

## RECOMMENDED AMENDMENTS

### Ala. R. Evid. 404(a):

Three amendments to Rule 404(a) are recommended:

1. **Rule 404(a)(1):** Subsection (a)(1) should be amended by adding the phrase “in a criminal case.” The amendment clarifies that the exception set forth in Ala. R. Evid. 404(a)(1) that allows an accused in a criminal case to offer evidence of his or her character to show propensity (the so-called “mercy rule”), applies only in criminal cases, and does not apply to a party in a civil case. The amendment clarifies, but does not supersede, established Alabama law. The amendment is based on a 2006 amendment to Federal Rule 404(a)(1) which resolved a dispute that had developed in the federal courts over whether the exception permitted the circumstantial use of character evidence in civil cases.

2. **Rule 404(a)(1):** Subsection (a)(1) should also be amended to provide that when the accused in a criminal case offers evidence of an alleged victim's character for a pertinent trait pursuant to Ala. R. Evid. 404(a)(2)(A)(i), the door is opened for the prosecution to offer evidence of the accused's character for the same trait. This amendment is based on a 2000 amendment to Federal Rule 404(a)(1), and, if adopted, would change existing Alabama law. Presently, Alabama law permits the accused to offer evidence of an alleged victim's character without opening the door for the prosecution to offer evidence of the accused's character.

3. **Rule 404(a)(2)(B):** Subsection (a)(2)(B) should be amended to provide that, *in civil cases*, when the party accused of assaultive conduct asserts self-defense and offers evidence of the victim's bad character as permitted in Alabama pursuant to Rule 404(a)(2)(B), the door is opened for the opposing party to prove the opponent's bad character for the same trait. This amendment represents a change in existing Alabama practice. There is no corresponding Federal Rule that permits the admission of character evidence *in civil cases*.

### Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence In a criminal case, evidence of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2)(A)(i), evidence of the same trait of character of the accused offered by the prosecution;

(2) *Character of victim.*

(A) In criminal cases. (i) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or (ii) evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(B) In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of assaultive conduct, or evidence of character for peacefulness to rebut the same; Whenever evidence of character for violence of the victim of assaultive conduct, offered by a party accused of such

assaultive conduct, is admitted on the issue of self-defense then evidence of character for violence of the party accused may be offered on the issue of self-defense by the victim and evidence of the party's character for peacefulness offered to rebut the same.

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**["CLEAN" version of recommended amendment]**

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**(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* In a criminal case, evidence of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2)(A)(i), evidence of the same trait of character of the accused offered by the prosecution;

(2) *Character of victim.*

(A) In criminal cases. (i) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or (ii) evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(B) In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of assaultive conduct, or evidence of character for peacefulness to rebut the same. Whenever evidence of character for violence of the victim of assaultive conduct, offered by a party accused of such assaultive conduct, is admitted on the issue of self-defense then evidence of character for violence of the party accused may be offered on the issue of self-defense by the victim and evidence of the party's character for peacefulness offered to rebut the same.

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**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

**Subsection (a)(1).** Two amendments have been made to subsection (a)(1) of Rule 404. First, the Rule has been amended to clarify that the "mercy rule," as set forth in subdivision 404(a)(1), does not apply in civil cases. The amendment resolves any dispute that has or may arise in the case law over whether the exception in Rule 404(a)(1) permits the circumstantial use of character evidence in civil cases. The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. *See C. Gamble, Gamble's Alabama Rules of Evidence* § 404(a)(1)(A) (2d ed. 2002); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 27.01 (6th ed. 2009). But that is because the accused, whose liberty is at stake, may need "some counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, §

4.12, p. 186 (3d ed. 2009). *See also* Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution" and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

The second amendment to Rule 404(a)(1) provides that when the accused attacks the character of an alleged victim under Rule 404(a)(2)(A)(i), the door is opened to an attack on the same character trait of the accused. *See* Fed. R. Evid. 404(a)(1) (advisory committee's note). Current law does not allow the prosecution to introduce negative character evidence of the accused unless the defense first introduces evidence of the accused's good character. *See* 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 27.02(1) (6th ed. 2009) ("The prosecution generally may not take the initiative, in its case in chief, to introduce any kind of evidence as to the accused's bad character in order to show conformity with that character on the occasion of the charged crime.").

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the prosecution has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim. *See* Fed. R. Evid. 404(a)(1) (advisory committee's note).

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See Brooks v. State*, 82 So. 2d 553 (Ala. 1953) (victim's reputation admitted as tending to show accused's apprehension of peril); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 63.01 (6th ed. 2009); C. Gamble, *Gamble's Alabama Rules of Evidence* § 404(a)(2)(A) (2d ed. 2002) (practice pointer #6). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

It should be noted that Rule 405(a), which regulates appropriate methods for proving character, has also been amended. Rule 405(a), as amended, adds opinion as an available method for proving the accused's character pursuant to Rule 404(a)(1). *See* Ala. R. Evid. 405(a) advisory committee's notes.

**Subsection (a)(2)(B).** As noted above, Rule 404(a)(1) has been amended to provide that when the accused in a criminal case attacks the character of an alleged victim under Rule 404(a)(2)(A)(i), the door is opened to an attack on the same character trait of the accused. Ala. R. Evid. 404(a)(1); *see*

Fed. R. Evid. 404(a)(1) (advisory committee's note). Without this evidence, as a matter of fairness, it was thought that the jury would possess only part of the information needed for an informed assessment of the probabilities as to who was the initial aggressor. As a similar means of fairness, Rule 404(a)(2)(B) is amended to provide that when a civil party pleading self-defense is permitted to prove the assault victim's bad character for violence, then the door is opened for the opposing counsel to prove the assaulting party's character for violence and for the assaulting party's attorney to rebut with evidence of good character for peacefulness.

**4. Rule 405(a) should be amended to add opinion as a medium of proof available to the accused in criminal cases for proving his or her own character pursuant to Ala. R. Evid. 401(a)(1). The amendment makes Alabama’s Rule 405(a) consistent with Federal Rule 405(a).**

**Rule 405. Methods of Proving Character**

**(a) Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, ~~except under Rule 404(a)(1),~~ proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

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**[“CLEAN” version of recommended amendment]**

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**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Ala. R. Evid. 404(a)(1) provides that the criminal defense may prove the accused’s good character as substantive proof from which to infer that the accused did not commit the crime in question. Additionally, the prosecution may offer evidence of the accused’s bad character in rebuttal. Prior to this amendment, Ala. R. Evid. 405(a) provided that the only medium of proof available to the defense or prosecution to prove such character was general reputation. *Jolly v. State*, 858 So. 2d 305, 312 (Ala. 2002); see C. Gamble, *Gamble’s Alabama Rules of Evidence* § 404(a)(1)(A) (2d ed. 2002); 1 C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence* § 27.01(1) (6th ed. 2009). This is a rejection of Fed. R. Evid. 405(a) under which opinion is allowed as an alternate medium for proving the accused’s character. In fact, precluding a character witness from giving an opinion of the accused’s character is likewise a rejection of the version of Rule 405(a) that was contained in the initially proposed and circulated version of the Alabama Rules of Evidence. See Order of Supreme Court of Alabama, Apr. 27, 1993 Ala. R. Evid. 405(a) (proposed) (found in 615 So. 2d Advance Sheets No. 2 (May 13, 1993)). Therefore, the purpose of the present amendment is to make available to the criminal defense, when exercising the right to prove the accused’s good character under the mercy rule as authorized under Ala. R. Evid. 404(a)(1), the medium of opinion as an alternative to reputation.

This additional medium of opinion, as to the accused’s character, is also usable by the prosecution in rebuttal. See Ala. R. Evid. 404(a)(1). Because the medium of the prosecution’s character proof, authorized under Rule 404(a)(1), is rebuttal of that which was proven during the defense’s case in chief, the advisory committee expects that the scope and nature of the accused’s evidence of good character will continue, as under preexisting case law, to generally form “the parameters of the state’s rebuttal evidence regarding bad character.” C. Gamble, *Gamble’s Alabama Rules of Evidence* § 404(a)(1)(B) (2d ed. 2002). See Ala. R. Evid. 404(a)(1) advisory committee’s notes (“Because the mercy rule is a right of special dispensation afforded the criminal defendant, the defendant is allowed some measure of power to limit the breadth of rebuttal.”).

**5. Rule 407 should be amended to clarify that: (1) Rule 407 only applies to measures taken after an injury or harm occurs, and (2) the rule applies in products liability cases. This amendment clarifies Alabama law consistent with interpretive Alabama case law, and a 1997 amendment to Federal Rule 407.**

**Rule 407. Subsequent Remedial Measures**

When, after an injury or harm allegedly caused by an event, measures are taken ~~that which~~, if taken previously, would have made the injury or harm event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or culpable conduct~~, a defect in a product, a defect in a product's design, or a need for a warning or instruction. ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**["CLEAN" version of recommended amendment]**

**Rule 407. Subsequent Remedial Measures**

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Alabama's Rule 407 has been amended in the same manner and for the same purposes that Federal Rule 407 was amended in 1997. The advisory committee's note accompanying the federal rule's 1997 amendment summarizes two changes made by the amendment as follows:

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp.*, 856 F.2d 17, 21-22 (4th Cir. 1988).

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.

In Alabama, these changes have application primarily in products liability or Alabama Extended Manufacturer's Liability Doctrine (AEMLD) cases. Both changes find support in Alabama case law.

See, e.g., *Phar-Mor, Inc. v. Goff*, 594 So. 2d 1213, 1216 (Ala. 1992) (“The general rule excluding evidence of subsequent remedial measures is that ‘evidence of repairs or alterations made, or precautions taken, by the defendant *after the injury to the plaintiff in an accident* [are] not admissible as tending to show the defendant's antecedent negligence [or culpable conduct].” (quoting C. Gamble, *McElroy's Alabama Evidence* § 189.02(1) (4th ed. 1991)) (emphasis added); *Blythe v. Sears, Roebuck & Co.*, 586 So. 2d 861, 866 (Ala. 1991) (affirming trial court’s exclusion of subsequent remedial measures evidence in case brought under the AEMLD).

The Committee recognized that the overwhelming body of federal case law holds that Federal Rule 407 does not require exclusion of evidence of (1) subsequent remedial measures made by non-parties, nor (2) subsequent remedial measures that were involuntarily undertaken or performed, and that such case law constitutes persuasive authority for the interpretation of Alabama’s Rule 407. See Ala. R. Evid. 102 advisory committee’s notes (“These rules have been modeled . . . after the Federal Rules of Evidence. . . . Cases interpreting the federal rules . . . are persuasive . . . authority before the Alabama courts.”); *Ex parte Lawrence*, 776 So.2d 50, 53 (Ala. 2000) (construing Rule 404(b); “The Advisory Committee Notes to the federal rules are persuasive authority in our interpretation of the Alabama Rules.”); *Snyder v. State*, 893 So.2d 488, 540 n.11 (Ala. Crim. App. 2003) (construing Rule 609(b); “Because Alabama has had little opportunity to address this issue we have looked to the federal courts for guidance.”). However, the Committee decided against incorporating language on these subjects into the text of Rule 407 primarily in order to maintain the Alabama Rule’s uniformity with the Federal Rule. For authority on the first point, see *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1303 (11th Cir. 2007) (“Rule 407 does not apply to a remedial measure that was taken without the voluntary participation of the defendant.”); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 189.02(13) (6th ed. 2009) (“The Rule 407 exclusionary principle applies only to subsequent remedial measures taken by the party to the present litigation. . . . Such third party remedial measures may be excluded but, rather than under Rule 407, such would be for lack of relevancy or because relevancy is substantially outweighed by prejudice.”). On the latter point, see *Herndon v. Seven Bar Flying Service, Inc.* 716 F.2d 1322, 1331 (10th Cir. 1983) (“Where a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tortfeasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case.”) (emphasis in original).

6. **Rule 408 should be amended to make it more readable, and to clarify that: (1) the Rule’s exclusionary principle applies in criminal cases, (2) the Rule prohibits unilateral waiver in favor of the offering party, and (3) that compromise evidence may not be used to impeach by prior inconsistent statement or contradiction. The amendment does not change preexisting Alabama case law, and is similar—but not identical—to a 2006 amendment to Federal Rule 408. Most notably, the Advisory Committee does not recommend adoption of a criminal case exception contained in the amendment to Federal Rule 408 because such an exception is not supported in Alabama case law.**

**Rule 408. Compromise and Offers to Compromise**

**(a) Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) ~~furnishing or offering or promising to furnish; —or (2) accepting or offering or promising to accept; —a valuable consideration in compromising or attempting to compromise a the claim, which was disputed as to either validity or amount; and is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

~~(2) conduct or statements made in compromise negotiations is likewise not admissible regarding the claim.~~

**(b) Permitted uses.** This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; ~~of a witness, negating~~ negating a contention of undue delay, ~~or~~; and proving an effort to obstruct a criminal investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

**[“CLEAN” version of recommended amendment]**

**Rule 408. Compromise and Offers to Compromise**

**(a) Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim.

**(b) Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 408 of the Alabama Rules of evidence was identical to Federal Rule 408 until the federal rule was amended in 2006. Ala. R. Evid. 408 has been amended to incorporate some, but not all, of

the changes made to the federal rule.

First, the text of Rule 408 has been edited and rearranged in the same fashion as the federal rule. These changes were made in an effort to make the rule easier to read and understand, and are not substantive.

Second, two of three changes made to Federal Rule 408 are adopted. Like Federal Rule 408, the amendment provides that compromise evidence “is not admissible on behalf of *any party*.” (emphasis added). Thus, Rule 408 clearly provides that compromise evidence is excluded even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. This language is added to keep Alabama’s rule consistent with the federal rule, but is not intended to effect any change in existing Alabama law. *See, e.g., Northwestern Mut. Life Ins. Co. v. Sheridan*, 630 So. 2d 384, 389 (Ala. 1993) (party could not admit portions of a letter it had sent to opposing party that constituted an offer of compromise); *Glaze v. Glaze*, 477 So. 2d 435, 436 (Ala. Civ. App. 1985) (excluding evidence of defendant’s self-serving offer of settlement); *Kelly v. Brooks*, 25 Ala. 523 (1854) (excluding evidence of plaintiff’s own offer to submit dispute to a panel). In addition, if this language were omitted from Ala. R. Evid. 408 it might lead to unintended confusion as to whether the omission meant that a change in Alabama law was intended.

The amendment also incorporates language from the federal rule prohibiting the use of negotiation conduct or statements when offered “to impeach through a prior inconsistent statement or contradiction.” Although impeachment by prior inconsistent statement or contradiction could technically be considered an “other purpose” for using compromise evidence, it is believed that allowing such broad impeachment would, in effect, swallow the rule and discourage parties from engaging in frank and open discussions.

This amendment does not incorporate all of the changes made to Federal Rule 408. Two differences should be noted. First, Federal Rule 408 allows the admission of settlement conduct or statements in a criminal case in one situation; where, “the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative or enforcement authority.” Fed. R. Evid. 408(a)(2). This criminal case exception for the use of settlement conduct or statements is rejected. Historically, the exclusionary rule embodied in Alabama’s Rule 408 has been applied to exclude compromise evidence in criminal cases. *See Hodges v. State*, 570 So.2d 1252, 1258 (Ala. Crim. App. 1989) (trial court properly excluded testimony regarding attempt by theft victim to work out repayment with accused); *Strickland v. State*, 115 So. 2d 273, 276 (Ala. Ct. App. 1959) (“Evidence of civil settlements adduced by the State is not admissible over objection in criminal trials); 1 C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence*, § 188.04(1) (6th ed. 2009) (“Such settlement negotiations have been excluded whether offered for or against the accused.”). Alabama case law has not recognized a criminal case exception for settlement conduct or statements made in civil cases brought by government agencies, and it is felt that recognizing such an exception is unwarranted because it would discourage settlement discussions in such cases.

A second change made to Federal Rule 408 is rejected. The 2006 amendment to Federal Rule 408 deleted, as superfluous, the following sentence, “This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” This sentence has been retained in Alabama’s Rule 408 as a precaution against frivolous argument.

7. Rule 412 should be amended to make it easier to read and comprehend, and to make it conform to interpretive Alabama case law. The recommended amendment is not intended to make substantive changes in existing Alabama inconsistent with interpretive case law. The amendment follows the familiar format of the Federal Rule 412, but does not incorporate all of the Federal Rule's provisions. Most notably, unlike Federal Rule 412, Alabama's Rule 412 continues to apply only in criminal cases.

[Because revisions are extensive, the use of underlining and mark-throughs to indicate additions and deletions was more confusing than helpful. Accordingly, only a "clean" version of the recommended amendment is set forth below. However, to highlight recommended changes, the current version of Rule 412 is set out alongside the proposed amendment on the last page of this Report (page 43)]

**["CLEAN" version of recommended amendment]**

**Rule 412. Admissibility of Evidence Relating to Complaining Witness in Prosecution for Criminal Sexual Conduct**

**(a) Evidence generally inadmissible.** The following evidence is not admissible in any prosecution for criminal sexual conduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any complaining witness engaged in other sexual behavior.

(2) Evidence offered to prove any complaining witness's sexual predisposition.

**(b) Exceptions.** The following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the complaining witness offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the complaining witness with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

**(c) Procedure to Determine Admissibility.**

(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so a reasonable time before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

(2) **Notice.** Regardless of who brings the motion, the prosecution shall notify the complaining witness of the motion or, when appropriate, the complaining witness's guardian or representative.

(3) **Hearing.** Before admitting evidence under this rule, the court must conduct an *in camera* hearing and give the parties a right to attend and be heard. If at the conclusion of the

hearing the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced and in what manner the evidence may be introduced. All *in camera* proceedings shall be included in their entirety in the transcript and record of the trial and case;

(4) The party may then introduce evidence pursuant to the order of the court.

(d) **Definitions:** As used in this rule, unless the context clearly indicates otherwise, the following words and phrases shall have the following respective meanings:

(1) **Complaining witness.** Any person alleged to be the victim of the crime charged, the prosecution of which is subject to the provisions of this rule.

(2) **Criminal sexual conduct.** Sexual activity, including, but not limited to, rape, sodomy, sexual misconduct, sexual abuse, assault with intent to commit, attempt to commit, solicitation to commit, or conspiracy to commit criminal sexual conduct.

#### **Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Sections (a) and (b) of amended Rule 412 are taken directly from sections (a) and (b) of Federal Rule of Evidence 412 — omitting only language which references the Federal Rule's application in civil cases. Unlike its federal counterpart, Alabama's Rule 412 applies only in criminal prosecutions for crimes involving "sexual conduct," and only affords protection to the "complaining witness." Accordingly, some changes in wording were required to recognize the more limited scope of the Alabama Rule. For example, in Alabama's Rule 412 the phrase "complaining witness" has been substituted for the federal rule's "alleged victim," and the phrase, "prosecution for criminal sexual conduct" has been substituted for the federal rule's "civil or criminal proceeding involving alleged sexual misconduct."

**Section (a).** As amended, Rule 412(a) bars evidence offered to prove the complaining witness engaged in "other sexual behavior" or to prove the complaining witness's "sexual predisposition." These terms are taken verbatim from Federal Rule 412(a)(1) and (2), and include evidence the former Alabama rule defined as "Evidence Relating to Past Sexual Behavior." *See* 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 32.01 (6th ed. 2009) (Rule 412 prohibits evidence of "sexual acts, marital history, mode of dress, general reputation for a pertinent trait and opinion of the victim's character for a pertinent trait."). Like the former rule, amended Rule 412 continues the general exclusion of all such evidence, in whatever form, unless the requirements for a section (b) exception are satisfied. This amendment is not intended to effect a change in the well-developed line of judicial authority admitting evidence that a victim made prior false allegations of sexual misconduct. *See Ex parte Loyd*, 580 So.2d 1374, 1375 (Ala. 1991) (evidence complaining witness made prior false allegations of sexual misconduct, or threatened to make such allegations, falls outside scope of Alabama's rape shield statute).

Under the amended rule, "other sexual behavior" connotes all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., Jackson v. State*, 375 So.2d 1271, 1273 (Ala. Crim. App. 1979) (evidence complaining witness was taking birth control pills at the time of the alleged assault inadmissible); *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright

& K. Graham, Jr., *Federal Practice and Procedure*, § 5384 at p. 548 (1980) (“While there may be some doubt under statutes that require ‘conduct,’ it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.”). The word “other” is used to suggest flexibility in admitting evidence “intrinsic” to the alleged criminal sexual misconduct.

Amended Rule 412 also excludes evidence relating to a complaining witness that is offered to prove a “sexual predisposition.” This is designed to exclude evidence that does not directly refer to sexual activities or thoughts, but that the proponent believes may have a sexual connotation for the factfinder. For example, evidence relating to the complaining witness’s mode of dress, speech, or life-style will not be admissible unless constitutionally required pursuant to subsection (b)(3). The exclusion of evidence of sexual predisposition is not new to Alabama. *Compare* Ala. Code 1975 § 12-21-203(a)(3) (superseded by this rule) (excluding evidence of marital history and mode of dress). *McGilberry v. State*, 516 So.2d 907, 913 (Ala. Crim. App. 1987) (affirming trial court’s exclusion of evidence concerning victim’s “interest in and propensity for seeking affection from older men” under Alabama’s statutory rape shield law).

**Section (b).** Section (b) sets forth three exceptions to the general rule of exclusion. These exceptions are identical to the three exceptions found in subsections (A), (B), and (C) of Federal Rule 412(b)(1). Evidence may be admitted pursuant to one of the three exceptions provided the evidence also satisfies other requirements for admissibility specified in the Alabama Rules of Evidence, including Rule 403. It should be noted that the exceptions contained in subdivisions (b)(1) and (b)(2) require proof to be in the form of specific instances of sexual behavior. This requirement is in recognition of the limited probative value and dubious reliability of evidence of the complaining witness’s reputation or evidence in the form of an opinion.

Under subdivision (b)(1), evidence of specific instances of sexual behavior with persons other than the accused may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. This exception is a codification of the so-called “Scottsboro exception,” and the Alabama Supreme Court’s decision in *Ex parte Dennis*, 730 So.2d 138, 142 (Ala. 1999) (“[T]he ‘Scottsboro exception’ is not only wise, but is constitutionally required in some cases in which the prosecution offers evidence to show that a physical injury or condition of the victim indicates that the defendant committed the rape.”).

Under the exception in subdivision (b)(2), evidence of specific instances of sexual behavior with respect to the accused is admissible if offered to prove consent, or by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. When such evidence is offered by the accused, this exception is consistent with the sole exception contained in the former rule and the Alabama statute the former rule superseded. *See* Ala. Code 1975, § 12-21-203 (superseded by the adoption of Rule 412). However, subdivision (b)(2) also incorporates language from the federal rule which provides that such evidence may also be offered “by the prosecution.” For example, in a prosecution for child sexual abuse, evidence of uncharged sexual activity between the accused and the complaining witness offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. If the prosecution seeks to offer evidence under this exception, it must comply with all procedural requirements set forth in subsection (c). Evidence relating to the complaining witness’s alleged sexual predisposition is not

admissible pursuant to this exception.

The third exception, set out in subsection (b)(3), recognizes that evidence of a complaining witness's other sexual activity or sexual predisposition may not be excluded when such exclusion would be in violation of the accused's constitutional rights. *See Ex parte Dennis*, 730 So.2d 138, 141 (Ala. 1999) (“[W]hen Rule 412 is applied to preclude the admission of particular exculpatory evidence, the constitutionality of its application is to be determined on a case-by-case basis.”); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 32.01 (6th ed. 2009) (“Nothing ... prevents the courts from concluding that the apparent absolutism of the rape shield principle gives way to constitutionally mandated rights.”). The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. *See, e.g., Olden v. Kentucky*, 487 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias). *Cf. Ex parte D.H.L.*, 806 So.2d 1190, 1193-94 (Ala. 2001) (prosecution may open the door to otherwise inadmissible evidence of the complaining witness's sexual activity with others to rebut and impeach testimony to the contrary). Arguably, it is not necessary to include such an exception because Rule 412 is of course subordinate to the Constitution.

**Section (c).** Section (c) sets forth the procedures which must be followed in determining whether evidence may be introduced pursuant to one the section (b) exceptions. Although the procedures track those contained in the previous Alabama Rule some differences should be noted.

First, subsection (c)(1)(A) requires that a motion be filed that “specifically describes the evidence and states the purpose for which it is to be offered.” This language is more specific than the former rule which stated only that the “defense shall notify the court of [its] intent” to introduce evidence under rule.

Second, unlike the former Alabama rule which stated the court could be notified, “[a]t any time before the defense shall seek to introduce evidence,” subsection (c)(1)(B) requires the motion to be “filed a reasonable time before trial,” but permits the motion to be filed later upon a showing of “good cause.” The requirement that the motion be filed pretrial is intended to provide for a more orderly review of the issues presented. Nonetheless, the rule also recognizes that in some instances circumstances justifying an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

Third, subsection (c)(1)(D) requires the prosecution to notify the complaining witness that a motion has been filed. This requirement is new to Alabama law. Although, in a technical sense, the complaining witness would not be considered a party to criminal proceedings, providing such notice represents sound policy in light of the purposes underlying Rule 412. It should be noted that the amended rule, unlike its federal rule counterpart, requires the prosecution — not the defense — to provide notice that a motion has been filed. *Cf. Fed. R. Evid. 412(c)(1)(B)* (providing that the party filing the motion and intending to offer evidence under a Rule 412 exception must notify the alleged victim).

Finally, subsection (c)(2) does not change the former rule's requirement that the court conduct an *in camera* hearing on the motion. This requirement is intended to assure that the privacy of the complaining witness is preserved. It should be noted that the amended rule does not provide that the complaining witness has a right to attend and be heard at the *in camera* admissibility hearing. *Cf. Fed. R. Evid. 412(c)(2)* (affording “victim and parties” a right to attend and be heard).

**Section (d).** The definition for “complaining witness” in subsection (d)(1) is unchanged from the definition in the former rule. The definition for “criminal sexual conduct” in subsection (d)(2) is

lengthier than the definition provided in the former rule, however, there is no difference in substance. The definition for “criminal sexual conduct” in subsection (d)(2) simply updates and combines language set out in two different subsections of the former rule. The former rule’s definition for “evidence relating to past sexual behavior” has been deleted as unnecessary since conduct associated with the phrase “past sexual behavior” is included within the terms “other sexual behavior” and “sexual predisposition” set out in subsections (a)(1) and (a)(2) of the amended rule.

8. A new section should be added to Rule 510 (Rule 510(b)) to establish a standard for determining whether and when an inadvertent disclosure of information subject to the attorney-client privilege or to work product protection results in waiver. The amendment resolves an issue that has not addressed by Alabama courts. The proposed amendment is based on new Federal Rule 502, and is consistent with recent revisions made to Alabama’s Rules of Civil Procedure.

**Rule 510. Waiver of Privilege by Voluntary Disclosure**

**(a) Generally.** A person upon whom these rules confer a privilege against disclosure 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 privileged matter. This rule does not apply if the disclosure itself is privileged.

**(b) Attorney-Client Privilege and Work Product; Limitations on Waiver.** Notwithstanding section (a) of this rule, the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

**(1) Disclosure made in an Alabama proceeding; scope of waiver.** When the disclosure is made in an Alabama proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Alabama proceeding only if:

- (A) the waiver is intentional;
- (B) the disclosed and undisclosed communications or information concern the same subject matter; and
- (C) they should, in fairness, be considered together.

**(2) Inadvertent disclosure.** When made in an Alabama proceeding, the disclosure does not operate as a waiver in an Alabama proceeding if:

- (A) the disclosure is inadvertent;
- (B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (C) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Alabama Rule of Civil Procedure 26(b)(6)(B).

**(3) Disclosure made in a proceeding in federal court or in another state.** When the disclosure is made in a proceeding in federal court or in another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Alabama proceeding if the disclosure:

- (A) would not be a waiver under this rule if it had been made in an Alabama proceeding; or
- (B) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

**(4) Controlling effect of a court order.** An Alabama court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.

**(5) Controlling effect of a party agreement.** An agreement on the effect of disclosure in an Alabama proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

**(6) Definitions.** In this rule:

(A) “Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(B) “Work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

**[“CLEAN” version of recommended amendment]**

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**(1) Disclosure made in an Alabama proceeding; scope of waiver.** When the disclosure is made in an Alabama proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Alabama proceeding only if:

**(A)** the waiver is intentional;

**(B)** the disclosed and undisclosed communications or information concern the same subject matter; and

**(C)** they should, in fairness, be considered together.

**(2) Inadvertent disclosure.** When made in an Alabama proceeding, the disclosure does not operate as a waiver in an Alabama proceeding if:

**(A)** the disclosure is inadvertent;

**(B)** the holder of the privilege or protection took reasonable steps to prevent disclosure; and

**(C)** the holder promptly took reasonable steps to rectify the error, including (if applicable) following Alabama Rule of Civil Procedure 26(b)(6)(B).

**(3) Disclosure made in a proceeding in federal court or in another state.** When the disclosure is made in a proceeding in federal court or in another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Alabama proceeding if the disclosure:

**(A)** would not be a waiver under this rule if it had been made in an Alabama proceeding; or

**(B)** is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

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**(B)** “Work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 510 has been amended to establish a standard for determining whether inadvertent disclosure in an Alabama proceeding, of matter otherwise protected by the attorney-client privilege or the work-product doctrine, results in waiver of the privilege or protection. This amendment is to be read consistent with revisions made to the Alabama Rules of Civil Procedure in 2010 to accommodate the discovery of electronically stored information (ESI).

The amendment is also intended to align Alabama law with Federal Rule of Evidence 502, and provide predictable, uniform standards whereby parties can protect against waiver of the privilege or protection in an Alabama proceeding. All substantive changes to Rule 510 are found in a new section (b) which is modeled on Federal Rule 502.

**Section (a). Generally.** No changes have been made to Rule 510’s original paragraph which is now designated as Rule 510(a). Rule 510(a) governs the consequences of voluntary disclosure of privileged matter generally in circumstances not covered by Rule 510(b).

**Section (b). Attorney-Client Privilege and Work Product; Limitations on Waiver.** Rule 510(b) addresses only the effect of *disclosure*, in an Alabama proceeding, of information otherwise protected by the attorney-client privilege or work-product doctrine, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility. The failure to address in Rule 510(b) other waiver issues or other privileges or protections is not intended to affect the law regarding those other waiver issues, privileges or protections. The amendment does not alter existing Alabama law for determining whether a communication or information qualifies for protection under the attorney-client privilege or the work-product doctrine in the first instance.

**Section (b)(1). Disclosure made in an Alabama proceeding; scope of waiver.** Rule 510(b)(1) adopts the standard set forth in Federal Rule 502(a). The advisory committee’s note accompanying Federal Rule 502(a) provides a clear description of this standard.

[A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.

Fed. R. Evid. 502(a) advisory committee’s note.

**Section (b)(2). Inadvertent disclosure.** Section (b)(2) fills a gap in Alabama law regarding the proper standard for determining whether an inadvertent disclosure of matter protected by the attorney-client privilege or work-product doctrine during discovery results in waiver of the privilege or protection. *See Koch Foods of Alabama LLC v. Gen. Elec. Capital Corp.*, 531 F. Supp.2d 1318, 1320-21 (M.D. Ala. 2008) (observing that courts have used three standards for determining whether an inadvertent waiver has occurred, but “Alabama law does not fall neatly into any of these categories.”). *See also* Ala. R. Civ. P. 26(b)(6)(B), committee comments to 2010 amendment (2010 amendment “provides a procedure to assert a claim of attorney-client privilege or work-product protection after production [that is] applicable to both non-ESI and ESI data, but [the change] is procedural and does not address substantive waiver law.”).

The substantive standard set forth in this section is intended to apply in the absence of a court order or party agreement regarding the effect of disclosure. In determining whether waiver has occurred court orders and party agreements should ordinarily control. *Cf.* Ala. R. Civ. P. 16(b)(6) committee comments to 2010 amendments (“subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced.”).

Alabama Rule 510(b)(2) adopts verbatim the three-part standard set out in Federal Rule 502(b). Under this standard disclosure does not operate as a waiver if: (1) the disclosure was inadvertent, (2) the holder took reasonable steps to prevent disclosure, and (3) the holder took prompt and reasonable steps to rectify the error including (if applicable) providing the notice and other steps set forth in Rule 26(b)(6)(B) of the Alabama Rules of Civil Procedure.

The standard adopted is intended to be flexible. Accordingly, no attempt is made to define “reasonable steps” or to list factors that must be considered in every case. Guidance for applying this standard can be found in the advisory committee’s notes accompanying Federal Rule 502(b) which provides:

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party’s efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken “reasonable steps” to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced

inadvertently.

Fed. R. Evid. 502(b) advisory committee's note.

**Section (b)(3). Disclosure made in a proceeding in federal court or in another state.**

Alabama Rule 510(b)(3) corresponds to Federal Rule 502(c) and addresses the situation where the initial disclosure occurred in a proceeding in federal court or in another state court and the disclosed matter is subsequently offered in an Alabama proceeding. Rule 510(b)(3) provides that in the absence of a court order, the disclosure will not operate as a waiver in an Alabama proceeding if: (1) the disclosure would not have resulted in a waiver in an Alabama proceeding by application of Ala. R. Evid. 510(b), *or* (2) if the disclosure would not have resulted in waiver under the law applicable to the federal or state proceeding where it occurred. Stated differently, the law which is the most protective of privilege and work-product should be applied.

**Section (b)(4). Controlling effect of a court order.** Alabama Rule 510(b)(4) corresponds to Federal Rule 502(d). Under Rule 510(b)(4) a confidentiality order governing the consequences of disclosure entered in an Alabama proceeding is enforceable against non-parties in a subsequent Alabama proceeding. Rule 510(b)(4), like its Federal Rule counterpart, is intended to provide predictability and reduce discovery costs. *See* Fed. R. Evid. 502(d) advisory committee's notes ("[T]he utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation."). *Cf.* Ala. R. Civ. P. 16(b)(6) (party agreements for asserting claims of privilege or work product protection after production may be included in court's scheduling order); Ala. R. Civ. P. 26(f) (party agreements for asserting claims of privilege or work product protection after production may be included in court's discovery conference order).

**Section (b)(5). Controlling effect of a party agreement.** Alabama Rule 510(b)(5) corresponds to Federal Rule 502(e), and recognizes that parties may enter into agreements concerning the effect of disclosure of privileged or protected materials in an Alabama proceeding. However, such agreements are only binding on the parties unless it is incorporated into a court order as provided in Rule 510(b)(4).

**Section (b)(6). Definitions.** Alabama Rule 510(b)(6) adopts verbatim the definitions for "attorney-client privilege" and "work product protection" contained in Federal Rule 502(g). The definitions are general. No substantive change in existing Alabama law is intended. *Cf.* Ala. R. Evid. 502(a) (attorney-client privilege); Ala. R. Civ. P. 26(b)(4) (trial preparation materials).

**9. Rule 608(b) should be amended to clarify that Rule 608(b) has no impact on whether cross-examination or extrinsic evidence regarding a witness' misconduct is permissible under other impeachment methods. The amendment makes no changes in preexisting law.**

**Rule 608. Evidence of Character and Conduct of Witness**

**(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness ~~credibility~~, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

**[“CLEAN” version of recommended amendment]**

**Rule 608. Evidence of Character and Conduct of Witness**

**(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 608(b) has been amended by replacing the word “credibility” with the phrase “character for truthfulness” and thereby tracking the 2003 amendment to Fed. R. Evid. 608(b). This amendment is not intended to bring any substantive change to Alabama’s general rule, codified in Rule 608(b), which precludes asking a witness about, or offering extrinsic proof of, the witness’ own unconvicted conduct. *See Hathcock v. Wood*, 815 So. 2d 502, 508 (Ala. 2001); *J.B. Hunt Transport, Inc. v. Credeur*, 681 So. 2d 1355, 1361 (Ala. 1996). Rather, the amendment conforms Rule 608(b) to its original intent and reaffirms and clarifies that this preclusion applies only when the misconduct is offered under Rule 608(b) on the theory that some unconvicted misconduct possesses probative value upon the witness’ character for truthfulness. As observed in the advisory committee’s note to

the Federal Rule's 2003 amendment, the preclusion applies "only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness." *See also* James E. McDaniel, *Alabama Rule of Evidence 608(b): The Call for Amendment to Prevent Abuse of the Protections Within the Rule*, 57 ALA. L. REV. 1105 (2006) (arguing that the term "credibility" in Ala. R. Evid. 608(b) should be removed and replaced with the phrase "character for truthfulness" to make it clear that the testifying witness may be asked about prior unconvicted bad acts that qualify under some other ground of impeachment, and noting that this change has already been made to Federal Rule of Evidence 608(b)).

Nothing precludes asking a witness about or offering extrinsic evidence to prove misconduct when it is relevant under some other rule either to impeach or as substantive evidence. As noted in Rule 608(b)'s original advisory committee note, "Rule 608 does not preclude cross-examination calling for evidence of conduct, or exclude extrinsic evidence of conduct, when that evidence is sought or offered for purposes sanctioned by other rules." Ala. R. Evid. 608(b) advisory committee's notes. For example, if evidence is proffered to show the witness's bias, self-contradiction, or sensory defect Rule 608(b)'s prohibition does not apply. *See Griffin v. State*, 790 So. 2d 267, 331-32 (Ala. Crim. App. 1999) (cross-examination about unconvicted misconduct to show self-contradiction not barred by Ala. R. Evid. 608(b)). *See also U.S. v. Brown*, 547 F. 2d 438, 445 (8th Circuit 1977) (extrinsic evidence to show bias); *Lewy v. So. Pac. Transp. Co.*, 799 F.2d 1281, 1298 (9th Circuit 1986) (same); *Carson v. Polley*, 689 F.2d 562, 574 (5th Circuit 1982) (extrinsic evidence to contradict); *Kasuri v. St. Elizabeth Hospital Medical Center*, 897 F. 2d 845, 854 (6th Circuit 1990) (extrinsic evidence of prior inconsistent statement); *U.S. v. Lindstrom*, 698 F. 2d 1154, 1162 n.6 (11th Circuit 1983) (noting that Rule 608(b) is not controlling when credibility is attacked by showing impaired capacity to observe, remember, or narrate). Further illustrations are set out in Rule 608(b)'s original advisory committee's note. *See generally*, 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 140.01(9)-(10) (6th ed. 2009); C. Gamble, *Gamble's Alabama Rules of Evidence* § 608(b) (2d ed. 2002).

**10. Rule 703 should be amended to permit an expert to base an opinion on facts or data that are otherwise inadmissible if of a type reasonably relied upon by experts in the particular field. The amendment changes Alabama’s common law rule which states that information an expert relies on in forming an opinion must generally be introduced into evidence. However, Alabama’s general rule is subject to several exceptions, and its application has become unclear. The amendment is designed to bring clarity to a confusing rule, and is consistent with a recent Alabama Supreme Court decision. *See Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So.3d 564, 579 (Ala. 2009) (recognizing an exception to the general rule for expert opinion testimony based on hearsay that is “customarily relied on by experts and likely to be trustworthy.”) (emphasis in opinion). The amendment makes Alabama’s Rule 703 consistent with Federal Rule 703 as originally enacted and as amended in 2000. The 2000 amendment to Federal Rule 703 provides that, upon objection, otherwise inadmissible facts or data should not be disclosed to the jury in the absence of trial court determination, and—if disclosed and not otherwise admissible—cannot be used for substantive purposes.**

### **Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

### **[“CLEAN” version of recommended amendment]**

### **Rule 703. Bases of Opinion Testimony by Experts**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

### **Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 703 has been amended by adding a second and third sentence to the former rule. The two new sentences are taken verbatim from Rule 703 of the Federal Rules of Evidence, and make the Alabama Rule identical to its federal counterpart. The amendment abandons the traditional common law rule that required information upon which an expert relied in forming an opinion to be admitted into evidence, but which also recognized exceptions. *See Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So.3d 564, 579 (Ala. 2009) (noting such exceptions and modifications); 1 C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence*, § 127.02(5) (6th ed. 2009) (“Alabama’s rule,

precluding expert testimony based on inadmissible facts or data has ... been judicially breached in certain situations.”). *Cf. Johnson v. Nagle*, 58 F.Supp.2d 1303, 1358 n.46 (N.D. Ala. 1999) (describing Alabama law as “confusing”).

Abandonment of the common law rule does not mean that expert opinions based on otherwise inadmissible evidence will be automatically admitted. As amended, the second sentence of Rule 703 provides, “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.” The phrase “*reasonably relied upon*” allows an expert to base an opinion on information not admitted into evidence only if other experts in the field normally and customarily rely on such information in forming opinions, and only if such reliance is reasonable. *See United States v. Steed*, 548 F.3d 961, 975 (11th Cir. 2008) (“Rule 703, however, is not an open door to all inadmissible evidence disguised as expert opinion. [U]nder the Rule, a law enforcement officer testifying as an expert witness may rely on information he received from other people if such sources of information were regularly relied upon by experts in his field.”) (citations omitted); *Moore v. Ashland Chem., Inc.*, 126 F.3d 679, 691 (5th Cir. 1997) (“In determining the preliminary question of whether reliance by the expert is reasonable, the party calling the witness must satisfy the court, both that such facts, data or opinions are of the type customarily relied upon by experts in the field and that such reliance is reasonable.”).

In many cases the result reached under the amended rule will be the same as under common law rule. For example, Alabama courts recognized an exception to the common law rule that admitted expert opinion testimony based on hearsay if the hearsay was, “customarily relied on by experts and likely to be trustworthy.” *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So.3d 564, 579 (Ala. 2009). The amendment is consistent with this exception. Hearsay that is not trustworthy would not satisfy Rule 703’s “reasonably relied upon” requirement.”

The last sentence of Rule 703 is identical to the sentence added to Federal Rule 703 by amendment in 2000, and has been added for the same reason—to emphasize that when an expert reasonably relies on otherwise inadmissible information to form an opinion the underlying information is not admissible simply because the expert’s opinion is admissible. The Advisory Committee’s Note accompanying the 2000 amendment to Federal Rule 703 provides an explanation of how the amendment to the federal rule should be interpreted, which applies equally to the amendment to Ala. R. Evid. 703.

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert’s opinion, a trial court applying this Rule must consider the information’s probative value in assisting the jury to weigh the expert’s opinion on the one hand, and the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert’s opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* [Ala. R. Evid.] 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably

relied on by an expert when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor or does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this amendment is intended to restrict the presentation of information underlying an expert opinion when such information is offered by an adverse party. *See* [Ala. R. Evid.] 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

Fed. R. Evid. 703 advisory committee's note.

**11. Rule 704 should be amended to abolish the “ultimate issue rule,” as an objection to both lay and expert opinion testimony. Although the amendment does change preexisting Alabama law, Alabama’s “ultimate issue rule” has become subject to numerous exceptions. If adopted, the Alabama’s Rule 704 would be consistent with Federal Rule 704 as originally enacted in 1975 (Federal Rule 704 was amended in 1984 with the addition of a subpart (b) which is not included in this recommendation).**

**Rule 704. Opinion on Ultimate Issue**

Testimony in the form of an opinion or inference otherwise admissible is ~~to be excluded if~~ not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**[“CLEAN” version of recommended amendment]**

**Rule 704. Opinion on Ultimate Issue**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 704 has been amended to abolish the so-called “ultimate issue” rule as an objection to both lay and expert opinion testimony. The amendment is a rejection of the common law rule which, as a general proposition, had been laxly enforced. *See, e.g., Fox Alarm Co. v. Wadsworth*, 913 So. 2d 1070, 1079 (Ala. 2005) (“[t]he trend of the Alabama appellate courts is to allow expert testimony as to an ultimate issue if that testimony would aid or assist the jury”); 1 C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence* § 127.02(6)(b) (6th ed. 2009) (“[T]he law on this point remains the same as it was when the Alabama Rules of Evidence became effective—*i.e.*, a general rule precluding ultimate issue opinions but with innumerable decisions allowing them.”).

It should be noted that the abolition of the ultimate issue rule does not lower the bars so as to admit all opinions that embrace ultimate issues. An opinion on an ultimate issue must still satisfy the helpfulness test of Ala. R. Evid. 701 or 702. Similarly, Ala. R. Evid. 403 authorizes the exclusion of evidence which wastes time or unduly prejudices, misleads or confuses the jury. *See* 1 C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence* § 128.07 (6th ed. 2009) (observing that lay or expert opinions constituting a legal conclusion may be excluded for failure to satisfy the helpfulness standard, or because they are a waste of time, confuse the jury, or create unfair prejudice).

**12. Rule 801(d)(1) should be amended by adding a subpart (C). The amendment adds “statements of identification of a person” to the list of prior statements made by a testifying witness that are not defined as hearsay. The amendment makes Alabama’s Rule 801(d)(1) conform to Federal Rule 801(d)(1).**

**Rule 801. Definitions**

The following definitions apply under this article:

\* \* \*

**(d) Statements which are not hearsay.** A statement is not hearsay if —

**(1) *Prior statement by witness.*** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person.

\* \* \*

**[“CLEAN” version of recommended amendment]**

**Rule 801. Definitions**

The following definitions apply under this article:

\* \* \*

**(d) Statements which are not hearsay.** A statement is not hearsay if —

**(1) *Prior statement by witness.*** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person.

**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 801(d)(1) has been amended to add part C. This reverses Alabama’s original rejection of the principal that a prior identification statement, of a witness who is now testifying and subject to cross-examination, is definitionally nonhearsay. Under this revised rule the prior identification is admissible only when the person who made it testifies at trial and is subject to cross-examination. This assures that if any discrepancy occurs between the witness’ in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for the discrepancy so that the trier of fact might determine which statement is to be believed. In criminal cases, the prior identification must meet constitutional and due process requirements against unnecessarily suggestive identifications.

**13. Rule 801(d)(2) should be amended to clarify that a trial court may consider the contents of a hearsay statement in determining whether the foundational requirements of Rule 801(d)(2)(C), (D), and (E) have been established. The proposed amendment is consistent with existing Alabama practice and an amendment made to its federal rule counterpart in 1997.**

**Rule 801. Definitions**

The following definitions apply under this article:

\* \* \*

**(d) Statements That Are Not Hearsay.** A statement is not hearsay if—

\* \* \*

**(2) Admission by party opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

\* \* \*

**["CLEAN" version of recommended amendment]**

**Rule 801. Definitions**

The following definitions apply under this article:

\* \* \*

**(d) Statements That Are Not Hearsay.** A statement is not hearsay if—

\* \* \*

**(2) Admission by party opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

\* \* \*

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 801(d)(2) has been amended to respond to issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987) and the resulting 1997 amendment to Federal Rule of Evidence 801(d)(2). This

amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

This amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

This amendment is in accordance with existing Alabama practice. The principal justification in *Bourjaily* for allowing "bootstrapping" was Federal Rule of Evidence 104(a) which allows the trial judge to consider the bootstrapping statement in determining the existence of a conspiracy. Alabama's Rule of Evidence 104(a) is identical to Federal rule of Evidence 104(a) and would also allow the trial judge to consider the alleged conspirators statement in proving the existence of a conspiracy. Additionally, in questions of agency, Alabama courts have traditionally allowed the trial judge to consider the statement itself along with other direct and circumstantial evidence. In *New Plan Realty Trust v. Morgan*, 792 So.2d 351,(2000) the Alabama Supreme Court reviews the issue of proving agency and, citing several cases that predate the adoption of Alabama's Rules of Evidence, finds

'[A]cts and declarations of one whose agency is the subject of inquiry, though incompetent when there is no other evidence of agency or of ratification, become competent for consideration in determining both the fact of agency and the scope of authority originally given, when shown in connection with other evidence of agency.' *Warren Webster & Co. v. Zac Smith Stationery Co.*, 222 Ala. 41, 44, 130 So. 545, 547 (1930) (quoting *Birmingham Mineral R.R. v. Tennessee Coal, Iron & R.R. Co.*, 127 Ala. 137, 145, 28 So. 679, 681 (1900)).

**14. Rule 803(6) should be amended—and two new subsections should be added to Rule 902 (designated as 902(11) and 902(12))—to provide for the self-authentication of business records. The amendment is consistent with amendments made to the corresponding Federal Rules in 2000. If adopted, the amendment would change existing practice which generally requires foundation witnesses to testify.**

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**["CLEAN" version of recommended amendment to Rule 803(6)]**

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 803(6) has been amended to keep this rule consistent with its federal counterpart, which was amended in 2000. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. This represents a change from pre-rules case law and the former Rule 803(6) in which Alabama courts generally required foundation witnesses to testify.

Protections are provided by the authentication requirements of Rule 902(11) for domestic records, and Rule 902(12) for foreign records.

The intent behind this amendment, combined with the addition of Rule 902(11) and 902(12), is to provide a means to satisfy the foundational elements of this hearsay exception without a live witness. The amendment is not intended to give these records *carte blanche* admissibility. With the addition of this amendment, the amendment to Rules 902(11) and (12), and the previously existing Rules 1001(2) and (3), the proponent of the evidence may now overcome authentication, hearsay, and best evidence rule objections with a properly certified copy of a record of regularly conducted activity, but all other valid objections remain. Thus, even if the proponent of the evidence satisfies the requirements of this amendment, the evidence may still be excluded under applicable general rules of evidence. See 2 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 254.01(7)(a) (6th ed. 2009) (recognizing that “successfully satisfying all the elements of the business records exception does not guarantee was the courts term *carte blanche* admissibility.”). By way of example, a record of regularly conducted activity that contains multiple levels of hearsay may still properly be excluded if the proponent does not overcome objections for each level of hearsay. See 2 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 254.01(7)(d) (6th ed. 2009).

#### **Rule 902. Self-authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

\* \* \*

**(11) Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or sworn testimony of its custodian or other qualified person, certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

**(12) Certified foreign records of regularly conducted activity.** The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all

adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

**["CLEAN" version of recommended amendment to Rule 902]**

**Rule 902. Self-authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

\* \* \*

**(11) Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or sworn testimony of its custodian or other qualified person, certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

**(12) Certified foreign records of regularly conducted activity.** The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rules 902(11) and 902(12) have been added to keep this rule consistent with Fed. R. Evid. 902, which was amended in 2000. The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity other than through the testimony of a foundation witness. *See* Ala. R. Evid. 803(6) (as amended).

The intent behind the addition of Rules 902(11) and 902(12) is to provide an alternative means of authenticating records of regularly conducted activity. The amendment is not intended to give these records *carte blanche* admissibility. With the addition of this amendment, the amendment to Rule 803(6), and the previously existing Rules 1001(2) and (3), the proponent of the evidence may now overcome authentication, hearsay, and best evidence rule objections with a properly certified copy of a record of regularly conducted activity, but all other valid objections remain. Thus, even if the proponent of the evidence satisfies the requirements of this amendment, the evidence may still be excluded under applicable general rules of evidence. See 2 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 319.01(4) (6th ed. 2009) (“The fact that an offered item of evidence is properly authenticated does not grant it *carte blanche* admissibility. Other evidentiary objections may be lodged against its admission.”).

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

**15. Rule 804(b)(2) should be amended to provide that Alabama’s hearsay exception for statements made under a belief of impending death (so-called “dying declarations”) applies in civil cases. This amendment would represent a change in existing Alabama practice, but is consistent with Federal Rule 804(b)(2) which permits the admission of such qualifying statements in a civil action.**

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

\* \* \*

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(2) Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death. ~~and offered in a criminal case.~~

**[“CLEAN” version of recommended amendment]**

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

\* \* \*

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(2) Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

\* \* \*

**Advisory Committee’s Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 804(b)(2) is amended to allow its use in civil and criminal cases. Since the historical basis for allowing this exception is the psychological motivation that a belief in impending death enhances the credibility of the declarant’s statement, there is no rational basis for differentiating between criminal or civil actions.

**16. Rule 804 should be amended by adding a new “forfeiture by wrongdoing” hearsay exception (designated Rule 804(b)(5)). The amendment is based on—but is not identical to—an exception added to the Federal Rules of Evidence in 1997. The new exception is not inconsistent with existing Alabama law.**

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

**(a) Grounds of unavailability.**

\* \* \*

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(5) Forfeiture by wrongdoing.** A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**[“CLEAN” version of recommended amendment]**

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

**(a) Grounds of unavailability.**

\* \* \*

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(5) Forfeiture by wrongdoing.** A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

\* \* \*

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

Rule 804(b)(5) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing procured the unavailability of the declarant as a witness. This exception recognizes the need for a prophylactic rule to deal with abhorrent behavior “which strikes at the heart of the system of justice itself.” *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). This rule applies to all parties, including the government.

Alabama’s Rule 804(b)(5) represents a slight departure from its federal counterpart, Fed. R. Evid. 804(b)(6), which was added by amendment in 1997. Federal Rule 804(b)(6) provides a hearsay exception for statements by unavailable witnesses where the party against which the statement is offered “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Alabama’s Rule 804(b)(5) rejects the phrase “or acquiesced” due to its breadth. This departure from the federal model is not intended to limit the court’s ability to interpret the breadth of the term “engaged in wrongdoing,” although it is intended to exclude situations in which a party’s mere inaction might otherwise be held to effect a forfeiture.

It is left to the courts to interpret when “wrongdoing” has occurred. *See e.g., United States v. White*, 116 F.3d 903, 916 (D.C. Cir. 1997) (holding that two defendants who murdered a potential witness forfeited their confrontation and hearsay objections to statements of that witness); *United States v. Dhina*, 243 F.3d 635, 644-45 (2d Cir. 2001) (applying exception where defendant ordered others to kill witnesses, supplied weapons in one killing, and personally participated in another); *United States v. Potamitis*, 739 F.2d 784, 788-89 (2d Cir. 1984) (admitting grand jury testimony of witness who fled country after being threatened by the defendant). The wrongdoing need not consist of a criminal act. *Cf. United States v. Scott*, 284 F. 3d 758, 764 (7th Cir. 2002) (“applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing”) *with Commonwealth v. Edwards*, 830 N.E.2d 158, 171 n.23 (Mass. 2005) (putting forth the idea to avoid testifying by threats, coercion, persuasion or pressure may be sufficient to constitute forfeiture, but merely informing a witness of their right to remain silent does not constitute pressure or persuasion).

The intent requirement of Ala. R. Evid. 804(b)(5) “means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.” *Giles v. California*, 128 S. Ct. 2678, 2687-88 (2008) (interpreting Fed. R. Evid. 804(b)(6)).

In determining whether there is a forfeiture the usual Rule 104(a) preponderance of the evidence standard has been adopted (rather than a clear and convincing standard) in light of the behavior Rule 804(b)(5) seeks to discourage. *See Davis v. Washington*, 547 U.S. 813, 833 (2006) (observing that federal courts applying Fed. R. Evid. 804(b)(6) have generally held the Government to the preponderance of the evidence standard); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001) (adopting the preponderance of the evidence standard for determining whether to admit hearsay under Fed. R. Evid. 804(b)(6)).

**17. Rule 1103 should be amended to provide a uniform rule for determining whether an amendment to the Alabama Rules of Evidence should be applied in proceedings that begin on or after the amendment's effective date, but where the action in which the proceeding is held began prior to the amendment's effective date. The amendment adds a new subsection (b) to Rule 1103 which merely continues the same rule adopted by the Alabama Supreme Court in 1995 with regard to the effective date of the Alabama Rules of Evidence.**

**Rule 1103. Effective Date**

**(a) The Rules.** In a proceeding to which Rule 1101 would make these rules applicable, these rules shall apply if the proceeding begins on or after January 1, 1996.

**(b) Amendments to the Rules.** In a proceeding to which Rule 1101 would make these rules applicable, an amendment to these rules shall apply if the proceeding begins on or after the effective date of the amendment.

**["CLEAN" version of recommended amendment]**

**Rule 1103. Effective Date**

**(a) The Rules.** In a proceeding to which Rule 1101 would make these rules applicable, these rules shall apply if the proceeding begins on or after January 1, 1996.

**(b) Amendments to the Rules.** In a proceeding to which Rule 1101 would make these rules applicable, an amendment to these rules shall apply if the proceeding begins on or after the effective date of the amendment.

**Advisory Committee's Note to \_\_\_\_ (year of Ala. S. Ct. adoption) Amendment**

The amendment divides Rule 1103 into two sections. The original content of Rule 1103, which provided a general effective date for the Alabama Rules of Evidence, has been placed unchanged in section (a). A new section (b) has been added to Rule 1103 which addresses the effective date of amendments to the Alabama Rules of Evidence.

Section (b) provides that amendments to the rules of evidence shall govern any proceeding begun on or after the effective date of the amendment without regard to when the action was filed. Conversely, an amendment will have no application in a proceeding begun before the effective date of the amendment and completed on or after that date. As noted in the Court Comment which accompanied the original rule, "A proceeding, for purposes of this rule, shall be understood to mean a proceeding at which evidence is to be presented. The commencement of an action is not the commencement of a proceeding." Ala. R. Evid. 1103 Court Comment. *See also Smith v. State*, 797 So. 2d 503, 531 n.9 (Ala. Crim. App. 2000) (noting that Ala. R. Evid. 614(b) did not apply because defendant's trial ended before January 1, 1996, the effective date of the Rules of Evidence); *Ex parte Woodall*, 730 So. 2d 652, 661 n.3 (Ala. 1998) ("We note that the trial in this case began before January 1, 1996; therefore, the Alabama Rules of Evidence do not apply."); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence*, § 1.02 (6th ed. 2009) ("[T]he Alabama Rules of Evidence apply to a proceeding held on or after January 1, 1996, even though the action itself was filed or commenced prior to this date.").

### **Rule 412. (CURRENT RULE)**

#### **Admissibility of Evidence Relating to Past Sexual Behavior of Complaining Witness in Prosecution for Criminal Sexual Conduct**

(a) As used in this rule, unless the context clearly indicates otherwise, the following words and phrases shall have the following respective meanings:

(1) **Complaining witness.** Any person alleged to be the victim of the crime charged, the prosecution of which is subject to the provisions of this rule.

(2) **Criminal sexual conduct.** Sexual activity, including, but not limited to, rape, sodomy, sexual misconduct, sexual abuse or carnal knowledge.

(3) **Evidence relating to past sexual behavior.** Such term includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, and general reputation for promiscuity, non-chastity, or sexual mores contrary to the community standards and opinion of character for those traits.

(b) In any prosecution for criminal sexual conduct or for assault with intent to commit, attempt to commit, or conspiracy to commit criminal sexual conduct, evidence relating to the past sexual behavior of the complaining witness, as defined in section (a) of this rule, shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or of other witnesses, except as otherwise provided in this rule.

(c) In any prosecution for criminal sexual conduct, evidence relating to the past sexual behavior of the complaining witness shall be introduced if the court, following the procedure described in section (d) of this rule, finds that such past sexual behavior directly involved the participation of the accused.

(d) The procedure for introducing evidence, as described in section (c) of this rule, shall be as follows:

(1) At any time before the defense shall seek to introduce evidence which would be covered by section (c) of this rule, the defense shall notify the court of such intent, whereupon the court shall conduct an in camera hearing to examine into the defendant's offer of proof. All in camera proceedings shall be included in their entirety in the transcript and record of the trial and case;

(2) At the conclusion of the hearing, if the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and

(3) The defense may then introduce evidence pursuant to the order of the court.

### **Rule 412. (PROPOSED AMENDMENT)**

#### **Admissibility of Evidence Relating to Complaining Witness in Prosecution for Criminal Sexual Contact**

(a) **Evidence generally inadmissible.** The following evidence is not admissible in any prosecution for criminal sexual conduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any complaining witness engaged in other sexual behavior.

(2) Evidence offered to prove any complaining witness's sexual predisposition.

(b) **Exceptions.** The following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the complaining witness, offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the complaining witness with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) **Procedure to Determine Admissibility.**

(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so a reasonable time before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(2) **Notice.** Regardless of who brings the motion, the prosecution shall notify the complaining witness or, when appropriate, the complaining witness's guardian or representative.

(3) **Hearing.** Before admitting evidence under this rule, the court must conduct an *in camera* hearing and give the parties a right to attend and be heard. If at the conclusion of the hearing the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced and in what manner the evidence may be introduced. All *in camera* proceedings shall be included in their entirety in the transcript and record of the trial and case;

(4) The party may then introduce evidence pursuant to the order of the court.

(d) **Definitions.** As used in this rule, unless the context clearly indicates otherwise, the following words and phrases shall have the following respective meanings:

(1) **Complaining witness.** Any person alleged to be the victim of the crime charged, the prosecution of which is subject to the provisions of this rule.

(2) **Criminal sexual conduct.** Sexual activity, including, but not limited to, rape, sodomy, sexual misconduct, sexual abuse, assault with intent to commit, attempt to commit, solicitation to commit, or conspiracy to commit criminal sexual conduct.