**16.06 DEFAMATION - FACT VERSUS OPINION**

For the plaintiff to recover, the statement must have been a false statement of fact, not an opinion. A statement of fact is a statement that can be proved to be true or false. An opinion may be considered a statement of fact if the opinion suggests that facts exist to support the opinion. In deciding this issue, you should consider whether the average person would conclude from the language of the statement and its context that the defendant was making a statement of fact. Rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt, and language used in a loose, figurative sense are generally not considered to be statements of fact.

 Use Note

This instruction will not be necessary in all cases. The court may determine as a matter of law whether an allegedly defamatory statement constitutes fact or opinion.

 Comment

This instruction is loosely based on California Pattern Jury Instruction 1707. As of 2010, Alaska had two cases relevant to this instruction. The first case is *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001), in which the plaintiff alleged that the defendants falsely described his church as a cult, and falsely described him as a cult recruiter. Assuming that plaintiff was alleging a claim for defamation based on these statements, the court held the defamation claim was barred by the First Amendment. “The First Amendment bars actions for defamation where the allegedly defamatory statements are expressions of ideas and ‘cannot reasonably be interpreted as stating actual facts about an individual.’” *Id*. at 960 (quoting *Milkovich v Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). The court concluded that the statements at issue were statements of religious belief and opinion, not factual statements that were capable of being proven true or false. Thus, the statements were not actionable as defamation under the First Amendment to the U.S. Constitution. In *State v. Carpenter*, 171 P.3d 41 (Alaska 2007), the court affirmed a summary judgment decision holding that a radio talk show host’s comments on his show implying that a woman listener had no sex life were not actionable as defamation. The court held that although the statements were offensive to a rational person, they were not defamatory because of the opinion/fact distinction and the First Amendment.