

THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 98

Amending Rules 1, 9, 13, 23 and 38, Rules Governing the Administration of All Courts; Amending Rules 7, 9, 13 and 43, Rules of the Supreme Court of Alaska; Amending Rules 4, 6, 36, 68, 72 and 81, Rules of Civil Procedure; Amending Rules 4, 5, 7, 11, 14, 17, 23, 28 and 35, Rules of Criminal Procedure; Amending Rule 22, District Court Rules of Civil Procedure; Amending Rule 1, District Court Rules of Criminal Procedure; Adding Rule 5 to Rules of Probate Procedure; Promulgating Canons of Judicial Ethics.

IT IS ORDERED:

The Rules Governing the Administration of All Courts, Rules of the Supreme Court of Alaska, Rules of Civil Procedure, Rules of Criminal Procedure, District Court Rules of Civil Procedure, District Court Rules of Criminal Procedure and Rules of Probate Procedure are amended as set out below:

Rule 1, Rules Governing the Administration of All Courts: Is amended by striking in subdivision (m) of said Rule 1, as re-numbered under Supreme Court Order No. 90, the first word "Is" in the renumbered subdivision (m) and substituting therefor the word: "Be".

Rule 9, Rules Governing the Administration of All Courts: Subdivision (a) of said rule 9 as previously amended is again amended now to read as follows:

(a) Amount. A witness attending before any court, referee, master, grand jury or coroner's jury or upon a deposition in a discovery proceeding, when necessarily subpoenaed to attend or whose testimony is necessary and material to the action, shall receive a witness fee of \$7.50 if such attendance, including the time necessarily occupied in traveling from his residence to the place of his attendance and returning from that place, requires not more than three consecutive hours. If such attendance requires more than three consecutive hours, the witness shall receive a witness fee of \$15 for each day of attendance. Any witness who attends at a point so far removed

from his residence as to necessarily prohibit return thereto from day to day shall receive an additional \$21 per day for expenses of subsistence for each day of attendance and for each day necessarily occupied in traveling to and from such attendance.

Rule 13, Rules Governing the Administration of All Courts: Is amended to read as follows:

Rule 13. Exemptions From Payment of Filing Fees. The state, or any office or agency thereof, or a person represented by an attorney furnished to him by an organization authorized to provide legal services to indigents, shall be exempt from the payment of any filing fee in any court of the state.

This rule shall not be construed to restrict the power of a court to allow an indigent party to proceed in forma pauperis in a proper case.

Rule 23(b), Rules Governing the Administration of All Courts: Is amended to read as follows:

(b) Holidays Falling on Sunday or Saturday. If any holiday designated in Rule 23 (a)(2) through (12) falls upon a Sunday, the Monday following is a holiday and if it falls on a Saturday, the Friday preceding is a holiday.

Rule 38, Rules Governing the Administration of All Courts: Is amended to read as follows:

Rule 38. Presiding District Judge. When more than one district judge is assigned to the district court in a judicial district, the presiding superior court judge of the district may designate one of such district judges to be the presiding district judge and administrative head of the district court for that judicial district to serve at the pleasure of the appointing judge.

→ Rule 7(a), Rules of the Supreme Court of Alaska: Is amended to read as follows:

(a) When Taken. The time within which an appeal may be taken to the supreme court shall be thirty (30) days from the entry of the judgment appealed from unless a shorter time is provided by law, except

that: (1) in any action in which the state or an officer or agency thereof is a party, the time as to all parties shall be sixty (60) days from such entry; (2) upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the court from which the appeal is taken may, in any action, extend the time for appeal not exceeding thirty (30) days from the expiration of the original time herein prescribed; (3) if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise herein prescribed, whichever period last expires.

Rule 9(a), Rules of the Supreme Court of Alaska: Is amended to read as follows:

(a) Designation of Contents of Record on Appeal.

(1) Upon the filing of an appeal from the superior court the judge who was sitting in the case from which the appeal was taken or if he is unavailable the presiding judge of the judicial district shall immediately order counsel for appellant and for any other party to the appeal to appear at a conference designed to discuss and to facilitate the appropriate designation of contents of the record on appeal and the preparation of the transcript thereof. The judge may cause the transcript secretary to be present at the conference. In proper cases, the possibility of filing a stipulation as to record under subdivision (c) of this rule or the preparation of a record on an agreed statement under Rule 10 of these rules may be explored at such conference.

(2) Immediately upon the conclusion of the conference as provided under sub-section (1), the appellant shall serve upon the appellee and file with the superior court a designation of the portions of record, proceedings and evidence to be included in the record on appeal and any other party to the appeal may serve and file a designation of additional portions of the record, proceedings and evidence to be included. If the appellee files the original designation the parties shall proceed under subdivision (b) of this rule as if the appellee was the appellant.

(3) Superior court judges before whom conferences as provided under sub-section (1) are held, are authorized to make suitable orders in each case designed to expedite the filing of the designations of record and the preparation of transcript.

Rule 9(1), Rules of the Supreme Court of Alaska: This subdivision is hereby deleted.

Rule 13, Rules of the Supreme Court of Alaska: Is amended by changing the title to read:

"Assigning of Causes for Hearing - Continuances" and by adding to this rule a new subdivision (d) to read as follows:

(d) Continuances. No continuance of a hearing of any cause in this court will be granted except upon filing of an application accompanied by an affidavit of counsel or the party or both showing good cause therefor.

Rule 43(b), Rules of the Supreme Court of Alaska: Is amended by adding to the said subdivision (b) as previously amended, the following sentences:

"Counsel appointed to represent the defendant in the superior court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon compelling reasons."

Rule 4(c)(5), Rules of Civil Procedure: Paragraph (5) of the previously amended subdivision (c) of said rule is again amended now to read as follows:

(5) The term "peace officer" as used in these rules shall include any officer of the state police, members of the police force of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty is to enforce and preserve the public peace, and within the authority conferred upon them, persons specially appointed pursuant to paragraph (3) of this subdivision.

Rule 4(e)(5), Rules of Civil Procedure: Paragraph (5) of subdivision (e) of said rule 4 is amended to read as follows:

(5) Form and Contents of Notice -- Time. The notice referred to in paragraphs (2) and (3) of this subdivision shall be in the form of a summons. It shall state briefly the nature of the action, the relief demanded, and why the party to whom it is addressed is made a party to the action. Where the action concerns real property or where real property of a party has been attached, the notice

shall set forth a legal description of the property, shall state the municipality or district in which it is located, and the street or road on which the property is situated, and if the property is improved, it shall state the street number of the same. Where personal property of a party has been attached, the notice shall generally describe the property. If a mortgage is to be foreclosed, the notice shall state the names of all parties thereto and the dates that the mortgage was executed. The notice shall specify the time within which the absent party has to appear or answer or plead, which shall not be less than 20 days after personal service or, if service is made by publication, not less than 30 days after the last date of publication, and shall state the effect of a failure to appear or answer or plead. If the absent party does not appear or answer or plead within the time specified within the notice, the court may proceed as if such party had been served with process within the state.

Rule 6(d), Rules of Civil Procedure: Is amended by striking in line 3 of said subdivision (d) the figure "5", and by substituting therefor the figure "10".

Rule 36(a), Rules of Civil Procedure: Is amended by striking in line 12 of said subdivision (a) the figure "10", and by substituting therefor the figure "15".

Rule 68, Rules of Civil Procedure: Is amended by adding at the end of the said rule the following sentence:

"When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

Rule 72(d)(2), Rules of Civil Procedure: Paragraph (2) of said subdivision (d) is amended to read:

(2) Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority and necessity for the taking, and the use for

which the property is to be taken. The notice must show the location, route and termini of any easement or right-of-way sought to be condemned.

The notice shall also state that the defendant may serve upon the plaintiff's attorney an answer within twenty (20) days after service of the notice, that a failure to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation, and that at a designated time and place the court will conduct a hearing to determine the authority and necessity for the taking.

The notice shall further state that the defendant, without filing an answer, may serve on plaintiff's attorney a notice of appearance designating the property in which he claims to be interested; that thereafter he will receive notice of all proceedings affecting it; that regardless of whether the defendant appears or answers, he may present evidence as to the amount of compensation to be paid for his property at the hearing or trial of the issue of just compensation; that regardless of whether he appears or answers he may share in the distribution of the award; that if neither an appearance nor an answer is filed the court will proceed to hear the action and to fix the compensation without further notice; and that if neither an appearance nor an answer is filed before ten (10) days after the jury's verdict is returned or the master's report is filed, judgment by default will be taken against the defendant for the relief demanded in the complaint.

Rule 72(h)(2), Rules of Civil Procedure: Paragraph (2) of said subdivision (h) is amended to read as follows:

(2) Hearing Before Master. A master appointed by the court to ascertain the amount to be paid by the plaintiff to each owner or other person interested in the property shall report to the court pursuant to Rule 53(d)(1). If all parties object to the appointment of a master, they may have a trial by jury or, if the jury is waived by all parties to the action, a trial without a jury, by filing a demand for it within the time allowed for answer or within the additional time which the court may set.

Rule 72(k), Rules of Civil Procedure:

(k) Costs. Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:

(1) the taking of the property is denied,
or

(2) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken, or

(3) the action was dismissed under the provisions of subdivision (1) of this rule, or

(4) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.

Attorney's fees allowed under this subdivision shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings.

Rule 81(a)(2), Rules of Civil Procedure: Paragraph (2) of said subdivision (a) is amended to read as follows:

(2) Other Attorneys. A member in good standing of the bar of a court of the United States, or of the highest court of any state or any territory or insular possession of the United States, who is not a member of the Alaska Bar Association and not otherwise disqualified from engaging in the practice of law in this state, may be permitted, upon motion, to appear and participate in a particular action or proceeding in a court of this state. The motion and notice of hearing thereon shall be served on the executive secretary of the Alaska Bar Association, the State Department of Revenue and, unless the court directs otherwise by an order pursuant to Rule 5(c) of these Rules, on each of the parties to the action or proceeding. With his motion, the applicant must file with the court the following:

[a] The name, address and telephone number of a member of the Alaska Bar Association with whom the applicant will be associated, who maintains an office in the judicial district where the action or proceeding is pending and who is authorized to practice in the courts of this state.

[b] A written consent to the motion, signed by such member of the Alaska Bar Association.

[c] A certificate of the presiding judge or clerk of the court where he has been

admitted to practice, executed not earlier than 60 days prior to the filing of the motion, showing that he has been so admitted in such court, that he is in good standing therein and that his professional character appears to be good.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

Rule 4(a)(1), Rules of Criminal Procedure: Paragraph (1) of said subdivision (a) is amended to read:

(1) Warrant. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.

Rule 5, Rules of Criminal Procedure: Is amended as follows:

Wherever the word "magistrate" appears in the title to this rule or anywhere in this rule, it shall read: "committing magistrate".

The said rule is further amended by amending subdivision (c) thereof to read:

(c) Statement by Committing Magistrate -- Right to Counsel -- Bail. The committing magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, and shall require that a copy of the complaint and of any affidavit filed therewith be delivered to the defendant if this has not already been done, and shall inform the defendant of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel and of his right to have a preliminary examination. The committing magistrate shall also inform the defendant that he is not required to make a statement and that any statement made may be used against him. The committing magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by law and these rules.

The said rule is further amended by adding new subdivision (e) to read:

(e) Magistrates, district judges and any other judicial officer of the State of Alaska are committing magistrates.

Rule 7(f), Rules of Criminal Procedure: Is amended to read:

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 11, Rules of Criminal Procedure: Is amended by adding at the end of this rule, the following sentence:

The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Rule 14, Rules of Criminal Procedure: Is amended by adding at the end of this rule the following sentence:

In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

Rule 17(b), Rules of Criminal Procedure: Is amended to read as follows:

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. The determination of financial inability shall be made in accordance with the criteria provided under Rule 39(b) of these rules and if counsel was previously appointed for defendant pursuant to said Rule 39, no further showing of financial inability shall be required. If the court orders the subpoena to be issued it shall contain an order to appear without the prepayment of any witness fee. The cost incurred by the process and the fees of the witness so subpoenaed shall be paid in the

same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the state.

Rule 23(c), Rules of Criminal Procedure: Is amended by adding at the end of said subdivision (c) the following sentence:

If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Rule 28, Rules of Criminal Procedure: Is amended by deleting the fourth sentence of this rule, which begins in line 6 of this rule, after the words "to act." and by substituting therefor the following sentence:

A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate.

Rule 35, Rules of Criminal Procedure: Is amended by deleting in the title of said rule the words: "-Motion Attacking Sentence" and substituting therefor the words: "-Post Conviction Procedure."

Said Rule 35 is further amended by deleting subdivision (b) and by substituting therefor new subdivisions as follows:

(b) Post Conviction Procedure -- Scope. Any person who has been convicted of, or sentenced for, a crime and who claims:

- (1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of Alaska;
- (2) that the court was without jurisdiction to impose sentence;
- (3) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) that his sentence has expired, his probation, parole or conditional release have been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

- (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; or
- (7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standard;

may institute a proceeding under this rule to secure relief.

(c) Not a Substitute for Remedies in Trial Court -- Replaces All Other Remedies for Challenging the Validity of a Sentence.

This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. It is intended to provide a standard procedure for accomplishing the objectives of all of the constitutional, statutory or common law writs.

(d) Commencement of Proceedings -- Filing -- Service.

A proceeding is commenced by filing an application with the clerk of the court in which the conviction occurred. Application forms will be furnished by the clerk of court. An application may be filed at any time. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the district attorney.

(e) Application -- Contents.

The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from

his conviction or sentence. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

(f) Indigent Applicant.

If the applicant is indigent, filing fees, transcript and other court costs shall be borne by the state. Where the court determines that the application shall not be summarily disposed of on the pleadings and record pursuant to subdivision (g) of this rule, but that the issues raised by the application require an evidentiary hearing, counsel shall be appointed to assist indigent applicants.

(g) Pleadings and Judgment on Pleadings.

- (1) Within 30 days after the docketing of the application, or within such further time as the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for ~~pleading over~~, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall consider substance and disregard defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.
- (2) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record shall not be made when a material issue of fact exists.

- (3) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

(h) Hearing -- Evidence -- Order.

The application shall be heard in, and before any judge of, the court in which the conviction took place. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. The court may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions ~~of law~~, relating to each issue presented. The order made by the court is a final judgment.

(i) Waiver of or Failure to Assert Claims.

All grounds for relief available to an applicant under this rule must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

(j) Review.

A final judgment entered under this rule may be reviewed by the supreme court on appeal brought either by the applicant or the state within 40 days from the entry of judgment.

Said Rule 35 is further amended by redesignating the present subdivision (c), now to be designated (k).

Rule 1(b), District Court Rules of Criminal Procedure:
Is amended by deleting in line 11 of said subdivision (b) the comma after the words "not guilty" and by adding there, the words:

"or, with the consent of the court, nolo contendere".

Rule 1(j), District Court Rules of Criminal Procedure:
Said subdivision (j) as previously amended is now amended to read as follows:

(j) Rules Inapplicable in Misdemeanor Cases.
In a misdemeanor case the provisions of the following Rules of Criminal Procedure shall not apply:

Rule 5, relating to preliminary examination,
Rule 32(c), relating to pre-sentence investigation,
Rule 30, relating to instructions,
Rule 39(b) and 15(c), with respect to appointment of counsel for indigent defendants.

Rule 22(b), District Court Rules of Civil Procedure:
Is amended by deleting in line 4 of said subdivision (b) after the words "a jury of", the balance of the first sentence and by substituting therefor the words: "qualified persons".

Rule 22(e), District Court Rules of Civil Procedure:
Is amended by inserting in line 2 of said subdivision (e), after the word "effective" and before the comma in said line 2, the following:

"or upon receiving a copy of an order or decree of the superior court that a person has not been heard of for a period of six continuous years and is presumed to be dead"

Rules of Probate Procedure: Are amended by adding to these rules a new rule to read as follows:

Rule 5. Finding of Presumptive Death of Missing Person.

Whenever pursuant to AS 20.05.130 the court determines that a missing person is presumed dead because he was not heard of for a period of six continuous years, a certified copy of such finding and of the order authorizing administration of his assets must be forwarded to the office of the registrar of vital statistics (district

judge or recording magistrate) in the district where the missing person had his last known residence in Alaska.

AND IT IS FURTHER ORDERED:

The Canons of Judicial Ethics of the American Bar Association shall be the standard of conduct of justices and judges in the State of Alaska.

EFFECTIVE DATE: September 16, 1968.

/s/ Buell A. Nesbett
Chief Justice

/s/ John H. Dimond
Associate Justice

/s/ Jay A. Rabinowitz
Associate Justice

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