their divorce shortly before the trial. Jane is willing to testify that, while they were still married, Paul told her in private that he did not have time to practice daily with Ruff. Paul objects, asserting the husband-wife privilege. The trial court overrules the objection and allows Jane to testify.

1. Discuss whether the trial court erred when it refused to allow Dave to impeach Paul with his prior criminal-mischief conviction.

2. Discuss whether the trial court erred when it refused to allow Ed to testify about Dave's change in training methods.

3. Discuss whether the trial court erred when it allowed Jane to testify despite Paul's assertion of the husband-wife privilege.

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*** * * QUESTION NO. 8 * * ***
EVIDENCE

1. Discuss whether the trial court erred when it refused to allow Dave to impeach Paul with his prior criminal-mischief conviction. (35 points)

Alaska Evidence Rule 609 allows a party to impeach a witness by introducing evidence of the witness's conviction of a crime. But the conviction must be no more than five years old and it must be of a crime involving dishonesty or false statement. *See* Alaska R. Evid. 609(a), (b); *City of Fairbanks v. Johnson*, 723 P.2d 79 (Alaska 1986); *Alexander v. State*, 611 P.2d 469 (Alaska 1980). (The state rule differs significantly from the parallel federal evidence rule. Most important for the purpose of this question, the federal rule sets a 10-year age limit on such convictions. *See* Fed. R. Evid. 609(a), (b).) As explained below, Paul's six-year-old conviction for criminal mischief does not qualify under Alaska Evidence Rule 609.

First, the conviction is more than five years old. Therefore, it may not be used to impeach Paul under Evidence Rule 609 unless Dave can show that admitting the conviction "is necessary for a fair determination of the case." Alaska R. Evid. 609(b). But the commentary to the rule cautions that the five-year limit should be relaxed under this exception only "in rare cases where limiting impeachment as to prior convictions threatens to deny a party a fair trial or to infringe upon a constitutionally protected right." Commentary to Evidence Rule 609(b), at second paragraph. *See also Clifton v. State*, 751 P.2d 27, 29-30 (Alaska 1988) (holding that admission of a witness's prior convictions, from eight to fourteen years earlier, was not necessary to a fair determination of the trial because the party seeking to admit the evidence had a strong case without them and because there were other grounds for impeaching the witness). Nothing in the fact pattern suggests that the criminal-mischief conviction was necessary to a fair determination of the trial.

Second, criminal mischief is not a crime involving dishonesty or false statement. The Commentary to Evidence Rule 609 describes crimes of dishonesty or false statement as "crimes such as perjury, fraud, forgery, false statement, and other crimes in the nature of crimen falsi." Commentary to Evidence Rule 609(a), at second paragraph. Alaska courts have also held that theft offenses as well as robbery may qualify as crimes of dishonesty because they "disclose the kind of dishonesty and unreliability which bear upon the veracity of persons perpetrating those crimes." *Lowell v. State*, 574 P.2d 1281, 1284 (Alaska 1978). *See also Richardson v. State*, 579 P.2d 1372, 1376-77 (Alaska 1978) (holding that a conviction for shoplifting (petty larceny) was a crime of dishonesty); *Alexander v. State*, 611 P.2d 469, 476 (Alaska 1980) (holding that a conviction for robbery qualifies as a crime of dishonesty).

Criminal mischief does not appear to fall within this category. As described in the facts – and as set out in AS 11.46.475 – 11.46.486 (defining criminal-mischief offenses) – criminal mischief concerns intentional or reckless damage to property. Therefore, it is unlikely that such a crime would qualify as a crime of dishonesty or false statement for purposes of Evidence Rule 609(a).

For these reasons, the trial court did not err when it refused to allow Dave to impeach Paul with the six-year-old criminal-mischief conviction.

2. Discuss whether the trial court erred when it refused to allow Ed to testify about Dave's change in training methods. (30 points)

Evidence Rule 407 limits the admissibility of evidence of subsequent remedial measures. The rule provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

Alaska R. Evid. 407. According to the commentary, this rule rests on several grounds, including: (1) the recognition that evidence of a person's subsequent actions is not necessarily an admission that the person's earlier actions were negligent; (2) the policy of encouraging people to take remedial measures in the furtherance of safety; and (3) the belief that "people who err on the side of caution and take measures to protect fellow citizens from even the possibility of injury should not bear the risk that the jury . . . will read more into a repair than is warranted." Commentary to Evidence Rule 407, at second paragraph.

This rule has been applied "to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees." Commentary to Evidence Rule 407, at third paragraph. And the language of the rule would appear to be broad enough to encompass a change in training method designed to prevent the type of deterioration in detection skills that Ruff experienced. (Please note that Evidence Rule 407 is not limited to changes relating to safety. As noted above, the rule encompasses any measures that "would have made the event less likely to occur." Alaska R. Evid. 407.) Thus, under this general rule, evidence of the change in training methods would not be admissible.

But such evidence can be admitted if it is offered for other purposes, "such as impeachment or, if controverted, proving ownership, control, feasibility of precautionary measures, or defective condition in a products liability action." *Id.* Although there is nothing in the facts that directly points to an exception that would apply to the evidence of Dave's change in training methods, examinees should be given credit if they argue for the application of one of

these exceptions. For example, if Dave attempts to defend on the ground that there is no training program available that would avoid the necessity for daily training, evidence of his change to a new and more effective training method might be offered as evidence of the feasibility of such measures.

Overall, however, it seems unlikely that this evidence would be admissible under Evidence Rule 407. Therefore, the trial court likely did not err when it refused to allow Ed to testify to the change in Dave's training methods.

3. Discuss whether the trial court erred when it allowed Jane to testify despite Paul's assertion of the husband-wife privilege. (35 points)

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 Rule 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." *See* Alaska R. Evid. 505(a). The privilege 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. *See Daniels v. State*, 681 P.2d 341, 345 (Alaska App. 1984).

The second type of husband-wife privilege 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."

Paul cannot assert the privilege set out in Evidence Rule 505(a). First, the privilege belongs to the witness spouse. The witness spouse (Jane) may waive the privilege and testify for or against her spouse (Paul). The facts suggest that Jane is willing to testify. Paul has no choice in the matter. Second, by the time of trial, Paul and Jane are divorced. Spousal immunity under Evidence Rule 505(a) protects only *spouses*, and Paul and Jane no longer fall into that category. The fact that they were married when Jane heard the statements that are the subject of her proposed testimony is irrelevant to the testimonial privilege under Rule 505(a). Neither Paul nor Jane may use the privilege of spousal immunity to keep Jane from testifying about Paul's statements concerning his failure to practice with Ruff.

Paul may, however, be able to assert the husband-wife privilege set out in Evidence Rule 505(b). Jane intends to testify about a communication made to

her by Paul, to whom she was married at the time of the communication. The fact that they are no longer married does not affect the privilege; as long as the communication was made during the marriage, the privilege continues to apply as to that communication even after the marriage. *See* Alaska Evid. R. 505(b)(1) (providing 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") (emphasis added). And unlike the privilege under Evidence Rule 505(a), the right to consent to the testimony of a spouse under Evidence Rule 505(b) rests with the non-testifying spouse – in this case, Paul. Alaska R. Evid. 505(b)(1). Therefore, Paul must consent before Jane can testify. Because the facts indicate that Paul does not consent to having Jane testify, the court erred when it allowed Jane to testify over Paul's objection.