

Alabama Rules of Evidence

Article IV. Relevancy and Its Limits

Rule 402.

Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Advisory Committee's Notes

Except as modified for state practice, Rule 402 is the same as the corresponding federal rule. Additionally, it follows the pattern adopted by most states. See, e.g., Colo.R.Evid. 402; Iowa R.Evid. 402 (1983); Mich.R.Evid. 402 (1978); N.C.R.Evid. 402 (1984). But see Fla.Stat.Ann.Evid.Code § 90.402 (West.Supp.1976) (omitting last sentence under the belief that it is to be implied that irrelevant evidence is to be excluded).

This rule recognizes two primary concepts. The first is that relevant evidence is admissible while irrelevant evidence is not. This concept traditionally has been acknowledged as the foundation stone upon which any rational system of evidentiary admission and exclusion is based. J. Thayer, *Preliminary Treatise on Evidence* 264 (1898). The admission of relevant evidence, as well as the corresponding exclusion of irrelevant evidence, is a presupposition of present Alabama evidence law. See C. Gamble, *McElroy's Alabama Evidence* § 21.01(1) (4th ed. 1991).

The second concept recognized in Rule 402 is that not all relevant evidence is admissible. The exclusion of even relevant evidence may be required by constitutional provisions, statutes, other provisions of these Alabama Rules of Evidence, and other rules promulgated by the Alabama Supreme Court. This principle is in accord with existing Alabama law and practice.

Constitutions. This rule leaves unaffected the developing case law under which certain evidence is declared inadmissible based upon constitutional considerations. Despite its relevancy, for example, evidence may be excluded if it was obtained by an unlawful search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914). Incriminating statements of an accused are excluded when secured in violation of the constitutional right to counsel. *Massiah v. United States*, 377 U.S. 201 (1964). The privilege against self-incrimination is another constitutional consideration that has rendered relevant evidence inadmissible. See *Ex parte Marek*, 556 So.2d 375 (Ala.1989); C. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional -- A Doctrine Ripe for Abandonment*, 14 Ga.L.Rev. 27 (1979); *Jenkins v. Anderson*, 447 U.S. 231, 249 n.2 (1980) (Marshall, J., dissenting) (citing the foregoing article).

Statutes. Relevant evidence may be excluded under an exclusionary rule found in a state or federal statute. While statutes generally expand admissibility, there are those that

restrict it. See 18 U.S.C. § 2515 (1988) (making electronically intercepted communications inadmissible in both state and federal courts); *Gelbard v. United States*, 408 U.S. 41 (1972) (interpreting the foregoing wiretap statute as constituting an exclusionary rule of evidence). See also *O'Daniel v. O'Daniel*, 515 So.2d 1248 (Ala.Civ.App.1986), rev'd, 515 So.2d 1250 (Ala.1987) (recorded telephone conversations of defendant spouse, offered in a divorce action, excludable as violating federal wiretapping statute); *Worsham v. Fletcher*, 454 So.2d 946 (Ala.1984) (construing a police accident report statute as constituting only a partial bar to admissibility). See generally C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 Ala.L.Rev. 95, 124 (1988).

Other provisions of these Alabama Rules of Evidence. Rule 402 expressly recognizes that material and relevant evidence may be excluded if its admission would violate some other provision of the Alabama Rules of Evidence. The trial judge may, for example, exclude relevant evidence under Rule 403 upon the ground that the relevancy of the evidence is substantially outweighed by its prejudicial impact. See *United States v. Pirolli*, 673 F.2d 1200 (11th Cir.), cert. denied, 459 U.S. 871 (1982) (recognizing Rule 403 as falling within the "other rules" exception of Rule 402). The Alabama Rules of Evidence contain a host of rules excluding evidence that might be argued to satisfy the test of logical relevancy found in Ala.R.Evid. 401. See, e.g., Ala.R.Evid. 404(a) (excluding character evidence when offered to prove circumstantially how one acted on the occasion in question); Ala.R.Evid. 407 (excluding evidence of subsequent remedial measures when offered to prove negligence or culpable conduct); Ala.R.Evid. 801 (excluding hearsay evidence that might otherwise be quite relevant); Ala.R.Evid. 501 (recognizing that privileges may be grounds upon which to exclude relevant evidence).

Other rules applicable in the courts of this state. The purpose of this phrase is to prevent any conflict between the Alabama Rules of Evidence and other rules promulgated by the Alabama Supreme Court. The Rules of Civil Procedure and the Rules of Criminal Procedure, for example, require the exclusion of relevant evidence in some instances. See, e.g., Ala.R.Civ.P. 30(b) and 32(a)(3) (both establishing requirements that may work to limit the admissibility of depositions).

Case law rules of exclusion for irrelevancy. Rule 402 does not mention excluding relevant evidence on the basis that to admit it would violate exclusionary principles established in case law. Some academic writers, as well as some courts, have interpreted the corresponding Fed.R.Evid. 402 as abrogating all preexisting case law rules of exclusion not restated in the adopted rules themselves. C. Wright & M. Graham, *Federal Practice and Procedure: Evidence* § 5199, at 222 (1978) (reviewing the legislative history of Rule 402, it is observed that "the record rather strongly suggests that Congress assumed that, except where the Evidence Rules otherwise provide, there would be no decisional law of evidence"); *Jones v. Pak-Mor Mfg. Co.*, 700 P.2d 819 (Ariz.), cert. denied, 474 U.S. 948 (1985); *State v. Williams*, 388 A.2d 500, 503 (Me.1978) (holding that the general acceptance requirement of the Frey test governing the admissibility of new scientific processes is inconsistent with Rule 402). Stated differently: "Rule 402 was intended to preclude the exclusion, on common law grounds, of relevant evidence." E. Imwinkelreid, *Federal Rule of Evidence 402: The Second Revolution*, 6 Rev. Litig. 129, 134 (1987). Other writers, however, have concluded that such a body of case law principles exists parallel to the adopted rules of evidence. See, e.g., D. Langum, *The Hidden Rules of Evidence: Michigan's Uncodified Evidence Law*, 61 Mich. B.J. 320 (1982); J. Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules*, 38 Baylor L.

Rev. 331 (1986). Yet others advocate that the courts may continue to apply exclusionary case law concepts by incorporating them as necessary parts of relevancy under Rule 401 or exclusion for prejudice under Rule 403. See D. Langum, *Uncodified Federal Evidence Rules Applicable to Civil Trials*, 19 Willamette L. Rev. 513, 516 (1983).

The Alabama Supreme Court is free, of course, to reexamine the wisdom of exclusionary case law lying outside the Alabama Rules of Evidence themselves. Nothing in Rule 402 is intended to restrict this freedom.