

ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Dennis was shopping in a downtown store when he abruptly sat down, saying that he was very nauseous and light-headed. Dennis asked a store clerk to call him a cab because he did not want to try to drive himself home. She did so.

The cab took Dennis home and the fare was substantial. As they neared Dennis's driveway, Dennis mumbled about how ill he was feeling. When the driver parked, Dennis ran into the house without paying the fare. The driver banged on the house door for a while in an attempt to be paid, but Dennis did not answer. The driver gave up and reported the incident to the cab company owner, Jerry.

Jerry was content to write off the lost fare until he heard rumors from other cab company owners that Dennis had recently done the same thing to their cab drivers. Jerry believed Dennis was running a scam (claiming he was sick to get a free ride home). In order to stop him, Jerry decided to sue Dennis for the lost fare, alleging breach of contract and misrepresentation and also seeking punitive damages. Dennis's answer stated by way of defense that a medical emergency had prevented him from paying the fare.

At the trial, the judge indicated that the Alaska Rules of Evidence would apply. Jerry called Dennis as his first witness. Dennis testified about what had happened that day. He stated that he was under Dr. Brown's care for a health problem that manifested itself with the sudden onset of symptoms such as nausea, light-headedness, and disorientation, but he could not remember the name of the disorder.

Dennis testified that on the day that he was taken home by Jerry's cab, he had suffered a bout of this disorder. He said that, after he had gotten inside his house, he had become even more ill than usual and had to be attended to by his sister, Sue. He said neither of them had heard anyone at the door.

After Jerry's cab driver and the store sales clerk had testified, Jerry called Dennis's doctor, Dr. Brown, to testify. Jerry attempted to question the doctor about what Dennis had told her that had resulted in her diagnosis. Dennis asked for a hearing outside the presence of the jury and asserted the physician-patient privilege, even though Dr. Brown indicated to the judge that she was willing to answer Jerry's question. The trial judge agreed that the privilege applied and would not allow Jerry to question Dr. Brown on this topic. In light of this ruling and Dennis's earlier testimony, Jerry asked the trial judge to instruct the jury that Dr. Brown was no longer available as a witness to him because Dennis had asserted his physician-patient privilege. The trial court

judge agreed to do so because it had been Dennis who had made the witness unavailable and so instructed the jury.

Jerry then called two cab drivers from other cab companies to testify that Dennis had engaged in exactly the same conduct on other recent occasions. Dennis objected, arguing that it was inadmissible. Jerry argued that it was admissible to establish habit or routine practice. The trial judge permitted the testimony, agreeing with Jerry's argument.

Dennis called his sister Sue as his first witness. When she began describing how ill Dennis had been when he came into the house, Jerry objected, arguing that Sue was not an expert witness and could not offer an opinion as to whether Dennis had been ill. The trial court judge overruled Jerry's objection and allowed Sue to testify. Sue testified that when Dennis came into the house, he was pale, shaking, clammy to the touch, and seemed unfocused and that these symptoms worsened for more than an hour before they subsided.

1. (a) Discuss whether the trial court ruling that Dennis had a valid physician-patient privilege was correct.

(b) Assuming that the privilege was validly asserted, discuss whether it was proper to instruct the jury that Dr. Brown was not available to Jerry because Dennis had exercised his physician-patient privilege.
2. Discuss whether the trial court ruling that the other cab drivers' testimony was admissible to establish habit or routine practice was correct.
3. Discuss whether the trial court ruling which allowed Sue to testify about Dennis's illness was correct.

GRADER'S GUIDE

*** QUESTION NO. 2 ***

SUBJECT: EVIDENCE

QUESTION 1: (a) Discuss whether the trial court ruling that Dennis had a valid physician-patient privilege was correct. (30 points)

ARE 504, the physician-patient privilege, can be asserted by a patient and is 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. ARE 504(b) and (c). Even if Dr. Brown was willing to testify, Dennis, as the patient, is the person who has the privilege and can prevent disclosure on any confidential communications between him and his doctor. Thus, unless any of the exceptions to the privilege apply, the judge was correct in allowing Dennis to assert the privilege.

One of the exceptions to the privilege is that of "condition or element of claim or defense." ARE 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." *Commentary*, ARE 504(d)(1). See also *Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976). Here because Dennis has made his medical condition his defense, this exception would likely apply.

Alternately, Jerry might argue that the exception found in ARE 504(d)(2), crime or fraud, applies. This exception states that 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 fraud, the privilege does not apply. Before a trial judge allows the invasion of the privileged area, though, the court can require that the crime or fraud be established by independent evidence. *Commentary*, ARE 503(d)(1), incorporated into *Commentary*, ARE 504(d)(2). Jerry could argue that all of Dennis's actions, taken in combination (his taking the cab, claiming illness, running into the house, refusing to answer the door, and having done this on prior occasions), demonstrated that a crime or fraud was established. But these facts are also consistent with Dennis's version (that he suffered an unanticipated episode of illness). Thus, the trial judge is likely within his discretion to rule either way - - that this exception has not been established by sufficiently independent evidence or that there is enough other evidence to conclude that the exception should apply.

(b) Assuming that the privilege was validly asserted, discuss whether it was proper to instruct the jury that Dr. Brown was not available to Jerry because Dennis had exercised his physician-patient privilege. (25 points)

The trial judge was wrong to instruct the jury in this manner. ARE 512 generally prohibits a judge or an attorney from commenting on any claim of privilege. ARE 512(b) requires that, in a jury trial, to the extent possible the proceedings be conducted to have any claim of privilege occur outside the jury's presence and without the jury's knowledge. ARE 512(a) prohibits any comment by judge or counsel on a claim of privilege. *See also Williams v. State*, 600 P.2d 1092, 1094 and n. 7 (Alaska 1079); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995). The rule further prevents any inference being drawn from the claim of privilege. *See ARE 512(a)*. Even when the privilege is not claimed in the presence of the jury, anything that conveys to the jury that a privilege has been asserted is improper as it depreciates the value of such a privilege. *Commentary*, ARE 512(b).

The judge in Dennis's trial violated both of these subsections of this rule. First, the judge informed the jury that the privilege had been asserted by Dennis. Then the judge suggested by the wording of the instruction that the jury could infer that Dennis was attempting to prevent a witness from testifying.

In fact, if Dennis were to request it, Dennis would have been entitled to a jury instruction, had the jury inadvertently learned of the exercise of the privilege, that the jury was to draw no inference from the claim of privilege. ARE 512(c).

QUESTION 2: Discuss whether the trial court ruling that the other cab drivers' testimony was admissible to establish habit or routine practice was correct. (25 points)

ARE 406 allows a party to introduce evidence of the habit of a person when it is relevant to prove that the conduct of the person was in conformity with the habit. But the trial judge must distinguish between what is habit evidence and what is character evidence. *Commentary*, ARE 406. A "habit" is considered to be something that is the regular response to a certain repeated specific situation. *Id.* Examples include a habit such as going down a particular stairway two steps at a time or always getting off a moving railway car before it has stopped. *Id.*

"Habit" is generally considered to be conduct that is a frequent, specific and a uniform response to a given situation, one that is more semi-automatic in nature than simply a tendency to act in a given manner. *Simplex In. v. Diversified Energy Systems*, 847 F.2d 1290 (7th Cir. 1988). Alaska courts have occasionally interpreted ARE 406 expansively, however. The Alaska Supreme Court allowed in under ARE 406 what might be considered non-habit character evidence, but did so because the party opposing admission of the evidence had raised a defense where the "habit or routine" evidence was relevant to rebut. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986)(evidence

that bar had served intoxicated persons in the past was admissible as habit or routine evidence given that the bar was claiming that its policy forbade its bartenders from serving drunk persons). But the courts have also found that evidence of habit must be sufficiently regular and uniform and the circumstances sufficiently similar to outweigh the danger of prejudice or confusion or a trial court may properly exclude it. *Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 845(Alaska 2001).

In Dennis's case, the question is a close one as to whether the judge's ruling was correct. The prior conduct is not necessarily what one thinks of as a "habit." It does not seem to be something that would be considered a semi-automatic response. On the other hand, like the evidence allowed in the *Kavorkian* case, it is being introduced to rebut a claim made by Dennis. And it is similar in nature to the conduct in issue in the trial. Thus, the judge was likely within his discretion to allow the evidence as habit evidence under ARE 406.

QUESTION 3: Discuss whether the trial court ruling which allowed Sue to testify about Dennis's illness was correct. (20 points)

The trial court's ruling was correct. Although Jerry objected because Sue was not an expert witness, ARE 701 permits opinion testimony by lay witnesses, including expressing an opinion, but is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue. Thus, Sue does not need to be an expert in the medical field to express a lay opinion. Alaska courts have allowed lay opinion testimony on the following similar subjects: the nature of physical injuries based on the lay witness's observations, *Callahan v. State*, 769 P.2d 444 (Alaska App. 1989); whether another person seemed scared, *Markgraf v. State*, 12 P.13 197 (Alaska App. 2000).

Thus, Sue's testimony was admissible. Her opinion that Dennis was ill was based on her personal observations and perceptions. It is a rationally-based conclusion that Dennis was ill which is one that a lay person could offer (similar to offering a lay opinion as to injuries or whether someone appeared scared). Since one of the issues in the case had to do with whether there was a medical emergency, Sue's testimony was helpful to the jury's determination on this issue.