APPENDIX

Alaska Court System

State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR
303 K STREET
ANCHORAGE, ALASKA
99501

March 6, 1978

Professor Stephen Saltzburg
Associate Professor
University of Virginia
School of Law
Charlottesville, Virginia 22901

Dear Professor Saltzburg:

Enclosed please find a draft of the proposed Alaska Rules of Evidence with revisions made by the Committee on Rules of Evidence appointed by the Alaska Supreme Court. Also enclosed is a list of specific questions and requests for revision and clarification, as well as a copy of the committee's preliminary revision and various letters submitted by Alaskan attorneys and organized bar groups commenting on the preliminary revision.

As you will note, the revised draft of the committee includes numerous changes to your original proposal; they are not described at length. To the extent that no reason is given for the revisions of the committee in the materials enclosed, I would hope that you will find the revisions self-explanatory. In addition to the specific questions submitted to, the committee would very much enjoy hearing comment by you on any of the revisions which we have made in the event that you think such comment might be appropriate.

Please bear in mind that, in drafting revisions to your original proposals, the committee has worked under the assumption that we, as Alaskan attorneys, are probably more familiar with the realities of legal practice in Alaska and specific Alaskan case law than you might be. However we fully realize that we would not, either individually or as a committee, be justified in claiming any particular expertise in the law of evidence, and certainly not the type of expertise which you possess. Therefore, in the event it appears that, in making changes to acommodate peculiarly Alaskan interests, this committee has ended up with proposals which would in the long

run be undesirable or untenable, please do not hesitate to inform us of this fact.

The committee would very much appreciate hearing from you as to a tentative date when we could meet with you to discuss the particular questions and requests which we are forwarding, as well as the revision as a whole. Since I have recently abandoned ship and am no longer a member of the State Judiciary, you can call or write me directly at the United States Attorney's Office in Anchorage, 805 W. Fourth Avenue Room 249, Anchorage, Alaska 99501, (907) 277-1491.

I would like to apologize to you for the delay in getting these materials to you, but circumstances involved with my job changeover made the delay unavoidable. I look forward to hearing from you in the near future.

Very truly yours,

Alexander O. Bryner
Chairman
Committee on Rules of Evidence

AOB/bjs
Encls.

cc: Chief Justice Boochever
Arthur H. Snowden, II

Committee Members:
Walter L. Carpeneti
Patrick Gullufsen
Judge William H. Sanders
Judge Victor D. Carlson
Judge James R. Blair
Richard L. Nadson
Richard Gantz

MEMORANDUM TO PROFESSOR STEVEN SALTZBURG

REGARDING: REVISED PRELIMINARY COMMITTEE REDRAFT OF PROPOSED ALASKA RULES OF EVIDENCE

Rule 106. Request for Addition to Commentary: The committee would request Professor Saltzburg to draft additions to the commentary on Rule 106, as revised, explicitely stating that the trial court has broad discretion in formulating specific mechanisms for deletion of privileged or irrelevant information; also that material deemed by the court to be privileged or irrelevant and, therefore, not subject to disclosure under this Rule, should be preserved under seal by the trial court for the purpose of appeal.

Rule 107. Additional Commentary: The committee's deletion of originally proposed Rule 107 reflects the view that, while judicial comment on the weight or effect of evidence should not, per se, be encourage, the Court, throughout a trial and, specifically, in the course of giving instructions such as those pertaining to credibility of accomplices and the weight to be given to out of court admissions by the accused in a criminal matter, is in effect commenting on the weight of evidence. Since comment by the judge has not constituted a problem in the past and proposed Rule 106 appeared potentially problematical, no specific rule precluding comment was deemed necessary.

Article II. Explanation and Request for Revision of Commentary: Article II has been redrafted in it's entirety. Much of the redraft was simply stylistic in nature, but substantial portions were revised to conform the Rule with

committee's impressions concerning the reality of judicial notice in the state of Alaska. Very few libraries in the state of Alaska contain current copies of statutes in effect in all states and territories of the United States. Similarly, very few libraries have full sets of regional reporters. There are numerous widespread areas of the state in which superior and district courts may regularly be holding sessions where lack of adequate research facilities constitutes a real problem. The committee's view was that the essential difference between mandatory judicial notice without request and mandatory or optional judicial notice upon request of a party was simply that, in the latter circumstances, the requesting party would be under an obligation to assure that correct information concerning the present state of the law or fact sought to be noted was made available to the court.

Due to lack of adequate research facilities in numerous relatively remote locations, it was deemed preferable to place the burden of providing adequate information upon which to base judicial notice on the requesting party, who would usually be in a position to anticipate the need for a request well in advance of trial, with sufficient time to obtain the requisite information. The extensive revision of Article II will require appropriate corresponding revision of the commentary pertaining to this Article.

Rule 203(a). Question and Request for Consideration of Possible Revision: The committee would like Professor Saltzburg to consider the possibility of adding additional language to the section permitting mandatory instructions to the jury with

respect to incontrovertible matters such as jurisdiction and venue. While it is no doubt true that the court cannot direct the jury in a criminal case to find as true noticed facts which are of an important or disputable nature, members of the committee felt that as to minor or incontrovertible issues, the court might properly instruct the jury in a binding fashion to accept as true a fact judicially noted.

Rule 203(a). Request for Addition to Commentary. The committee would like the commentary to this section to provide specifically that the meaning of the word "tenor" as used in the section is synonymous with the word "substance." Although "substance" was deemed a clearer word by the committee, "tenor" was retained to maintain continuity with the Federal Rules.

Rule 303. Request for Additional Commentary: The commentary to Rule 303, as revised by the committee, should indicate that the committee reinstated in full the language of the United States Supreme Court Rule from which the original Alaska proposal was drafted. Reinstatement of the U.S. Supreme Court Rule was decided on due to the advantage of the commentary on that rule provided in the form of the Advisory Committee's note contained in the Appendix to the Federal Rules of Evidence. See, e.g., Federal Rules of Evidence Annotated by the Federal Judicial Center, at 230-33 (Mathew Bender 1975). The committee was of the opinion that the Advisory Committee's note would be of substantial benefit in clarifying the intent and practical application of Rule 303.

Rule 303(a). Request for Additional Commentary: The committee would like to have additional commentary similar to

the language of the Advisory Committee's note to the United States Supreme Court Rule to the effect that Rule 303(a) does not apply to the presumption of innocence in a criminal case. Additionally, the commentary should make explicit that, in order to meet the presumption, the accused need not actually offer affirmative of evidence if evidence brought out on cross-examination or on direct examination in the course of the prosecution's case in chief is in itself sufficient.

Rule 404(a)(2)(ii). Request for Additional Commentary: Commentary should be added specifically stating that a hearing in camera should normally be on record with the right to cross-examination, the extent remaining in the court's discretion. The court additionally would have discretion to keep the record of proceedings in camera sealed pending appellate review in the event that it rules inadmissible the character evidence in question.

Rule 405(b). Request for Additional Commentary: The committee felt that it would be helpful to have specific examples given of the types of charges or cases in which character is an essential element of the charge or defense for the purpose of applying Rule 405(b).

Rule 410. Request for Additional Commentary. The committee's amendment of subsection (b)(1) of Rule 410 should be specifically dealt with in the commentary. The commentary should reflect that the committee's amendment of subsection (b)(1) was adopted to obviate the possibility of use of the word "impeachment", as it appeared in the original proposal, being misconstrued as limiting the use of prior inconsistent

statements beyond what is currently permissible under the Alaska Supreme Court's ruling in Beavers v. State.

Rule 412. Possible Redraft of Commentary: In light of the fact that the committee forwarded the original draft of Rule 412, along with one specific alternative, both without recommendation subject to the committee's statements appended as a footnote to Rule 412, the commentary applying to Rule 412 may have to be redrafted in accordance with the final version of the Rule adopted by the Alaska Supreme Court. It should be noted that the original proposal constitutes a narrowing of the current provisions of Criminal Rule 26(g) in that it would preclude a third party from having standing to assert violations of 5th Amendments rights vicariously. Although vicarious assertion of 5th Amendments rights is generally not permitted in other jurisdictions (see Dimmick v. State), the history of adoption of Criminal Rule 26 makes it clear that that Rule was specifically adopted to confer standing to assert 5th Amendment rights vicariously. See State v. Sears (1976). In the event that the Alaska Supreme Court should adopt Rule 412 as originally proposed, the commentary should explicitely reflect the change with respect to the issue of standing. The commentary in its present form is silent on the issue.

Rule 501. Request for Additional Commentary: The committee would like the commentary to Rule 501 to indicate specifically that, with the exception of the additional words "organization, or entity", the Rule is identical to former United States Supreme Court Rule 501.

commentary does not deal with this omission, and it is not clear whether the omission is inadvertent, stylistic, or substantive. It is generally the committee's view that in instances where a proposed Alaska Rule follows a Federal or United States Supreme Court Rule verbatim with the exception of several words, to avoid possible confusion and misinterpretation, the reason for the difference ought to be clarified in the commentary, even if the change is simply one of style.

Rule 503(d)(1). Additional Commentary: The committee's addition of the words "were used" in subsection 503(d)(1) was intended to cover instances where information given by an attorney--though initially given in the course of consultation for legitimate purpose--is subsequently used by the client to commit a crime.

Rule 504(b). Question: The committee did not understand exactly why this subsection adopted the language of the United States Supreme Court Rule verbatim except in changing the word "or" or "and" in the phrase "and persons who are participating. . . ." Use of the disjunctive "or" seems preferable. Can this be clarified?

Rule 504(c). Question: Although the committee was somewhat reluctant to change the proposed draft without more information, members of the committee were concerned as to whether there is any good reason to allow survival of privileges such as the attorney-client or physician-patient privilege after the death of the client/patient. If there is no good justification for survival of the privilege, then should it not terminate upon death of the client or patient?

Rule 504(d)(1). Question: Why isn't the language of the United States Supreme Court Rule 504(d)(3), with the addition of the word "physical", sufficient here? As is, the grammatical structure of Rule 504(d)(1) appears to be rather awkward and difficult to understand.

Rule 504(d)(4). Request for Revision of Commentary: It was the sense of the committee that the language of the commentary to the effect that "control over disclosure placed largely in the hands of a person in whom the patient has already manifested confidence" is largely unfounded in reality. Almost invariably, physicians or psychiatrists testify in involuntary commitment proceedings by court appointment, and, from the inception, there is little or no real physician-patient relationship in existence. The committee feels that this fact should be stated as the actual basis for the exception to the privilege, rather than the commentary as it now stands.

Rule 505. Request for Revision of Commentary: The privilege provided for in Rule 505 has been substantially amended by the committee, and spousal immunity has been deleted. The commentary should be revised accordingly. Additionally, the committee would like to include specific commentary with respect to some of the revised provisions. As to Rule 505(b)(4)(C), the commentary should specify that the exception contained in the subparagraph is not intended to be restricted solely to the natural or adoptive child of the spouse. With respect to Rule 505(b)(10), the committee thought that clarification as to the scope of the exception

created should be provided in the commentary by a specific statement that a communication between spouses is not confidential if it is made in the context of an agency relationship between the spouses, or in the context of any primarily business and non-marital relationship in which the marital relationship between the spouses is merely incidental to the business or non-marital communication. With respect to Rule 505(d) the committee would like to add to the commentary that a communication is not confidential if the context indicates that it either is not intended to be kept secret by the spouse making the communication or is not made by the communicating spouse as a result of the marital relationship. In general, the committee would appreciate comment on its revised form of Rule 505.

Request for Commentary Pertaining to Omission of United States Supreme Court Rule 509: The "secrets of state" privilege encompassed by former United States Supreme Court Rule 509 is properly omitted from the Alaska Rules of Evidence in the judgment of the committee; however, the committee thinks that commentary with reference to omission of the provision should make it clear that the omission does not justify the conclusion that all "state secrets" ought to be unprivileged; the only inference to be drawn from the omission is that, to the extent that any "state secrets" should be privileged, the problem of privilege should be left for resolution by legislation or regulation.

Rule 509. The committee would like to have Professor Saltzburg's view with respect to Rule 509 as to whether

political subdivisions ought to have a right to withhold the name of an informant.

Rule 509(c)(3). Question: The committee thinks that the language of this subsection needs substantial clarification. It was simply difficult for the committee to understand the subsection and how it is to be implemented. In this regard, the committee's own sentiments were joined by the comments of the Juneau Bar Association submitted to the committee with respect to Rule 509 generally.

Privileges Generally; Question: The committee voted to submit to Professor Saltzburg the question of whether consideration should be given to creation of a parent/child privilege, with further consideration to the alternative of allowing the party called as a witness to be holder of the privilege.

Rule 612. Request for Additional Commentary: By an odd twist of draftsmanship, the present version of Alaska Civil Rule 43 appears to treat the necessary foundation for refreshing memory and admitting evidence under the past recollection recorded doctrine by the same criteria. This unfortunate confusion has been perpetuated in a specific decision of the Alaska Supreme Court, Gilbert v. Zamarello. The committee would like to have the commentary with respect to Rule 612 make it clear that documents or materials used for the purpose of refreshing memory need not meet the foundational requirements for admission of evidence under the past recollection recorded doctrine. Additionally, with respect to subsection 612(d), the committee believes that it would be

appropriate to add to the commentary a statement that actual dismissal should be regarded as a last resort available to the court, and not regularly used.

Rule 613(b)(2). Request: The committee would appreciate consideration and comment on the views stated with respect to Rule 613(b)(2) by the Tanana Valley Bar Association and by Mr. Murphy. As noted in a footnote to the committee revision, the statements of the Tanana Valley Bar Association and of Mr. Murphy echo the sentiments of a minority of the committee.

Rule 615. Request for Additional Commentary: Although the strict language of the rule applies only to presence in court of non-testifying witnesses--i.e., the opportunity to hear the testimony of other witnesses--the committee believes that the commentary ought to make it clear that the intent of the rule is not only to prevent non-testifying witnesses from actually hearing the testimony of other witnesses, but generally to prevent non-testifying witnesses from obtaining the opportunity to conform their testimony to the prior testimony of others. For this reason, the commentary should reflect that under normal circumstances, when the exclusionary rule is invoked, the court should instruct all witnesses to refrain from discussing their testimony with other witnesses outside the courtroom.

Rule 703. Question with Respect to Commentary: The committee has doubts as to whether the commentary pertaining to Rule 703, at pages 3 and 4, relating to categories of "unreliable evidence", items number 1 and 2, are actually valid or accurate. Clarification would be appreciated

Rule 704. Additional Commentary: The committee would like the commentary to this Rule specifically to reflect that, in permitting an opinion to be voiced as to ultimate questions, the Rule does not contemplate admissibility of opinions as to the guilt or innocence of the accused in a criminal matter.

Rule 705(b). The committee amendment of Rule 705(b) reflects the belief that use of the term "in camera", as opposed to "out of the presence of the jury", may be misleading, and, in any event, inordinately restrictive. The committee thinks that the commentary should reflect that the precise mechanism for determination of whether the requirements of Rule 705 are satisfied should be left to the sound discretion of the court, and tht these mechanisms may include side bar proceedings as well as proceedings out of the presence of jury or in camera. Perhaps the confusion arises due to differences in practice in various jurisdictions. In the state of Alaska, when hearing out of the presence of jury is required, common procedure is to send the jury out of the courtroom; in other jurisdiction, common procedure may be for the jury to remain seated while the judge discusses issues with counsel in the judge's chambers. Substantive proceedings conducted "in camera"--i.e., actually in the judge's chambers--are unusual in the state of Alaska.

Rule 706. Additional Commentary: The committee revision omits subsection (b) of the original proposed rules, covering the topic of compensation of experts. The omission is due to the fact that compensation of experts is already covered by Administrative Rule 9(c), and the subject of compensation was

not deemed an appropriate concern for the Rules of Evidence. The committee does suggest, however, that the commentary to Rule 706, in noting the omission of the originally proposed subsection (b), suggest to the Alaska Supreme Court that Administrative Rule 9 be revised to provide for more realistic compensation of expert witnesses, and to include specific provision for payment of experts by the court when, in the exercise of its discretion, the court elects to appoint experts; there should also be provision for a specific mechanism for advance payment of such witnesses.

Rule 803. Additional Commentary: The commentary should reflect that the committee voted to number, rather than to letter the subsections of Rule 803 in order to conform the subsections to the counterpart federal rule and to facilitate comparison and cross-referencing between the state and federal provisions.

Rule 804(a)(5). Question: The committee voted to submit to Professor Saltzburg the question whether Rule 804(a)(5) is repetitive and unnecessary in light of the provisions of Rule 803(w) [803 (23) as renumbered]. 804(a)(5) and 803(w) provide an identical exception; since 803(w) makes its exception applicable to all situations regardless of the availability of the witness, it appears adequately to cover those cases encompassed by Rule 804(a)(5), where the witness is unavailable. This may, in fact be, be the reason why there is no parallel provision in the corresponding Federal Rule.

Rule 901. Additional Commentary, Revision to Commentary and Question: The committee was of the view that the

provisions of originally proposed Rule 901(b), since they constituted mere examples, should more appropriately appear in the commentary rather than in the text. These examples should be joined in with existing commentary in an appropriate fashion. Specifically with reference to example 5, the committee voted to have the example rewritten as follows:

> 5. Since all voice identification is not a subject of expert testimony an opinion may be stated regardless of whether the requisite familiarity was acquired solely for the purpose of litigation, in this respect resembling visual identification of a person rather than identification of hand-writing.

The committee also wanted to refer to Professor Saltzburg the question whether specific reference to administrative regulations as well as statutes and rules might be desirable in example 10.

Rule 1004. Additional Commentary: The committee thought that the commentary should make it clear that this section applies to situations in which neither the original nor a duplicate, as defined by the rules, is available.

Rule 1005. Additional Commentary: The committee was of the view that additional language clarifying this provision should be included. As is, considerable effort is required to understand exactly how Rule 1005 relates to Rules 1002, 1003, 1004. A more specific explanation in the commentary of the relationships of these rules to each other would assist in better understanding and more accurate interpretation of these rules.

Rule 1101. Additional Commentary: The committee thinks that additional commentary should be added specifying that the

revisions made by the committee to the originally proposed draft are the result of the committee's view that inapplicability of the Rules of Evidence to various types of proceedings should be specifically provided for in the statutes or rules governing the excluded proceedings. To a large measure, this situation already exists in Alaska law. Specifically with reference to subsection (b), the committee wanted the commentary to reflect that the subsection and the Alaska Rules of Evidence do not apply to extradiction proceedings, but do apply to habeas corpus proceedings.

General Request: The committee voted to request Professor Saltzburg to consider the California Code of Evidence and the benefits and drawbacks of its structure and substance compared to the rules presently under consideration. Specifically, the committee would like to hear comment on the feasibility and desirability of a general definitions section such as that contained in the California Code of Evidence.

Memorandum to the Committee

I have tried to carefully review all of the changes, questions and suggestions made by the Committee. What I have done in light of your comments and actions is to supply you with a draft accompanied by an appropriate Reporter's Comment for every Rule that you have indicated that you propose to adopt. At times I have vigorously disagreed with the approach that you have chosen. In such cases I have supplied an alternative rule. It is my hope that you might consider the alternative that I have put forth and perhaps adopt it. But, assuming that you stay with your original preference, I hope that you will be willing to send my alternative rules along with yours to the Supreme Court. I have tried to confine myself to disagreeing only in the very few places where I think that the disagreement is fundamental and where I think that the Supreme Court ought to consider the competing drafts.

As I have gone through the material that you sent and commented upon it, I have pulled no punches. If I disagreed, I said so.

It seems to me unnecessary that I travel to Alaska to meet with the Committee. I don't think that I can add anything to what I have put in writing, and I have a pretty good idea from your comments as to what was on your minds. By providing you with alternative drafts, the drafting is over for all practical purposes. I would think that you could get something to the Supreme Court very quickly.

Of course, as I indicated in my letter to Mr. Bryner, he can call me at any time if he has questions.

If I thought that I could do any good by coming there, I would not hesitate to do so. But I really think that I would slow down the work. When you see what I have provided, I think that you will agree

with me that it is complete and that you will have no additional need for my services.

I would like to think that with this final submission I have given you the very best in service in terms of drafting a Code of Evidence for the State of Alaska. I received the material from Mr. Bryner on March 11, a Saturday. I spent 15-hour days doing nothing but going over the material doing what was to have been my spring vacation here. At the end of seven or eight days, I think I have a final product that you will like.

I am sending a copy of the comments that I have made and the alternative drafts of the Rules to Gerry Dubie at the Alaska Court System. I thought that he should have it for his records.

There was some confusion as to the way in which the Committee was going to respond to the material that I submitted to the Supreme Court. But I think that this confusion arose out of a transition between a Committee that once headed by Justice Erwin and the current Committee. In any event, I doubt that it was your fault, and I will note the confusion for the Supreme Court's administrative staff.

In choosing to be blunt in my comments, I intended to be helpful, not impolite. It struck me that I would be doing noone a service by being less than candid at this distance.

Please do not hesitate to call me if you have any questions. I respect the job that the Committee did in going over the draft, and I hope that the Committee understands why I have been concerned with certain changes.

One of the things that I have tried to do is to add in all the recent cases that have come down since I first drafted these Rules. Sometimes this required handwritten additions. But it really makes

the set a complete version of what has happened in Alaska Evidence since Alaska became a state.

My hope now is that you will keep the Rules and the comments together. I also hope that they will go to the Supreme Court relatively soon and that the Supreme Court will consider the Rules and comments together. If you think that a comment needs changes or additions, there is no reason you cannot make additions or changes. You can either change the comment directly, or indicate that the Committee has a note it is adding. However you want to do this would be fine with me. You might even consider taking the Reporter's Comments and adopting them as Committee's Comments. But there is no single right way to do this. Whatever you do will be fine with me.

Supreme Court

State of Alaska

ROBERT D. BACON
CLERK OF COURT

POUCH U
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June 5, 1979

TO: Alaska Attorneys and Judges

FROM: Robert D. Bacon
Clerk of the Supreme Court

Enclosed you will find a complete copy of the new Alaska Rules of Evidence, which will take effect on August 1, 1979.

Many of you have the blue paperbound copies of the rules issued by the Alaska Bar Association in May in conjunction with the continuing legal education program on the new rules. You will want to note that the Supreme Court has modified Rule 412 since that time, and the final, revised version appears in the enclosed set. In addition, non-substantive editorial corrections have been made in about half a dozen rules under the supervision of the Alaska Supreme Court. In case of discrepancies, the enclosed text is official and is the one which will be applied by the courts.

Book Publishing Company, official publishers of the Alaska Rules of Court, will publish the Rules of Evidence, together with the complete text of the commentary by Prof. Stephen A. Saltzburg of the University of Virginia, as a new Volume I-A of the Alaska Rules of Court. Subscribers should receive that volume late this summer or early this fall. The commentary has been modified since the Bar Association institutes in May to reflect the final changes in the text of the rules.

Users with suggestions for improvements in the form or substance of these or other Alaska court rules are urged to send them to this office. All suggestions are given careful consideration by the Alaska Supreme Court.

Robert D. Bacon