RULES OF EVIDENCE

Table of Contents

ARTICLE I. GENERAL PROVISIONS

Rule
101 Scope and Applicability.
(a) General Applicability.
(b) Rules of Privilege.
(c) Rules Inapplicable.
(1) Preliminary Questions of Fact.
(2) Miscellaneous Proceedings.
102 Purpose and Construction.
103 Rulings on Evidence.
(a) Effect of Erroneous Ruling.
(1) Objection.
(2) Offer of Proof.
(b) Record of Offer and Ruling.
(c) Hearing of Jury.
(d) Plain Error.
104 Preliminary Questions.
(a) Questions of Admissibility Generally.
(b) Relevancy Conditioned on Fact.
(c) Hearing of Jury.
(d) Testimony by Accused.
(e) Weight and Credibility.
105 Limited Admissibility.
106 Remainder of, or Related Writings or Recorded Statements.

ARTICLE II. JUDICIAL NOTICE

201 Judicial Notice of Fact.
(a) Scope of Rule.
(b) General Rule.
(c) When Discretionary.
(d) When Mandatory.
202 Judicial Notice of Law.
(a) Scope of Rule.
(b) Without Request—Mandatory.
(c) Without Request—Optional.
(d) With Request—Mandatory.
203 Procedure for Taking Judicial Notice.
(a) Determining Propriety of Judicial Notice.
(b) Time of Taking Notice.
(c) Instructing the Jury.

ARTICLE III. PRESUMPTIONS

301 Presumptions in General in Civil Actions and Proceedings.
(a) Effect.
(b) Prima Facie Evidence.
(c) Inconsistent Presumption.
302 Applicability of Federal Law in Civil Actions and Proceedings.
303 Presumptions in General in Criminal Cases.

(a) Effect.
(1) Presumptions Directed Against an Accused.
(2) Presumptions Directed Against the Government.
(b) Prima Facie Evidence.
(c) Inconsistent Presumptions.

ARTICLE IV. ADMISSIBILITY OF RELEVANT EVIDENCE

401 Definition of Relevant Evidence.
402 Relevant Evidence Admissible—Exceptions—Irrelevant Evidence Inadmissible.
403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
404 Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes.
(a) Character Evidence Generally.
(1) Character of Accused.
(2) Character of Victim.
(3) Character of Witness.
(b) Other Crimes, Wrongs, or Acts.
405 Methods of Proving Character.
(a) Reputation or Opinion.
(b) Specific Instances of Conduct.
406 Habit—Routine Practice.
407 Subsequent Remedial Measures.
408 Compromise and Offers to Compromise.
409 Payment of Medical and Similar Expenses.
410 Inadmissibility of Plea Discussions in Other Proceedings.
411 Liability Insurance.
412 Evidence Illegally Obtained.

ARTICLE V. PRIVILEGES

501 Privileges Recognized Only as Provided.
502 Required Reports Privileged by Statute.
503 Lawyer—Client Privilege.
(a) Definitions.
(b) General Rule of Privilege.
(c) Who May Claim the Privilege.
(d) Exceptions.
(1) Furtherance of Crime or Fraud.
(2) Claimants Through Same Deceased Client.
(3) Breach of Duty by Lawyer or Client.
(4) Document Attested by Lawyer.
(5) Joint Clients.
504 Physician and Psychotherapist-Patient Privilege.
(a) Definitions.
(b) General Rule of Privilege.
(c) Who May Claim the Privilege.
(d) Exceptions.
(1) Condition on Element of Claim or Defense.
(2) Crime or Fraud.
(3) Breach of Duty Arising Out of Physician-Patient Relationship.
(4) Proceedings for Hospitalization.
(5) Required Report.
(6) Examination by Order of Judge.
(7) Criminal Proceeding.
505 Husband-Wife Privileges.
(a) Spousal Immunity.
(1) General Rule.
(2) Exceptions.

(b) Confidential Marital Communications.
(1) General Rule.
(2) Exceptions.
506 Communications to Clergymen.
(a) Definitions.
(b) General Rule of Privilege.
(c) Who May Claim the Privilege.
507 Political Vote.
508 Trade Secrets.
509 Identity of Informer.
(a) Rule of Privilege.
(b) Who May Claim.
(c) Exceptions.
(1) Voluntary Disclosure—Informer a Witness.
(2) Testimony on Merits.
(3) Legality of Obtaining Evidence.
510 Waiver of Privilege by Voluntary Disclosure.
511 Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.
512 Comment Upon or Inference From Claim of Privilege—Instruction.
(a) Comment or Inference Not Permitted.
(b) Claiming Privilege Without Knowledge of Jury.
(c) Jury Instruction.
(d) Application—Self-Incrimination.

ER

ARTICLE VI. WITNESSES—IMPEACHMENT

601 Competency of Witnesses.
602 Lack of Personal Knowledge.
603 Oath or Affirmation.
604 Interpreters.
605 Competency of Judge as Witness.
606 Competency of Juror as Witness.
(a) At the Trial.
(b) Inquiry Into Validity of Verdict or Indictment.
607 Who May Impeach or Support.
608 Evidence of Character and Conduct of Witness.
(a) Opinion and Reputation Evidence of Character.
(b) Specific Instances of Conduct.
(c) Admissibility.
609 Impeachment by Evidence of Conviction of Crime.
(a) General Rule.
(b) Time Limit.
(c) Admissibility.
(d) Effect of Pardon, Annulment, or Certificate of Rehabilitation.
(e) Juvenile Adjudications.
(f) Pendency of Appeal.
610 Religious Beliefs or Opinions.
611 Mode and Order of Interrogation and Presentation.
(a) Control by Court.
(b) Scope of Cross-Examination.
(c) Leading Questions.
612 Writing Used to Refresh Memory.
(a) While Testifying.
(b) Before Testifying.
(c) Claims of Privilege or Irrelevance.
(d) Failure to Produce.

613 Prior Inconsistent Statements—Bias and Interest of Witnesses.
(a) General Rule.
(b) Foundation Requirement.
614 Calling and Examination of Witnesses by Court.
(a) Calling by Court.
(b) Examination by Court.
(c) Objections.
615 Exclusion of Witnesses.

ARTICLE VII. OPINION TESTIMONY AND EXPERT WITNESSES

701 Opinion Testimony by Lay Witnesses.
702 Testimony by Experts.
703 Basis of Opinion Testimony by Experts.
704 Opinion on Ultimate Issue.
705 Disclosure of Facts or Data Underlying Expert Opinion.
(a) Disclosure of Facts or Data.
(b) Admissibility.
(c) Balancing Test—Limiting Instructions.
706 Court Appointed Experts.
(a) Appointment.
(b) Disclosure of Appointment.
(c) Parties' Experts of Own Selection.

ARTICLE VIII. HEARSAY

801 Definitions.
(a) Statement.
(b) Declarant.
(c) Hearsay.
(d) Statements Which Are Not Hearsay.
(1) Prior Statement by Witness.
(2) Admission by Party-Opponent.
(3) Recorded Statement by Child Victims of Crime.
802 Hearsay Rule.
803 Hearsay Exceptions—Availability of Declarant Immaterial.
(1) Present Sense Impression.
(2) Excited Utterance.
(3) Then Existing Mental, Emotional, or Physical Condition.
(4) Statements for Purposes of Medical Diagnosis or Treatment.
(5) Recorded Recollection.
(6) Business Records.
(7) Absence of Record.
(8) Public Records and Reports.
(9) Records of Vital Statistics.
(10) Absence of Public Record or Entry.
(11) Records of Religious Organizations.
(12) Marriage, Baptismal, and Similar Certificates.
(13) Family Records.
(14) Records of Documents Affecting an Interest in Property.
(15) Statements in Documents Affecting an Interest in Property.
(16) Statements in Ancient Documents.
(17) Market Reports, Commercial Publications.
(18) Learned Treatises.
(19) Reputation Concerning Personal or Family History.
(20) Reputation Concerning Boundaries or General History.
(21) Reputation as to Character.
(22) Judgment as to Personal, Family, or General History, or Boundaries.

(23) Other Exceptions.
804 Hearsay Exceptions — Declarant Unavailable.
(a) Definition of Unavailability.
(b) Hearsay Exceptions.
(1) Former Testimony.
(2) Statement Under Belief of Impending Death.
(3) Statement Against Interest.
(4) Statement of Personal or Family History.
(5) Other Exceptions.
805 Hearsay Within Hearsay.
806 Attacking and Supporting Credibility of Declarant.

ARTICLE IX. DOCUMENTARY EVIDENCE

901 Requirement of Authentication or Identification.
902 Self-Authentication.
(1) Domestic Public Documents Under Seal.
(2) Domestic Public Documents Not Under Seal.
(3) Foreign Public Documents.
(4) Certified Copies of Public Records.
(5) Official Publications.
(6) Newspapers and Periodicals.
(7) Trade Inscriptions and the Like.
(8) Acknowledged Documents.
(9) Commercial Paper and Related Documents.
(10) Presumptions Created by Law.
(11) Certified Records of Regularly Conducted Activity.
903 Subscribing Witness's Testimony Unnecessary.

ARTICLE X. WRITINGS

1001 Definitions.
(1) Writings and Recordings.
(2) Photographs.
(3) Original.
(4) Duplicate.
1002 Requirement of Original.
1003 Admissibility of Duplicates.
1004 Admissibility of Other Evidence of Contents.
(a) Originals Lost or Destroyed.
(b) Original Not Obtainable.
(c) Original in Possession of Opponent.
(d) Collateral Matters.
1005 Public Records.
1006 Summaries.
1007 Testimony or Written Admission of Party.
1008 Functions of Court and Jury.

ARTICLE XI. TITLE

1101 Title

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope and Applicability.

(a) **General Applicability.** These rules apply in all proceedings in the courts of the State of Alaska except as otherwise required by the Constitution of the United States or this state or as otherwise provided for by enactment of the Alaska Legislature, by the provisions of this rule, or by other rules promulgated by the Alaska Supreme Court. The word "judge" in these rules includes magistrate judges and masters.

(b) **Rules of Privilege.** The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(c) **Rules Inapplicable.** The rules, other than those with respect to privileges, do not apply in the following situations:

(1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 104(a).

(2) *Miscellaneous Proceedings.* Proceedings relating to extradition or rendition; sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search; and summary contempt.

(Added by SCO 364 effective August 1, 1979; and amended by SCO 1829 effective October 15, 2014)

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.

(Added by SCO 364 effective August 1, 1979)

Rule 103. Rulings on Evidence

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain Error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Added by SCO 364 effective August 1, 1979)

Rule 104. Preliminary Questions.

(a) **Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of Jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interest of justice require or, when an accused is a witness, if the accused so requests.

(d) **Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case. Testimony given by the accused at the hearing is not admissible against the accused unless inconsistent with the accused's testimony at trial.

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. In cases tried to a jury, evidence inadmissible as to one party shall not be admitted as to other parties until the court has made all reasonable efforts to effectively delete all references to the parties as to whom it is inadmissible.

(Added by SCO 364 effective August 1, 1979)

Rule 106. Remainder of, or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Fact.

(a) **Scope of Rule.** This rule governs only judicial notice of facts. Judicial notice of a fact as used in this rule means a court's on-the-record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.

(b) **General Rule.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice as specified in subdivision (b), whether requested or not.

(d) **When Mandatory.** Upon request of a party, the court shall take judicial notice of each matter specified in subdivision (b) if the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

(Added by SCO 364 effective August 1, 1979)

Rule 202. Judicial Notice of Law.

(a) **Scope of Rule.** This rule governs only judicial notice of law.

(b) **Without Request—Mandatory.** Without request by a party, the court shall take judicial notice of the common law, the Constitution of the United States and of this state, the public statutes of the United States and this state, the provisions of the Alaska Administrative Code, and all rules adopted by the Alaska Supreme Court.

(c) **Without Request—Optional.** Without request by a party, the court may take judicial notice of:

(1) All duly adopted federal rules of court, and the constitutions, public statutes and duly adopted regulations and rules of court of every state, territory and jurisdiction of the United States.

(2) Private acts and resolutions of the Congress of the United States and of the legislature of this state and duly published regulations of agencies of the United States.

(3) Duly enacted ordinances of municipalities or other governmental subdivisions, and emergency orders or unpublished regulations adopted by agencies of this state.

(4) The laws of foreign countries, international law and maritime law.

(5) Any matter of law which would fall within the scope of this subdivision or subdivision (b) of this rule but for the fact that it has been replaced, superseded or otherwise rendered no longer in force.

(d) **With Request—Mandatory.** Upon request of a party, the court shall take judicial notice of each matter specified in subdivision (c) if the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

(Added by SCO 364 effective August 1, 1979)

Rule 203. Procedure for Taking Judicial Notice.

(a) **Determining Propriety of Judicial Notice.** Upon timely request, a party is entitled to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of proper notification, the request may be made after judicial notice has been taken. In determining the propriety of taking judicial notice on a matter or the tenor thereof, the judge may consult and use any source of pertinent information, whether or not furnished by a party.

(b) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(c) **Instructing the Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but it is not required to, accept as conclusive any fact judicially noticed. Judicial notice of any matter of law falling within the scope of Rule 202 shall be a matter for the court and not the jury.

(Added by SCO 364 effective August 1, 1979)

ARTICLE III. PRESUMPTIONS

Rule 301. Presumptions in General in Civil Actions and Proceedings.

(a) **Effect.** In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" may be made to the jury.

(b) **Prima Facie Evidence.** A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) **Inconsistent Presumption.** If two presumptions arise which conflict with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

(Added by SCO 364 effective August 1, 1979; and amended by SCO 1806 effective September 9, 2013)

Note: Ch. 80, SLA 2001 enacted a new subsection (b)(8) to AS 34.77.120 concerning the sufficiency of spousal testimony to rebut presumptions established under AS 34.77.120(b)(5) or (7). According to section 7 of the Act, this new subsection has the effect of amending Evidence Rule 301 by changing the rule's general criteria for the evidence that must be introduced to satisfy the burden of proof to rebut the presumptions.

Note: Chapter 45, SLA 2013 (HB 65) enacted various changes, including amendments to AS 34.77.110 relating to community property, effective September 9, 2013. According to section 47 of the Act, AS 34.77.110(i), enacted by section 43 of the Act, has the effect of amending Alaska Rule of Evidence 301 by specifying the evidence that is sufficient to rebut a presumption under AS 34.77.110(i).

Rule 302. Applicability of Federal Law in Civil Actions and Proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

(Added by SCO 364 effective August 1, 1979)

Rule 303. Presumptions in General in Criminal Cases.

(a) **Effect.**

(1) *Presumptions Directed Against an Accused.* In all criminal cases when not otherwise provided for by statute, by these rules or by judicial decision, a presumption directed against the accused imposes no burden of going forward with evidence to rebut or meet the presumption and does not shift to the accused the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast. However, if the accused fails to offer evidence to rebut or meet the presumption, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" shall be made to the jury. If the accused offers evidence to rebut or meet the presumption, the court may instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" shall be made to the jury.

(2) *Presumptions Directed Against the Government.* In all criminal cases when not otherwise provided for by statute, by these rules, or by judicial decision, a presumption directed against the government shall be treated in the same manner as a presumption in a civil case under Rule 301.

(b) **Prima Facie Evidence.** A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) **Inconsistent Presumptions.** If two presumptions arise which conflict with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

(Added by SCO 364 effective August 1, 1979)

ARTICLE IV. ADMISSIBILITY OF RELEVANT EVIDENCE

Rule 401. Definition of Relevant Evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Added by SCO 364 effective August 1, 1979)

Rule 402. Relevant Evidence Admissible— Exceptions — Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1841 effective October 6, 2014)

Note: Chapter 110 SLA 04 (HB 285) adopts the Uniform Electronic Transactions Act. According to Section 3 of the Act, AS 09.80.100, enacted in Section 1, has the effect of amending Evidence Rule 402 by adding a provision that prevents electronic evidence of a record or signature from being inadmissible as evidence just because it is in electronic form.

Note: Chapter 62, SLA 2014 (HB 250), effective October 6, 2014, enacted various changes, including a new section AS 09.55.544 restricting the evidence that is admissible in medical malpractice actions.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1716 effective January 1, 2010)

Note (effective January 1, 2010): Chapter 44 SLA 2009 (HB 102), effective January 1, 2010, enacted changes relating to the Uniform Commercial Code. According to section 9 of the Act, AS 45.01.303(g) has the effect of amending Alaska Rules of Evidence Rule 403 by requiring the exclusion of certain relevant evidence relating to usage of trade unless certain conditions are met.

Rule 404. Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes.

(a) **Character Evidence Generally.** Evidence 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, except:

(1) *Character of Accused.* Evidence of a relevant trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, or evidence of a relevant character trait of an accused or of a character trait for peacefulness of the victim offered by the prosecution in a case to rebut evidence that the victim was the first aggressor, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, the party must apply for an order of the court at any time before or during the trial or preliminary hearing.

(ii) The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted in camera where there is a danger of unwarranted invasion of the privacy of the victim.

(iii) The court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

(iv) In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts.**

(1) Evidence of other crimes, wrongs, or acts is not admissible 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. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

(i) are similar to the offense charged; and

(ii) were committed upon persons similar to the prosecuting witness.

(3) In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible if the defendant relies on a defense of consent. In a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible.

(4) In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, "domestic violence" and "crime involving domestic violence" have the meanings given in AS 18.66.990.

(Added and amended by SCO 364 effective August 1, 1979; amended by SCO 906 effective nunc pro tunc May 28, 1988; by SCO 1092 effective July 15, 1992; by SCO 1153 effective July 15, 1994; by SCO 1204 effective July 15, 1995; by SCO 1293 effective January 15, 1998; by SCO 1339, effective June 13, 1998; and by SCO 1806 effective nunc pro tunc July 1, 2013)

Note: SCO 906 incorporated changes in Evidence Rule 404 made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added subparagraph (b)(2).

Note: SCO 906 is amended by adding a new paragraph 3 which provides: "3. This order is made for the sole reason that the legislature has mandated the above amendments. If the act mandating these amendments is invalidated by a court of competent jurisdiction, this order shall be considered automatically rescinded." This amendment is effective retroactively to May 28, 1988. Paschall v. State, No. S-4277 (Alaska Dec. 20, 1990) (order granting original application for relief).

Note: Subparagraph (b)(1) was amended by ch. 79, § 4, SLA 1991.

Note to SCO 1204: Ch. 116 § 2 SLA 1994 amended Evidence Rules 404(a)(2) and 404(b) to allow circumstantial use of character evidence and evidence of other crimes in certain criminal cases. Section 8 of this order is adopted for the sole reason that the legislature has mandated the amendments.

Note to SCO 1293: Evidence Rule 404(b) (4) was added by § 22 ch. 63 SLA 1997. Section 5 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Note to SCO 1339: Evidence Rule 404(b) (3) was amended by § 18 ch. 86 SLA 1998 to expand the circumstances when evidence of other sexual assaults or attempted sexual assaults by the defendant will be admitted. Section 3 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Note: Chapter 43, SLA 2013 (SB 22), effective *nunc pro tunc* to July 1, 2013, amended Evidence Rule 404(b)(2) relating to the admissibility of evidence, in prosecutions of crimes involving physical or sexual assault of a minor, of similar acts by the defendant toward the same or another child. The changes to Evidence Rule 404(b)(2) are adopted for the sole reason that the legislature has mandated the amendments.

Note: Chapter 43, SLA 2013 (SB 22) enacted a number of changes relating to criminal procedure effective *nunc pro tunc* to July 1, 2013. According to section 45 of the Act, AS 12.45.045(a), as amended by section 16 of the Act, has the effect of amending Alaska Rule of Evidence 404(a) by providing, with some exceptions, that a defendant must request admission of certain evidence about the complaining witness five days before trial and by applying the rule to the conduct of the complaining witness after the alleged offense.

LAW REVIEW COMMENTARIES

"Admissibility of Battered-Spouse-Syndrome Evidence In Alaska," 32 Alaska L. Rev. 153 (2015).

Rule 405. Methods of Proving Character.

(a) **Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation in any community or group in which the individual habitually associated or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 406. Habit—Routine Practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Added by SCO 364 effective August 1, 1979)

Rule 407. Subsequent Remedial Measures.

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. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as impeachment or, if controverted, proving ownership, control, feasibility of precautionary measures, or defective condition in a products liability action.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1841 effective October 6, 2014)

Note: Chapter 62, SLA 2014 (HB 250), effective October 6, 2014, enacted various changes, including a new section AS 09.55.544 restricting the evidence that is admissible in medical malpractice actions. According to section 2 of the Act, AS 09.55.544(a)(2), enacted by section 1 of the Act, has the effect of amending Evidence Rule 407 by modifying the admissibility of evidence of subsequent remedial measures so that evidence of subsequent remedial measures in a malpractice cause of action is not admissible for any purpose.

Rule 408. Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1841 effective October 6, 2014)

Note: Chapter 62, SLA 2014 (HB 250), effective October 6, 2014, enacted various changes, including a new section AS 09.55.544 restricting the evidence that is admissible in medical malpractice actions. According to section 2 of the Act, AS 09.55.544(a)(3), enacted by section 1 of the Act, has the effect of amending Evidence Rule 408 by modifying the admissibility of evidence of compromise and offers of compromise or settlement in a medical malpractice cause of action so that evidence of compromise or settlement in a medical malpractice cause of action is not admissible for any purpose.

Rule 409. Payment of Medical and Similar Expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1841 effective October 6, 2014)

Note: Chapter 62, SLA 2014 (HB 250), effective October 6, 2014, enacted various changes, including a new section AS 09.55.544 restricting the evidence that is admissible in medical malpractice actions. According to section 2 of the Act, AS 09.55.544(a)(4), enacted by section 1 of the Act, has the effect of amending Evidence Rule 409 by modifying the admissibility of evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses by a health care provider in medical malpractice cause of action.

Rule 410. Inadmissibility of Plea Discussions in Other Proceedings.

(a) Evidence of a plea of guilty or nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements or agreements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the government or an accused person who made the plea or offer if:

(i) A plea discussion does not result in a plea of guilty or nolo contendere, or

(ii) A plea of guilty or nolo contendere is not accepted or is withdrawn, or

(iii) Judgment on a plea of guilty or nolo contendere is reversed on direct or collateral review.

(b) This rule shall not apply to (1) the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas when offered in subsequent proceedings as prior inconsistent statements, and (2) proceedings by a defendant to attack or enforce a plea agreement.

(Added by SCO 364 effective August 1, 1979)

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 412. Evidence Illegally Obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966), may be used in

(A) a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; or

(B) any prosecution, to impeach the defendant, codefendant, or a former defendant in the case who made the statement 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; and

(2) other evidence illegally obtained may be admitted in

(A) a prosecution for perjury if it is relevant to the issue of guilt or innocence and if the prosecution shows that the evidence was not obtained in substantial violation of rights of the defendant; or

(B) any criminal action, to impeach the defendant, codefendant, or a former defendant in the case, if the prosecution shows that the evidence

(i) was the product of a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384 U.S. 436 (1966); and

(ii) was not obtained in substantial violation of the rights of the defendant, codefendant, or a former defendant in the case, as appropriate.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1556 effective July 22, 2004)

Note: Chapter 16 § 1 SLA 2004 amended Evidence Rule 412 to allow evidence illegally obtained to be used to impeach a defendant, codefendant, or former defendant in a case, under specified circumstances. Section IV of this order is adopted for the sole reason that the legislature has mandated the amendments.

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer of an agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer—Client Privilege.

(a) **Definitions.** As used in this rule:

(1) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A representative of the client is one having authority to obtain professional legal services and to act on advice rendered pursuant thereto, on behalf of the client.

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services.

(5) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The authority to do so is presumed in the absence of evidence to the contrary.

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

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought, obtained or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(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

(4) *Document Attested by Lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 504. Physician and Psycho-therapist—Patient Privilege.

(a) **Definitions.** As used in this rule:

(1) A patient is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A psychotherapist is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor

under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.

(4) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) **General Rule of Privilege.** A patient has 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, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(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.

(2) *Crime or Fraud.* If the services of the physician or psychotherapist were sought, obtained or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or a fraud.

(3) *Breach of Duty Arising Out of Physician-Patient Relationship.* As to a communication relevant to an issue of breach, by the physician, or by the psychotherapist, or by the patient, of a duty arising out of the physician-patient or psychotherapist-patient relationship.

(4) *Proceedings for Hospitalization.* For communications relevant to an issue in proceedings to hospitalize the patient for physical, mental or emotional illness, if the physician or psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization.

(5) *Required Report.* As to information that the physician or psychotherapist or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection, or as to information or matters contained in or reasonably raised by a report submitted under AS 08.64.336, other than information that would establish the identity of a patient, unless the court finds that it is necessary to admit the identifying information in order to serve the interests of justice.

(6) *Examination by Order of Judge.* As to communications made in the course of an examination ordered by the court of the physical, mental or emotional condition of the patient, with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise. This exception does not apply where the examination is by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that the lawyer may advise the defendant whether to enter a plea based on insanity or to present a defense based on the defendant's mental or emotional condition.

(7) *Criminal Proceeding.* For physician-patient communications in a criminal proceeding. This exception does not apply to the psychotherapist-patient privilege.

(Added by SCO 364 effective August 1, 1979; amended by SCO 850 effective January 15, 1988; by SCO 1108 effective January 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1337 effective March 1, 1999; and by SCO 1522 effective October 15, 2003)

Note: SCO 1108 incorporated changes in Evidence Rule 504(a)(3) made by the legislature in ch. 129 § 12 SLA 1992. This legislation added the language in subparagraph (a)(3), "or (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged."

SCO 1108 was entered for the sole reason that the legislature has mandated the above amendment. If ch. 129 § 12 SLA 1992 is invalidated by a court of competent jurisdiction, SCO 1108 shall be considered automatically rescinded.

Note to SCO 1337: Evidence Rule 504(a)(3) was amended by § 5 ch. 75 SLA 1998 to expand the definition of "psychotherapist" to include licensed professional counselors. Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 505. Husband-Wife Privileges.

(a) **Spousal Immunity.**

(1) *General Rule.* 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.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) In a civil proceeding brought by or on behalf of one spouse against the other spouse; or

(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

(D) In a proceeding in which one spouse is charged with:

(i) A crime against the person or the property of the other spouse or of a child of either, whether such crime was committed before or during marriage.

(ii) Bigamy, incest, adultery, pimping, or prostitution.

(iii) A crime related to abandonment of a child or nonsupport of a spouse or child.

(iv) A crime prior to the marriage.

(v) A crime involving domestic violence as defined in AS 18.66.990.

(E) In a proceeding involving custody of a child.

(F) Evidence derived from or related to a business relationship involving the spouses.

(b) **Confidential Marital Communications.**

(1) *General Rule.* Neither 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.

(2) *Exceptions.* There is no privilege under this subdivision:

(A) If any of the exceptions under subdivision (a) (2) of this rule apply; or

(B) If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud; or

(C) In a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction; or

(D) In a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made; or

(E) In a proceeding under the Rules of Children's Procedure; or

(F) If the communication was primarily related to and made in the context of a business relationship involving both spouses or the spouses and third parties.

(Added by SCO 364 effective August 1, 1979; amended by SCO 823 effective August 1, 1987; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note to SCO 1269: Evidence Rule 505(a) was amended by § 70 ch. 64 SLA 1996. Section 13 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 506. Communications to Clergymen.

(a) **Definitions.** As used in this rule:

(1) A member of the clergy is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(2) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in that individual's professional character as spiritual adviser.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The authority so to do is presumed in the absence of evidence to the contrary.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 508. Trade Secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 509. Identity of Informer.

(a) **Rule of Privilege.** The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished by the informer.

(c) **Exceptions.**

(1) *Voluntary Disclosure—Informer a Witness.* No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the prosecution.

(2) *Testimony on Merits.*

(i) If a party claims that a government informer may be able to give testimony necessary to a fair determination of the issue of guilt, innocence, credibility of a witness testifying on the merits, or punishment in a criminal case, or of a material issue on the merits in a civil case to which the state is a party, and if the government invokes the privilege, the party shall be given an opportunity to show that the party's claim is valid. The judge shall hear all evidence presented by the party and the government, and both sides shall be permitted to be present with counsel during the presentation of evidence, subject to subdivision (c) (2) (ii) of this rule.

(ii) If the government requests an opportunity to submit to the court, by affidavit or testimony or otherwise, evidence concerning the information possessed by an informant, which submission might tend to reveal the informant's identity, the judge shall permit the government to make its submission without disclosure to the other party. Neither the attorney for the government, nor the other party or the other party's attorney may be present when the judge is examining the in camera submission. Although the submission generally will consist of affidavits, the judge may direct that witnesses appear before the judge, without the government or the other party present, to give testimony.

(iii) If the judge finds that there is a reasonable possibility that the informant can give the testimony sought, and if the government elects not to disclose the informant's identity, the judge shall, either on motion of a party or sua sponte, dismiss criminal charges to which the testimony would relate if the informant's testimony is material to guilt or innocence. In criminal proceedings in which the informant's testimony is not material to guilt or innocence and in civil proceedings the judge may make any order that justice requires.

(iv) Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

(3) *Legality of Obtaining Evidence.*

(i) When a defendant challenges the legality of the means by which evidence was obtained by the prosecution and the prosecution relies upon information supplied by an informer to support its claim of legality, if the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible the judge may require the identity of the informer to be disclosed. In determining whether or not to require disclosure, the judge shall hear any evidence offered by the parties and both the defendant and the government shall have the right to be represented by counsel.

(ii) If the judge determines that disclosure of the informant's identity is necessary, upon request by the prosecution the disclosure shall be made to the court alone, not to the defendant. The judge may, if necessary, examine the informant or other witnesses about the informant, but such examination will be in camera and neither the defendant nor the prosecution shall be present or represented.

(iii) If disclosure of the identity of the informer is made to the court and not to the defendant, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 510. Waiver of Privilege by Voluntary Disclosure.

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

(Added by SCO 364 effective August 1, 1979)

Rule 512. Comment Upon or Inference From Claim of Privilege—Instruction.

(a) **Comment or Inference Not Permitted.** The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) **Claiming Privilege Without Knowledge of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) **Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(d) **Application—Self-Incrimination.** The foregoing subsections do not apply in a civil case with respect to the privilege against self-incrimination.

(Added by SCO 364 effective August 1, 1979)

ARTICLE VI. WITNESSES—IMPEACHMENT

Rule 601. Competency of Witnesses.

A person is competent to be a witness unless the court finds that (1) the proposed witness is incapable of communicating concerning the matter so as to be understood by the court and jury either directly or through interpretation by one who can understand the proposed witness, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and to the administration of an oath or affirmation that the interpreter will make a true translation of all communications to and from the person for whom the interpretation is made. In determining whether an interpreter is qualified and impartial, the court shall inquire into and consider the interpreter's education, certification and experience in interpreting relevant languages; the interpreter's understanding of and experience in the proceedings in which the interpreter is to participate; and the interpreter's impartiality. Parties to the proceedings may also question the interpreter concerning the interpreter's qualifications and impartiality.

(Added by SCO 364 effective August 1, 1979; by SCO 959 effective July 15, 1989)

Rule 605. Competency of Judge as Witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

(Added by SCO 364 effective August 1, 1979)

Rule 606. Competency of Juror as Witness.

(a) **At the Trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not be questioned as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any matter or statement upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 607. Who May Impeach or Support.

(a) Subject to the limitation imposed by these rules, the credibility of a witness may be attacked by any party, including the party calling the witness.

(b) Evidence proffered by any party to support the credibility of a witness may be admitted to meet an attack on the witness' credibility.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 608. Evidence of Character and Conduct of Witness.

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness

for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** If a witness testifies concerning the character for truthfulness or untruthfulness of a previous witness, the specific instances of conduct probative of the truthfulness or untruthfulness of the previous witness, may be inquired into on cross-examination. Evidence of other specific instances of the conduct of a witness offered for the purpose of attacking or supporting that witness' credibility is inadmissible unless such evidence is explicitly made admissible by these rules, by other rules promulgated by the Alaska Supreme Court or by enactment of the Alaska Legislature.

(c) **Admissibility.** Before a witness may be impeached by inquiry into specific instances of conduct pursuant to subdivision (b), the court shall be advised of the specific instances of conduct upon which inquiry is sought and shall rule if the witness may be impeached by such inquiry by weighing its probative value against its prejudicial effect.

(Added by SCO 364 effective August 1, 1979)

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is only admissible if the crime involved dishonesty or false statement.

(b) **Time Limit.** Evidence of a conviction under this rule is inadmissible if a period of more than five years has elapsed since the date of the conviction. The court may, however, allow evidence of the conviction of the witness other than the accused in a criminal case after more than five years have elapsed if the court is satisfied that admission in evidence is necessary for a fair determination of the case.

(c) **Admissibility.** Before a witness may be impeached by evidence of a prior conviction, the court shall be advised of the existence of the conviction and shall rule if the witness may be impeached by proof of the conviction by weighing its probative value against its prejudicial effect.

(d) **Effect of Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is inadmissible under this rule if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and

(2) The procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

(e) **Juvenile Adjudications.** The court may allow evidence of the juvenile adjudication of a witness if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence would substantially assist in determining the credibility of the witness.

(f) **Pendency of Appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 611. Mode and Order of Interrogation and Presentation.

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading Questions.** On direct examination, leading questions should not be allowed except: (1) when they are merely formal or preliminary, (2) when they are necessary to develop the witness' testimony, (3) when the witness is hostile, an adverse party, or identified with an adverse party, or (4) when they are necessary for the purposes of impeachment of the witness' testimony. On cross-examination, leading questions should ordinarily be permitted.

(Added by SCO 364 effective August 1, 1979)

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.

(c) **Claims of Privilege or Irrelevance.** If it is claimed that a writing or object contains matters privileged or not related to the subject matter of the testimony the court shall rule on any claim of privilege raised and examine the writing or object in camera, excise any portions not so related and deliver the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

(d) **Failure to Produce.** If a writing or object is not produced or delivered pursuant to an order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial or dismissing the prosecution.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 613. Prior Inconsistent Statements—Bias and Interest of Witnesses.

(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.

(b) **Foundation Requirement.** Before extrinsic evidence of a prior contradictory statement or of bias or interest may be admitted, the examiner shall lay a foundation for impeachment by affording the witness the opportunity, while testifying, to explain or deny any prior statement, or to admit, deny, or explain any bias or interest, except as provided in subdivision (b) (1) of this rule.

(1) The court shall permit witnesses to be recalled for the purpose of laying a foundation for impeachment if satisfied that failure to lay a foundation earlier was not intentional, or if intentional was for good cause; even if no foundation is laid, an inconsistent statement may be admitted in the interests of justice.

(2) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; by SCO 1269 effective July 15, 1997; and by SCO 1522 effective October 15, 2003)

Note: In 1996, the legislature enacted AS 12.61.127, which provides that statements obtained from victims or witnesses in violation of AS 12.61.120 or 12.61.125 are presumed inadmissible. According to § 79, ch. 64 SLA 1996, this statute had the effect of amending Evidence Rule 613 relating to impeachment of witnesses.

Rule 614. Calling and Examination of Witnesses by Court.

(a) **Calling by Court.** The court may call witnesses on its own motion or at the suggestion of a party, and all parties are entitled to cross-examine witnesses thus called.

(b) **Examination by Court.** The court may examine any witness.

(c) **Objections.** Objections to the calling or examination of witnesses by the court may be made at the time or at the next available opportunity when the jury is not present.

(Added by SCO 364 effective August 1, 1979)

Rule 615. Exclusion of Witnesses.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of

(1) a party who is a natural person;

(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney;

(3) a person whose presence is shown by a party to be important to the presentation of the party's cause; or

(4) the victim of the alleged crime or juvenile offense during criminal or juvenile proceedings when the accused has the right to be present; in this paragraph, "victim" has the meaning given in AS 12.55.185.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1293 effective January 15, 1998)

Note to SCO 1293: Paragraph (4) of Evidence Rule 615 was added by § 23 ch. 63 SLA 1997. Section 6 of this order is adopted for the sole reason that the legislature has mandated the amendment.

ARTICLE VII. OPINION TESTIMONY AND EXPERT WITNESSES

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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 702. Testimony by Experts.

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) No more than three independent expert witnesses may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(c) **[Applicable to cases filed on or after August 7, 1997.]** Professional Negligence Cases. In an action based on professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care except as provided in AS 09.20.185.

(Added by SCO 364 effective August 1, 1979; amended by SCO 793 effective March 15, 1987; by SCO 1172 effective July 15, 1995; by SCO 1269 effective July 15, 1997; and by SCO 1281 effective August 7, 1997)

Note: In 1996, the legislature enacted AS 12.45.037 relating to the admissibility of expert testimony about criminal street gang activity. According to § 11 ch. 60 SLA 1996, this statute has the effect of amending Evidence Rule 702 to allow expert testimony to be admitted in a criminal prosecution to show criminal gang characteristics, activity, and practices.

AS 09.20.185, enacted by sec. 15, ch. 26, SLA 1997, effective August 7, 1997, has the effect of amending this rule by requiring certain qualifications from a person testifying as an expert witness.

Note to SCO 1281: In 1997 the legislature enacted AS 09.20.185 which prohibits a person from testifying as an expert in a professional negligence action unless the person has the qualifications listed in AS 09.20.185(a). According to ch. 26, § 51, SLA 1997, this statute has the effect of amending Evidence Rule 702 by requiring certain qualifications for a person testifying as an expert witness. According to § 55 of the session law, AS 09.20.185 applies "to all causes of action accruing on or after the effective date of this Act." However, Rule 702(c), adopted by paragraph 15 of this order, is applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

Rule 703. Basis of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994, and by SCO 1247 effective July 15, 1996)

Note: Sec. 3 of ch. 7 SLA 1995 states: "AS 09.25.051, added by sec. 1 of this Act, and AS 12.45.035, added by sec. 2 of this Act, have the effect of amending Rule 703, Alaska Rules of Evidence, to the extent that Rule 703 would limit the admissibility of DNA profile evidence as a result of the application of the standard previously adopted by the Alaska Supreme Court in Pulakis v. State, 476 P.2d 474 (Alaska 1970), that requires a finding of general acceptance of scientific evidence in the relevant scientific community as a precondition of admission of scientific evidence."

Rule 704. Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Added by SCO 364 effective August 1, 1979)

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

(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).

(b) **Admissibility.** An adverse party may request a determination of whether the requirements of Rule 703 are satisfied before an expert offers an opinion or discloses facts or data.

(c) **Balancing Test—Limiting Instructions.** When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 706. Court Appointed Experts.

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' 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. A witness so appointed shall advise the parties of

the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. If the court determines that the interests of justice so require, the party calling an expert appointed under this rule may cross-examine the witness.

(b) **Disclosure of Appointment.** In the exercise of its discretion, the court may disclose to the jury the fact that the court appointed the expert witness.

(c) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A declarant is a person who makes a statement.

(c) **Hearsay.** 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.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with the declarant's testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; or

(3) *Recorded Statement by Child Victims of Crime.* The statement is a recorded statement by the victim of a crime who is less than 16 years of age and

(A) the recording was made before the proceeding;

(B) the victim is available for cross-examination;

(C) the prosecutor and any attorney representing the defendant were not present when the statement was taken;

(D) the recording is on videotape or other format that records both the visual and aural components of the statement;

(E) each person who participated in the taking of the statement is identified on the recording;

(F) the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim;

(G) the defense has been provided a reasonable opportunity to view the recording before the proceeding; and

(H) the court has had an opportunity to view the recording and determine that it is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording into evidence.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; by SCO 1580 effective July 7, 2005; and by SCO 1841 effective October 6, 2014)

Note: Chapter 64, section 59, SLA 2005 (HB 53) amended Evidence Rule 801 as reflected in section 13 of this Order. The change to Evidence Rule 801 is adopted for the sole reason that the legislature has mandated the amendment.

Note: Chapter 62, SLA 2014 (HB 250), effective October 6, 2014, enacted various changes, including a new section AS 09.55.544 restricting the evidence that is admissible in medical malpractice actions. According to section 2 of the Act, AS 09.55.544(a)(5), enacted by section 1 of the Act, has the effect of amending Evidence Rule 801 by prohibiting the admission of an offer of correction, remediation, or settlement, by a health care provider in a medical malpractice cause of action.

Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

(Added by SCO 364 effective August 1, 1979)

Rule 803. Hearsay Exceptions—Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(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.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Record.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(b) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family Records.** Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, codes, standards, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(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.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

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

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 804. Hearsay Exceptions—Declarant Unavailable.

(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 the statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(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.

(3) *Statement Against Interest.* 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. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(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.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994; and by SCO 1522 effective October 15, 2003)

Rule 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

(Added by SCO 364 effective August 1, 1979)

Rule 806. Attacking and Supporting Credibility of Declarant.

When a hearsay statement, or a statement defined in Rule 801 (d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement or a statement defined in Rule 801(d)(2) (C), (D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

ARTICLE IX. DOCUMENTARY EVIDENCE

Rule 901. Requirement of Authentication or Identification.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, except as provided in paragraphs (a) and (b) below:

(a) Whenever the prosecution in a criminal trial offers (1) real evidence which is of such a nature as not to be readily identifiable, or as to be susceptible to adulteration, contamination, modification, tampering, or other changes in form attributable to accident, carelessness, error or fraud, or (2) testimony describing real evidence of the type set forth in (1) if the information on which the description is based was acquired while the evidence was in the custody or control of the prosecution, the prosecution must first demonstrate as a matter of reasonable certainty that the evidence is at the time of trial or was at the time it was observed properly identified and free of the possible taints identified by this paragraph.

(b) In any case in which real evidence of the kind described in paragraph (a) of this rule is offered, the court may require additional proof before deciding whether to admit or exclude evidence under Rule 403.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1295 effective January 15, 1998)

EDITOR'S NOTE: To the extent that this rule conflicts with AS 12.45.086 the rule controls, as sec. 44, ch. 143, SLA 1982 did not receive the required 2/3 vote in the legislature.

Note: Section 41 of ch. 87 SLA 1997 adds AS 25.20.050(j) which provides that invoices and other standard documents showing charges for medical and related costs of pregnancy, childbirth or genetic testing are admissible in an action to establish paternity without testimony or other foundational evidence from the medical provider or third party payor. According to § 154 of the Act, this provision has the effect of amending Evidence Rule 901 by limiting discretion of the court to exclude documentary evidence of specified costs in a paternity action.

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(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:

(a) To bear the seal of state of a nation recognized by the executive power of the United States; or

(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. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any enactment of the Alaska Legislature or other rule prescribed by the Alaska Supreme Court.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial Paper and Related Documents.** Commercial paper, signatures therein, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions Created by Law.** Any signature, document, or other matter declared by enactment of the Alaska Legislature or rule prescribed by the Alaska Supreme Court to be presumptively or prima facie genuine or authentic.

(11) **Certified Records of Regularly Conducted Activity.** The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified person certified under penalty of perjury (i) was made at or near the time of the occurrence of the matter set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) or kept in the course of regularly conducted activity and (iii) was made by the regularly conducted activity as a regular practice, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. A party intending to rely on this paragraph must serve on other parties a notice of this intent and make available for copying relevant documents at least 20 days before the documents are to be introduced at a hearing unless the court shortens this time for good cause shown. The word "certifies" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. The certificate relating to a foreign record must be accompanied by a final certificate as to the genuineness of the signature and official position (i) of the person executing the certificate and (ii) of any foreign official who certifies the genuineness of signature and official position of the executing person, or is in a chain of certificates of genuineness of signature and official position of the executing person. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(Added by SCO 364 effective August 1, 1979; amended by SCO 851 effective January 15, 1988; by SCO 1522 effective October 15, 2003; and by SCO 1716 effective January 1, 2010)

Note (effective January 1, 2010): Chapter 44 SLA 2009 (HB 102), effective January 1, 2010, enacted changes relating to the Uniform Commercial Code. According to section 9 of the Act, AS 45.01.307 has the effect of amending Alaska Rules of Evidence Rule 902 by establishing the authenticity and stated facts of certain documents.

Rule 903. Subscribing Witness's Testimony Unnecessary.

When the execution of an attested writing is in issue, whether or not attestation is a statutory requisite of its effective execution, no attester is a necessary witness even though all attesters are available unless the statute requiring attestation specifically provides otherwise.

(Added by SCO 364 effective August 1, 1979)

ARTICLE X. WRITINGS

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) **Writings and Recordings.** Writings and recordings consist of 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.

(2) **Photographs.** Photographs include still photographs, x-ray films, video tapes, and motion pictures.

(3) **Original.** An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect that data accurately, is an original.

(4) **Duplicate.** A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(Added by SCO 364 effective August 1, 1979)

Rule 1002. Requirement of Original.

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.

(Added by SCO 364 effective August 1, 1979)

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(Added by SCO 364 effective August 1, 1979)

Rule 1004. Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if

(a) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent in bad faith lost or destroyed them; or

(b) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or

(c) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(d) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(Added by SCO 364 effective August 1, 1979; amended by SCO 1153 effective July 15, 1994)

Rule 1005. Public Records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Added by SCO 364 effective August 1, 1979)

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

(Added by SCO 364 effective August 1, 1979)

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).

(Added by SCO 364 effective August 1, 1979; amended by SCO 1522 effective October 15, 2003)

Rule 1008. Functions of Court and Jury.

When the admissibility of other evidence of contents of

writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Added by SCO 364 effective August 1, 1979)

ARTICLE XI. TITLE

Rule 1101. Title.

These rules may be cited as the Alaska Rules of Evidence.

(Added by SCO 364 effective August 1, 1979)