ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

Ava is a teller at State Bank in Anchorage. One morning, Dan approaches her window and passes her a handwritten note that reads: "Give me $50,000 or else." Ava activates the security alarm and a security guard wrestles Dan to the ground. In the scuffle, Dan's note falls to the floor and is never recovered. The police promptly arrive and arrest Dan. When the police search Dan, they find in his jacket pocket a map of Anchorage with the locations of several banks, including State Bank, circled in red ink. Several of the circled banks had been the victims of unsolved robberies in the past several weeks.

Officer Joe takes Dan to the police station. The officer intends to question Dan about the robbery. But before the officer can ask any questions, Dan eagerly begins to talk. As a result, the officer forgets to advise Dan of his rights under *Miranda v. Arizona*. In a recorded statement, Dan claims that he was merely trying to close his bank account, which he thought had a balance of $50,000. When questioned more closely, Dan admits that he did not have an account at State Bank and claims that he went to the wrong bank.

Dan is charged with robbery. Before trial, he moves to suppress his statement to Officer Joe. The trial judge finds that the statement was voluntary but suppresses it based on the judge's finding that the officer violated *Miranda*.

At trial, the prosecutor calls Ava to testify. Ava testifies that Dan handed her a note. But when the prosecutor asks her to describe the contents of the note, Dan objects. He argues, first, that the contents of the note are hearsay and, second, that the prosecutor must present the original note which had been lost in the scuffle. The original, Dan argues, is the best evidence of the note. The trial judge permits Ava to testify as to the note's contents.

Next, the prosecutor calls the police officer who searched Dan and discovered the map. When the officer is asked to describe and then identify the map, Dan objects. He argues that the evidence is inadmissible because it suggests his propensity to rob banks. In response, the prosecutor argues that the evidence tends to prove Dan's intent. The trial judge allows the officer to testify.

Dan testifies at trial. Contrary to his earlier statement, Dan testifies that he had an account at State Bank and that he was merely trying to withdraw money from that account rather than close the account. Dan testifies that he used a note to communicate with Ava because he was suffering from a chronic throat condition that resulted in an inability to speak above a whisper. On cross-examination, the prosecutor asks Dan about his statement to Officer Joe that he wanted to close his account at State Bank. Dan objects, arguing that the statement is inadmissible because it was obtained in violation of *Miranda*. The trial judge sustains the objection.

On rebuttal, the prosecutor announces his intention to call Dan's doctor, who will testify that he gave Dan a general physical examination several days before the robbery. According to the doctor, during the examination, Dan told the doctor that he was having no problems with his throat. Dan objects, claiming that the testimony violates the physician-patient privilege. The trial judge allows the doctor to testify.

1. Discuss whether the trial judge erred when he rejected Dan's hearsay and best-evidence objections and thus allowed Ava to testify about the contents of the note Dan handed to her.

2. Discuss whether the trial judge erred when he rejected Dan's propensity argument and thus admitted evidence of the map found in Dan's jacket pocket.

3. Discuss whether the trial judge erred when he refused to allow the prosecutor to question Dan about his prior statement to Officer Joe based on the fact that the statement was obtained in violation of *Miranda*. (Do not discuss whether the trial judge's *Miranda* ruling was correct.)

4. Discuss whether the trial judge erred when he allowed the prosecutor to call Dan's doctor to testify, despite Dan's assertion of the physician-patient privilege. (Do not discuss the hearsay implications of the testimony.)

GRADERS' GUIDE
*** * * QUESTION NO. 1 * * ***
EVIDENCE

1. Discuss whether the trial judge erred when he rejected Dan's hearsay and best-evidence objections and thus allowed Ava to testify about the contents of the note Dan handed to her. (40 points)

Hearsay Objection.

Dan raised a hearsay objection to the admission of the contents of the note that he handed to Ava during the robbery. 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). A "statement" is defined to include "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Alaska R. Evid. 801(a).

Here, the note qualifies as a statement since it is a "written assertion" accompanied by the nonverbal conduct of handing the note to Ava. From the facts, there does not appear to be any dispute that the note was from Dan and was intended by Dan to communicate to Ava. In addition, it is a statement that was made outside the trial or hearing. Therefore, the note potentially falls within the definition of hearsay. But, as explained below, the statement likely qualifies as non-hearsay under Evidence Rule 801(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). As the Commentary to the rule explains, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Commentary to Evidence Rule 801, at paragraph (c). Here, one could argue that the evidentiary value of the out-of-court statement—"Give me $50,000 or else"—does not hinge on the truth of that statement, but on the fact that the statement was made. That is, the statement was a verbal act, akin to pointing a gun at someone. One could also argue that the statement was offered not for its truth, but to show its effect on the listener, Ava. Under either approach, the statement would not qualify as hearsay.

Second, even if the statement were offered for its truth, it would likely qualify as an admission of a party opponent. Under Evidence Rule 801(d)(2), a statement that qualifies as an admission of a party opponent is removed 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 the prosecution against Dan, a party opponent. And from the facts set out in the question, there appears to be no dispute that it was Dan's statement. Thus, it is admissible as non-hearsay.

Third, Dan chose to testify at trial. Under Evidence Rule 801(d)(1), a witness's prior inconsistent statement qualifies as non-hearsay. *See* Alaska R. Evid. 801(d)(1)(A). To the extent Dan testified that he was not attempting to rob the bank, his prior statement to Ava to give him $50,000 "or else" is arguably inconsistent. (On the other hand, one could also argue that there was no inconsistency to the extent that Dan can establish that he was merely trying to withdraw $50,000 from his alleged account with the bank.) But this exception applies only if the witness has been questioned about the statement during his testimony and has been given an opportunity to explain or deny the statement. *See* Alaska R. Evid. 801(d)(1)(A)(i) and (ii). Here, the prosecutor is asking Ava to testify to the contents of the note—presumably in its case-in-chief. Thus, Dan has not yet testified. To introduce the evidence as a prior inconsistent statement, the state would have to first question Dan during his testimony and then recall Ava as a rebuttal witness.

But even if the statement qualified as hearsay, it is likely admissible under one or more exceptions to the hearsay rule. First, the statement may qualify under Evidence Rule 803(3), which allows statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's present condition or future action." Alaska R. Evid. 803(3). To the extent that the state is offering Dan's statement in the note to prove Dan's intent to rob the bank, the statement would likely be considered admissible under this hearsay exception.

There is also an argument that Dan's statement might fall within the hearsay exception set forth in Evidence Rule 804(b)(3), which allows as an exception to the hearsay rule 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). For this exception to apply, however, the declarant must be unavailable. *See* Alaska R. Evid. 804(a). A declarant is unavailable when "exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Alaska R. Evid. 804(a)(1). Here, Dan has a constitutional right not to testify, but he arguably waived that privilege when he chose to take the stand and testify. Thus,

although there is nothing in the question to suggest that the court issued an order exempting Dan from testifying, one could persuasively argue that he is available given his waiver of the privilege. (Note: this exception is not ordinarily used when the declarant is a party. Thus, examinees should not be penalized for failing to mention Evidence Rule 804(b)(3) as an alternative.)

Best-Evidence Objection.

The best-evidence rule states a preference that a party introduce the "original" of a "writing, recording, or photograph" in order to prove its contents. *See* Alaska R. Evid. 1002 ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by an enactment of the Alaska Legislature or by these or other rules promulgated by the Alaska Supreme Court."). A "writing" is defined to include "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photo-stating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." Alaska R. Evid. 1001(1). Under this definition, the handwritten note that Dan handed to Ava clearly qualifies as a "writing."

But an original is not always required. Under Evidence Rule 1004, the original of a writing is not required, and other evidence of the contents of a writing is admissible if "[a]ll originals are lost or have been destroyed, unless the proponent in bad faith lost or destroyed them." Alaska R. Evid. 1004(a). Here, the note fell to the floor during the robbery and was never recovered. Under these circumstances, there does not appear to be any evidence of bad faith in the loss or destruction of the note. Therefore, the original of the note was not required, and the trial judge could properly permit Ava to testify to the contents of the note based on her memory of the note.

2. Discuss whether the trial judge erred when he rejected Dan's propensity argument and thus admitted evidence of the map found in Dan's jacket pocket. (25 points)

At trial, Dan argued that evidence of the map was offered simply to prove that he had the propensity to rob banks. 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). Thus, if the prosecutor had offered the map solely to prove Dan's propensity to rob banks and to argue from this propensity that Dan must have robbed State Bank, the evidence would be inadmissible under Evidence Rule 404(a). Similarly, Evidence Rule 404(b) precludes evidence of other or prior acts "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). To the extent the map suggested that Dan had robbed other banks, thereby proving Dan's character as a bank robber, the

evidence would be inadmissible under Evidence Rule 404(b)(1) to prove that Dan acted in conformity with that character.

But there are exceptions to this general rule. 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). Evidence of the map was relevant here to prove that Dan had a plan to rob the bank. Evidence of other acts is often used to prove a plan. *See*, *e.g.*, *Phillips v. State*, 211 P.3d 1148, 1152 (Alaska App. 2009) (evidence of stolen checks and credit cards found in defendant's possession but unrelated to the forgery and theft offenses with which he was charged was admissible to prove defendant's overall identity-theft scheme, thus proving his intent to make unauthorized purchases with the stolen checks referred to in the indictment); *Miller v. State*, 866 P.2d 130, 133-34 (Alaska App. 1994) (evidence of defendant's drug-dealing debts was admissible to show his plan or motive to commit a robbery to finance a larger drug enterprise).

For example, in *Gehrke v. State*, No. A-10172, 2011 WL 746459 (Alaska App. Mar. 2, 2011) (unpublished), the court held that evidence found in a burglary defendant's hotel room—a list of the defendant's debts and maps of several homes in the area, with notations about items that could be found in each home—was admissible to prove the defendant's burglary plan, which tended to show his intent to steal property to satisfy his debts. *Gehrke*, 2011 WL 746459 at *2-3. The evidence in Dan's case may show a similar plan and intent. The existence of a map with previously robbed banks circled in red may suggest an overall plan and therefore may suggest an intent to rob a bank. It also tends to negate Dan's claim that he was merely trying to withdraw money from State Bank. Therefore, the trial judge correctly overruled Dan's objection and allowed evidence of the map to be admitted.

3. Discuss whether the trial judge erred when he refused to allow the prosecutor to question Dan about his prior statement to Officer Joe based on the fact that the statement was obtained in violation of *Miranda*. (Do not discuss whether the trial judge's *Miranda* ruling was correct.) (25 points)

As noted in the facts, the trial judge granted Dan's motion to suppress his statement to Officer Joe based on the judge's determination that the officer violated Dan's *Miranda* rights. Therefore, the state could not present evidence of the statement in its case-in-chief. But the prosecutor was not offering the evidence in its case-in-chief; he was attempting to use it to impeach Dan's testimony. The illegally obtained statement may be admissible for that purpose.

Evidence Rule 412 provides that evidence illegally obtained cannot be used

over proper objection by the defendant in a criminal proceeding. *See* Alaska R. Evid. 412. There are two exceptions to this rule of exclusion. Of relevance to this case, a statement illegally obtained in violation of the right to warnings under *Miranda* may be used to impeach the defendant "if the prosecution shows that the statement was (i) otherwise voluntary and not coerced; and (ii) recorded, if required by law, or has been determined to be covered by one of the recognized exceptions to the recording requirement." *See* Alaska R. Evid. 412(1)(B). *See also State v. Batts*, 195 P.3d 144, 157-59 (Alaska App. 2008) (evidence obtained in violation of *Miranda* may be used to impeach defendant unless the *Miranda* violation was intentional or egregious).

The only remaining question is whether the prior statement could be properly used to impeach Dan. In general, "[p]rior statements of a witness inconsistent with the testimony of the witness at a trial, hearing or deposition, and evidence of bias or interest on the part of a witness are admissible for the purpose of impeaching the credibility of a witness." *See* Alaska R. Evid. 613(a). Here, Dan testified that he had an account at State Bank. But in his statement to Officer Joe, he stated that he did not have an account at State Bank. Because the prior statement is clearly inconsistent with Dan's trial testimony and because the prosecutor seeks to use the prior statement to impeach Dan, the prior statement is admissible under Evidence Rule 613(a).

To admit this evidence at trial, however, the state must first give Dan an opportunity, while testifying, to explain or deny the prior statement. *See* Alaska R. Evid. 613(b). Here, the prosecutor appears to be following the correct procedure—by confronting Dan with the prior inconsistent statement. If Dan denies having made the statement, then the prosecutor may wish to call Officer Joe to testify to the statement.

Note: Because the prior inconsistent statement is being offered only for impeachment purposes and not for the truth of the statement, the statement does not qualify as hearsay. *See* Alaska R. Evid. 801(c) (defining hearsay as a statement "offered in evidence to prove the truth of the matter asserted"). Therefore, examinees should not discuss whether the statement qualifies as non-hearsay under Evidence Rule 801(d)(1) (prior statement by witness) or (d)(2) (admission of party-opponent). Nor should examinees discuss whether the statement qualifies under any of the hearsay exceptions set out in Evidence Rules 803 and 804.

4. Discuss whether the trial judge erred when he allowed the prosecutor to call Dan's doctor to testify, despite Dan's assertion of the physician-patient privilege. (Do not discuss the hearsay implications of the testimony.) (10 points)

Under Evidence Rule 504, a patient may assert a physician-patient privilege—*i.e.*, a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional conditions. The privilege is that of the patient, not the physician. *See* Alaska R. Evid. 504(b) and (c). Even if Dan's doctor is willing to testify, Dan, as his patient, is the person who has the privilege and can prevent disclosure of any confidential communications between him and his doctor. Therefore, unless an exception to the privilege applies, the judge must allow Dan to assert the privilege and thus must exclude the doctor's testimony.

The primary exception applicable here is the exception for criminal proceedings. Specifically, the physician-patient privilege set out in Evidence Rule 504 does not apply "in a criminal proceeding." *See* Alaska R. Evid. 504(b)(7). *See also Russell v. Municipality of Anchorage*, 706 P.2d 685, 693 n.6 (Alaska App. 1985) (noting that physician-patient privilege set out in Evidence Rule 504 does not apply in criminal cases).

This answer—*i.e.*, that the privilege does not apply in criminal cases—should receive full credit as a correct answer. However, examinees who overlook this exception should receive partial credit if they correctly discuss several other exceptions that might apply but for the criminal-proceedings exception. These alternative exceptions are discussed below.

Another exception to the privilege concerns "communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient." *See* Alaska R. Evid. 504(d)(1). "If the patient himself tenders the issue of his condition, he should not be able to withhold relevant evidence from the opposing party by the exercise of the physician-patient privilege." *See* Commentary to Evidence Rule 504(d)(1). *See also Trans-World Investments v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976). Here, because Dan has made his medical condition a part of his defense, this exception would likely apply.

Alternatively, an examinee might argue that the exception found in Evidence Rule 504(d)(2) applies. This exception states that the privilege does not apply if the services of the physician were sought, obtained or used to enable anyone to commit a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud. Before a trial judge allows the testimony under this exception, however, the judge may require that a prima facie case of wrongdoing be established by independent evidence. *See* Commentary to Evidence Rule 504(c)(1), incorporated into Commentary to Evidence Rule 504(d)(2).

In support of this exception, one would argue that all of Dan's actions taken together—planning and committing the robbery and then claiming falsely that he had a chronic throat condition that precluded verbal communications—demonstrate that Dan is attempting to use his doctor's services to enable him to escape detection or apprehension for the commission of the robbery. This, however, is a stretch. The facts do not indicate that Dan actually sought his doctor's services in connection with the robbery; the doctor merely gave Dan a general physical examination. Instead, the doctor's testimony is offered to negate his claimed condition. Under these circumstances, it is unlikely that a trial judge would find that the "fraud" exception applies.