

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1841

Amending Criminal Rule 16(d) and CINA Rule 8, and adding Notes to implement the direct court rule amendments made by Chapter 60 SLA 2014 (SB 187); and

Adding Notes to Evidence Rules 402, 407, 408, 409, and 801 concerning indirect rule amendments made by Chapter 62 SLA 2014 (HB 250).

IT IS ORDERED:

1. Criminal Rule 16(d) is amended by adding new items (viii) and (ix) to subparagraph (3)(A), by amending subparagraph (3)(D), and by adding new paragraph (7) to read as follows, *effective nunc pro tunc to July 8, 2014*:

Rule 16. Discovery.

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(d) Regulation of Discovery.

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(3) *Materials to Remain in Custody of Attorney.*

(A) Materials furnished to an attorney pursuant to these rules shall be used only for the purpose of conducting the case. The following materials must remain in the custody of the defense attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the defendant's case, and shall be

subject to other terms and conditions that the court may provide. The materials listed in this paragraph shall not be provided to the defendant, but the information in the materials may be shared with the defendant to the extent necessary to prepare the defense of the case:

- (i) a criminal history record of a victim or witness;
- (ii) a medical, psychiatric, psychological, or counseling record of a victim or witness;
- (iii) an adoption record;
- (iv) a record that is confidential under AS 47.12.300 or a similar law in another jurisdiction;
- (v) a report of a presentence investigation of a victim or witness prepared pursuant to Criminal Rule 32.1 or a similar law in another jurisdiction;
- (vi) a record of the Department of Corrections other than the defendant's own file and any other incident report relating to the crime with which the defendant is charged; ~~and~~
- (vii) any other record that the court orders be kept in the exclusive custody of attorneys;
- (viii) in a prosecution under AS 11.41.410 – 11.41.440 or 11.41.450, an audio or video interview of a victim; and
- (ix) in a prosecution under AS 11.41.040 – 11.41.440 or 11.41.450, photographs taken during a medical examination of a victim.

* * * *

(D) If a defendant is proceeding without counsel, materials covered by subsection (d)(3)(A) may be provided to the defendant. If materials are provided to an unrepresented defendant under this paragraph, the court shall order that the materials remain in the defendant's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. Upon a showing of good cause, the court may impose specific terms, conditions, or restrictions concerning inspection of the materials by other persons involved in the preparation of the case, such as staff, investigators, experts, witnesses, or others. The court shall also inform the defendant and such other persons involved in the preparation of the case that violation of an order issued under this paragraph is punishable as a contempt of court and may also constitute a criminal offense.

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(7) Confidential filing. A party that files with the court or offers as an exhibit materials listed in subsection (d)(3)(viii) or (d)(3)(ix) of this rule shall file the materials in a confidential envelope. In this paragraph, "confidential" has the meaning given in Rule 37.5, Alaska Rules of Administration.

2. The following Note is added to the end of Criminal Rule 16, *effective nunc pro tunc July 8, 2014*:

Note: Chapter 60, sections 3-4, SLA 2014 (SB 187), *effective nunc pro tunc* to July 8, 2014, amended Criminal Rule 16(d) by adding new items (viii) and (ix) to subparagraph (3)(A), by amending subparagraph (3)(D), and by adding new paragraph

(7) limiting disclosure of recordings of victim interviews or certain photographs in prosecutions under AS 11.41.410-.440 or AS 11.41.450. This rule change is adopted for the sole reason that the legislature has mandated the amendment.

3. Child in Need of Aid Rule 8 is amended by adding new subsections (j)-(m) to read as follows, *effective nunc pro tunc to July 8, 2014*:

Rule 8. Disclosures, Depositions, and Discovery.

* * * *

(j) **Limitations on disclosure of certain recordings, images, and records that are also evidence for an investigation under AS 11.41.410 – 11.41.450.** Materials collected during an investigation under AS 47.10.011 or AS 47.14.300 that are also evidence for an investigation under AS 11.41.410 – 11.41.450 furnished to an attorney under these rules shall be used only for the purpose of conducting the case. A video or audio recording or medical record of a child, including photographs taken during a medical examination of a child, must remain in the custody of a parent's attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the parent's case, and shall be subject to the other terms and conditions that the court may provide. A video or audio recording or medical record of a child, including a photograph taken during a medical examination of a child, shall not be provided to the parent, but the information in the materials may be shared with the parent to the extent necessary to prepare the defense of the case.

(k) If a parent is proceeding without counsel, the materials described in (j) of this section may be provided to the parent. If materials are provided to an unrepresented parent under this subsection, the court shall order that the materials remain in the parent's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. Upon showing of good cause, the court may impose specific terms, conditions, or restrictions concerning inspection of the materials by other persons involved in preparation of the case, such as staff, investigators, experts, witnesses, or others. The court shall also inform the parent and other persons involved in the preparation of the case that violation of an order issued under this subsection is punishable as a contempt of court and may also constitute a criminal offense.

(l) **Confidential filing.** A party that files with the court or offers as an exhibit materials listed in (j) of this rule shall file the materials in a confidential envelope. In this subsection, "confidential" has the meaning given in Rule 37.5, Alaska Rules of Administration.

(m) Notwithstanding another provision of this section, the legal custodian of a child may provide records of a medical examination of a child to the child's treating health care provider if the records are required for the treatment of the child. In this subsection, "health care provider" includes a physician, dentist, physician's assistant, nurse, nurse practitioner, psychologist, counselor, marital and family therapist, village or community health aide, community health worker, or another person that

provides health care treatment in the course and scope of the person's employment.

4. The following Note is added to the end of CINA Rule 8, *effective nunc pro tunc to July 8, 2014*:

Note: Chapter 60, section 5, SLA 2014 (SB 187), effective nunc pro tunc to July 8, 2014, amended CINA Rule 8 by adding new subsections (j) through (m) limiting disclosure of certain recordings, images, and records that are evidence for an investigation under AS 11.41.410-.440 or AS 11.41.450. This rule change is adopted for the sole reason that the legislature has mandated the amendment.

5. The following Note is added to the end of Evidence Rule 402, *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)(1), enacted by section 1 of the Act, has the effect of amending Evidence Rule 402 by prohibiting the admission of an expression of apology, sympathy, commiseration, compassion, or benevolence by a health care provider in a medical malpractice cause of action regardless of its relevance.

6. The following Note is added to the end of Evidence Rule 407, *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.

7. The following Note is added to the end of Evidence Rule 408, *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.

8. The following Note is added to the end of Evidence Rule 409, *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.

9. The following Note is added to the end of Evidence Rule 801, *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)(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.

DATED: October 29, 2014

EFFECTIVE DATE: As provided in the order.

/s/
Chief Justice Fabe

/s/
Justice Winfree

/s/
Justice Stowers

/s/
Justice Maassen

/s/
Justice Bolger