

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1522

Amending Civil Rules 4 and 90.5; District Court Rule 1(a)(3); and Commentary to Evidence Rule 706 to correct technical and typographical errors; and amending Evidence Rules 405(b), 503(d)(3), 504(c) & (d), 505(a)(2), 507, 610, 612(a) & (b), 613, 701, 705(a), 803 (3), (19), (21) & (23); 804(a) & (b), 902, and 1007; and Appellate Rule 102 to incorporate gender neutral language.

IT IS ORDERED:

I. Civil Rule 4 is amended to renumber the last subsection and create a new “reserved” subsection as follows:

Rule 4. Process.

(h) Service of Process by Mail. ****

(i) RESERVED

(~~h~~)(j) Summons—Time Limit for Service. ****

II. The Note at the end of Civil Rule 90.5 is amended to read as follows:

Note: The petition forms (DR-335 for occupational licenses and DR-336 for driver’s licenses) are available at all superior court locations and from the Child Support Enforcement Division.

III. Subparagraph (3) of District Court Civil Rule 1(a) is amended to read as follows:

(3) The following rules are inapplicable in their entirety to proceedings before district judges and magistrates:

CIVIL RULE TITLE

Rule 57(a) Declaratory Judgments.

IV. The final paragraph of the Commentary to Evidence Rule 706(a) is amended to read as follows:

Although this rule is based on Federal Rule 706, it has no provision for compensation of experts comparable to subdivision (b) of the Federal Rule. Compensation of experts is a subject covered by Administrative Rule 7(c). However, once Rule 706 takes effect it may be necessary to reconsider the question of how best to compensate expert witnesses to assure that sufficient compensation is provided so that experts are not reluctant to testify.

V. Paragraph (b) of Evidence Rule 405 is amended to read as follows:

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct.

VI. Paragraph (d)(3) of Evidence Rule 503 is amended to read as follows:

(3) *Breach of Duty by Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

VII. Paragraphs (c) and (d)(1) of Evidence Rule 504 are amended to read as follows:

Rule 504. Physician and Psychotherapist-Patient Privilege.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Condition on Element of Claim or Defense.* As to 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, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

VIII. Subparagraphs (B) and (C) of Evidence Rule 505(a)(2) are amended to read as follows:

Rule 505. Husband-Wife Privileges.

(a) **Spousal Immunity.**

(1) *General Rule.* ****

(2) *Exceptions.* ****

(B) In a proceeding to commit or otherwise place a spouse, the property of a spouse or both the spouse and the property of the spouse under the control of another because of the alleged mental or physical condition of the spouse; or

(C) In a proceeding brought by or on behalf of a spouse to establish the spouse's competence; or

IX. Evidence Rule 507 is amended to read as follows:

Rule 507. Political Vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

X. Evidence Rule 610 is amended to read as follows:

Rule 610. Religious Beliefs or Opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

XI. Paragraphs (a) and (b) of Evidence Rule 612 are amended to read as follows:

Rule 612. Writing Used to Refresh Memory.

(a) **While Testifying.** Any writing or object may be used by a witness to refresh the memory of the witness while testifying. If, while testifying, a witness uses a writing or object to refresh his memory, any party seeking to impeach the witness is entitled, subject to subdivision (c), to inspect the writing or object, to cross-examine the witness thereon, and to introduce those portions which relate to the testimony of the witness.

(b) **Before Testifying.** If, before testifying, a witness uses a writing or object to refresh the memory of the witness for the purpose of testifying, and the court in its discretion determines that the interests of justice so require, any party seeking to impeach the witness is entitled, subject to subdivision (c), to have the writing or object produced, if practicable, at the hearing, to inspect it, and to cross-examine the witness thereon, as to those portions which relate to the testimony of the witness. If production of the writing or object at the hearing is impracticable, the court may make any appropriate order, including one for inspection.

XII. Paragraph (a) of Evidence Rule 613 is amended to read as follows:

(a) **General Rule.** Prior 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.

XIII. Evidence Rule 701 is amended to read as follows:

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences 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 the determination of a fact in issue.

XIV. Paragraph (a) of Evidence Rule 705 is amended to read as follows:

(a) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data, subject to subdivisions (b) and (c).

XV. Paragraphs (3), (19), (21) and (23) of Evidence Rule 803 are amended to read as follows:

Rule 803. Hearsay Exceptions—Availability of Declarant Immaterial

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement 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, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(19) Reputation Concerning Personal or Family History.

Reputation among members of a person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(23) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in

advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

XVI. Paragraph (a) of Evidence Rule 804 is amended to read as follows:

(a) **Definition of Unavailability.** Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, the declarant's attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

XVII. Paragraphs (b)(2) and (5) of Evidence Rule 804 are amended to read as follows:

(b) **Hearsay Exceptions.** ****

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(5) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

XVIII. Paragraphs (2) and (3)(b) of Evidence Rule 902 are amended to read as follows:

Rule 902. Self-Authentication.

(2) **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in an official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and the signature is genuine.

(3) **Foreign Public Documents.** A document purporting:

(b) To be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. ****

XIX. Evidence Rule 1007 is amended to read as follows:

Rule 1007. Testimony or Written Admission of Party.

Without accounting for the nonproduction of the original, the contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, including the testimony,

deposition or writing of a declarant whose statements are attributable to a party under Rule 801(d)(2)(C), (D), or (E).

XX. Paragraph (d) of Appellate Rule 102 is amended to read as follows:

(d) The clerk shall, before entering office, take and subscribe to the oath set forth in section 5, article XII of the state Constitution and such further oaths or affirmations as may be prescribed by the legislature, and shall give bond in the sum to be fixed, and with sureties to be approved by the supreme court, faithfully to discharge the duties of the office. The bond shall be deposited for safekeeping as the supreme court may direct. The supreme court may permit the clerk to be covered under the blanket bond provided in Rule 34 of the Rules Governing the Administration of All Courts, in lieu of giving a separate bond.

DATED: August 12, 2003

EFFECTIVE DATE: October 15, 2003

Chief Justice Bryner

Justice Matthews

Justice Eastaugh

Justice Fabe

Justice Carpeneti