

Excerpts of Court Rules and Cases

Child Psychotherapist Privilege

December 16, 2022

Court Rule Excerpts

Evidence 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.

[**Note:** “For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence.” – Wigmore on Evidence]

Evidence Rule 510. Waiver of Privilege by Voluntary Disclosure

A person upon who 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.

Evidence Rule 504 (attached)

CINA Rule 9 (attached)

West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Evidence
Article V. Privileges

Alaska Rules of Evidence, Rule 504

Rule 504. Physician and Psychotherapist-Patient Privilege

Currentness

(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.

Credits

[Amended effective January 15, 1988; January 15, 1993; July 15, 1994; March 1, 1999; October 15, 2003.]

Table of Rules

Editors' Notes

NOTE

SCO [Supreme Court Order] 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.

Rules of Evid., Rule 504, AK R REV Rule 504
Currency with amendments received through October 15, 2022.

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West's Alaska Statutes Annotated
Alaska Court Rules
Child in Need of Aid Rules
Part IV. Discovery, Evidence, Proof

Child in Need of Aid Rules, Rule 9

Rule 9. Evidence

Effective: July 1, 2022

Currentness

(a) Applicability of Evidence Rules. The Alaska Rules of Evidence apply to child in need of aid proceedings to the same extent as they govern civil proceedings, except as otherwise provided by these rules.

(b) Privileges Inapplicable.

(1) *Husband-Wife Privilege.* The husband-wife privilege, [Evidence Rule 505](#), does not apply to the parent, child or custodian in Child in Need of Aid proceedings.

(2) *Physician-Patient Privilege.* The physician-patient privilege, [Evidence Rule 504](#), does not apply to the parent, child or custodian in Child in Need of Aid proceedings.

(3) *Psychotherapist-Patient Privilege.*

(A) The psychotherapist-patient privilege, [Evidence Rule 504](#), applies to the parent, child or custodian in Child in Need of Aid proceedings only to the extent described in this rule.

(B) The privilege applies to the child unless the child or the child's guardian ad litem waives the privilege, or the party seeking disclosure shows that the need for the requested disclosure outweighs the child's interest in confidentiality.

(C) The privilege does not apply to the parent unless the parent shows that the parent's interest in confidentiality outweighs the need for the requested disclosure. No disclosure may be made until the parent has an opportunity to make this showing.

(D) When considering a request to disclose or protect a communication, the court shall consider the following:

(i) the content and nature of the communication;

(ii) the purposes of AS 47.10, as expressed by [AS 47.06.020](#), and of [Evidence Rule 504](#);

(iii) whether there is any other effective way to obtain the information; and

(iv) whether the public interest and need for disclosure outweighs the potential injury to the patient and the patient's psychotherapist relationship.

Before ruling on such a request, the court may inspect records in camera. The court may allow, limit, or prohibit disclosure and use of the communication.

(E) If the court grants the request for disclosure of the child's privileged information, the court order must:

(i) limit disclosure to those parts of the child's records which are essential to fulfill the purpose of the disclosure;

(ii) limit disclosure to those persons whose need for the information is the basis for the order; and

(iii) include such other measures as are necessary to limit disclosure for the protection of the child and the psychotherapist-patient relationship.

(F) Evidence Rule 504(c) does not apply in child in need of aid proceedings. Unless otherwise ordered, the child's psychotherapist-patient privilege may only be claimed or waived as follows:

(i) If the child is twelve or older, the privilege may be claimed or waived by the child after consulting with an attorney, if an attorney has been appointed, or with the guardian ad litem.

(ii) If the child is younger than twelve, the privilege may be claimed or waived by the guardian ad litem.

(iii) The person who was the psychotherapist at the time of the communication is presumed to have authority to claim the privilege on behalf of the child.

Credits

[Amended effective July 15, 1999; October 15, 2001. Amended July 14, 2022, retroactively effective July 1, 2022.]

Child in Need of Aid Rule 9, AK R CINA Rule 9

Currency with amendments received through October 15, 2022.

Case Excerpts – Purpose of Psych-Patient Privilege

“Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of a confidential relationship necessary for successful treatment.”

Jaffee v. Redmond, 518 U.S. 1, 10 (1996)

“[C]ommunications to a psychotherapist in the course of therapy are inherently confidential. Patients often make statements in psychotherapy which they would not make to even the closest members of their families. Psychotherapy tends to explore the innermost recesses of the personality, the very portions of the self which the individual seeks to keep secret from the world at large. Revelation of such matters could have an irrevocably harmful effect upon the reputation and well being of the patient. . . .

[In addition], inviolability of the confidence is essential to achievement of the psychotherapeutic goal. Without foreknowledge that confidentiality will attach, the patient will be extremely reluctant to reveal to his therapist the details of his past life and his introspective thoughts and feelings. Without the patient’s confidence a psychiatrist’s efforts are useless.

...

[T]he scales weigh heavily in favor of confidentiality. We believe that the goals of therapy may be frustrated in the privilege does not attach. Reasons indicates that the absence of a privilege would make it doubtful whether either psychotherapists or their patients could communicate effectively if it were thought that what they said could be disclosed compulsorily in a court of law.”

Allred v. State, 554 P.2d 411, 417-18 (Alaska 1976)

Scope of Psychotherapist-Patient Privilege

“[T]he psychotherapist-patient privilege protects more than the statements that a patient makes to their psychotherapist. Evidence Rule 504(b) declares that the privilege applies to *all* confidential communications made for the purpose of diagnosis or treatment – regardless or whether those communications take place directly between the patient and the psychotherapist, or between the patient and other persons who are participating in the diagnosis or treatment under the direction of the psychotherapist (including members of the patient’s family), or solely among the people participating in the diagnosis or treatment (*i.e.*, even when the patient is not a participant in the conversation).”

...

“[E]ven though Evidence Rule 504(b) ostensibly protects only ‘confidential communications’, we interpret this phrase to include other information generated during the professional relationship (*e.g.*, test results), as well as the psychotherapist’s perceptions, theories, and conclusions pertaining to diagnosis and treatment when these perceptions, theories, and conclusions are based on information imparted to the psychotherapist through confidential communications.”

N.G. v. Superior Court, 291 P.3d 328, 332 (Alaska App. 2012)

“The privilege would essentially be gutted if a psychotherapist could be ordered to testify about a person’s diagnosis or treatment, over the person’s objection, so long as the psychotherapist refrained from expressly describing or referring to the content of any confidential communications.”

N.G. v. Superior Court, 291 P.3d 328, 334 (Alaska App. 2012)

“[T]he close nexus between the psychotherapist[-]patient privilege and the state constitutional right to privacy requires us to apply the privilege literally and strictly construe any limitation on the privilege.”

State v. R.H., 683 P.2d 269, 280 n. 12 (Alaska App. 1984) (citing Alaska Constitution Art. I, § 22) (*see also* discussion of crime victim’s right to privacy, Art. I § 24, in *N.G.* concurrence by Justice Bolger, *N.G.*, 291 P.3d at 340)