IN THE SUPREME COURT OF ALABAMA
AUGUST 15, 2013

ORDER

IT IS ORDERED that Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Alabama Rules of Evidence, be amended to read in accordance with Appendices A, C, E, G, I, K, M, O, Q, S, U, and Y, respectively;

IT IS FURTHER ORDERED that the Advisory Committee's Notes to Amendment to Rule 404(a) Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 405(a) Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 407 Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 408 Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 412 Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 510 Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 608(b) Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 703 Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 801(d) Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 803(6) Effective October 1, 2013; the Advisory Committee's Notes to Amendment to Rule 804(b) Effective October 1, 2013; and the Advisory Committee's Notes to Amendment to Rule 1103 Effective October 1, 2013, be adopted to read in accordance with Appendices B, D, F, H, J, L, N, P, R, T, V, and Z, respectively;

IT IS FURTHER ORDERED that Rule 902(11) and (12), Alabama Rules of Evidence, and the Advisory Committee's Notes to Adoption of Rule 902(11) and (12) Effective October 1, 2013, be adopted to read in accordance with Appendices W and X, respectively;

IT IS FURTHER ORDERED that these amendments and the adoption of Rule 902(11) and (12) and the Advisory Committee's Notes are effective October 1, 2013;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 404, Rule 405, Rule 407, Rule 408, Rule 412, Rule 510, Rule 608, Rule 703, Rule 801, Rule 803, Rule 804, Rule 902, and Rule 1103:

> "Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of Alabama Reporter that contains Alabama cases from ___ So. 3d."

Stuart, Bolin, Shaw, Main, Wise, and Bryan, JJ., concur.

Moore, C.J., and Parker and Murdock, JJ., concur, except as to the amendment of Rule 703, and the Advisory Committee's Notes to the Amendment to Rule 703, as to which they dissent.

APPENDIX A

Rule 404(a), Alabama Rules of Evidence

(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 the victim's 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, 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 accused party's character for peacefulness may be offered to rebut the same.

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, 609, and 616.

APPENDIX B

Advisory Committee's Notes to Amendment to
Rule 404(a) Effective October 1, 2013

Subsection (a)(1). Character of Accused. 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 subsection (a)(1), does not apply in civil cases. The amendment resolves any dispute that has or may arise in caselaw over whether the exception in Rule 404(a)(1) permits the use of circumstantial character evidence in civil cases. The use of circumstantial 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 H. 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 use of circumstantial 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 fact-finder 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). Although 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 Notes). 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 that 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 Notes).

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 Rule 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, 263 Ala. 386, 82 So. 2d 553 (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); and 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 Rule 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). Character of Victim in Civil Cases. 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 Notes). 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 party to prove the assaulting party's character for violence and for the assaulting party to rebut such evidence with evidence of his or her good character for peacefulness.

APPENDIX C

Rule 405(a), Alabama Rules of Evidence

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, 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.

APPENDIX D

Advisory Committee's Notes to Amendment to
Rule 405(a) Effective October 1, 2013

Rule 404(a)(1), Ala. R. Evid., 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, Rule 405(a) provided that the only medium of proof available to the defense or the prosecution to prove such character was evidence of the accused's 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); and 1 C. Gamble & R. Goodwin, McElroy's Alabama Evidence § 27.01(1) (6th ed. 2009). This amounted to a rejection of Fed. R. Evid. 405(a), under which opinion evidence 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 likewise amounted to 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 evidence as an alternative to reputation evidence.

This additional medium of opinion as to the accused's character is also available to the prosecution in rebuttal. See Ala. R. Evid. 404(a)(1). Because the prosecution's character proof, authorized under Rule 404(a)(1), is in rebuttal to evidence presented during the defense's case-in-chief, the Committee expects that the scope and nature of the medium of the accused's evidence of good character will continue, as under preexisting caselaw, to generally form the parameters of the medium 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).

APPENDIX E

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.

APPENDIX F

Advisory Committee's Notes to Amendment to Rule 407 Effective October 1, 2013

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 notes accompanying the 1997 amendment of the federal rule summarize 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 product-liability or Alabama Extended Manufacturer's Liability Doctrine (AEMLD) cases. Both changes find support in Alabama caselaw. 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))); 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 recognizes that the overwhelming body of federal caselaw holds that Federal Rule 407 does not require exclusion of evidence of (1) subsequent remedial measures made by nonparties or (2) subsequent remedial measures that were involuntarily undertaken or performed, and that such caselaw 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."); and Snyder v. State, 893 So. 2d 488, 540 (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 has decided against incorporating language on these subjects into the text of Rule 407 primarily in order to maintain uniformity with the Federal Rule. For authority on the first point, see Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293, 1302 (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 any relevancy is substantially outweighed by prejudice." (footnotes omitted)). 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 tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force -- a tort feasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case." (emphasis omitted)).

APPENDIX G

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 when offered 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
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> (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 section (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.

APPENDIX H

Advisory Committee's Notes to Amendment to Rule 408 Effective October 1, 2013

Rule 408 of the Alabama Rules of Evidence was identical to Federal Rule 408 until the federal rule was amended in 2006. Rule 408, Ala. R. Evid., has been amended to incorporate some of, but not all, 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." 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 it 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); and 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 the changes made to Federal Rule 408. Two differences should be noted. First, Federal Rule 408 allows the admission of evidence 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 evidence 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, 40 Ala. App. 413, 416, 115 So. 2d 273, 276 (1959) ("Evidence of civil settlements adduced by the State is not admissible over objection in criminal trials); and 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 caselaw 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.

APPENDIX I

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 sections (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, or, when appropriate, the complaining witness's guardian or representative, of the motion.

(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; and assault with intent to commit, attempt to commit, solicitation to commit, or conspiracy to commit criminal sexual conduct.

APPENDIX J

Advisory Committee's Notes to Amendment to Rule 412 Effective October 1, 2013

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 that references the application of the federal rule to civil cases. Unlike its federal counterpart, Alabama's Rule 412 applies only in criminal prosecutions for crimes involving "sexual conduct," and it affords protection to only 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 phrase "alleged victim" in the federal rule, and the phrase "prosecution for criminal sexual conduct" has been substituted for the phrase "civil or criminal proceeding involving alleged sexual misconduct."

Section (a). Evidence Generally Inadmissible. 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 that 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 that 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) (evidence of use of contraceptives inadmissible because such use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (evidence of birth of an illegitimate child inadmissible); and State v. Carmichael, 240 Kan. 149, 156-57, 727 P.2d 918, 925 (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 fact-finder. For example, evidence relating to the complaining witness's mode of dress, speech, or lifestyle 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 the adoption of Rule 412) (excluding evidence of marital history and mode of dress). See 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). Exceptions. 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

subsections (b)(1) and (b)(2) require proof relating to 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 of evidence in the form of an opinion.

Under subsection (b)(1), evidence of specific instances of the complaining witness's 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. When 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 offense of rape.").

Under the exception in subsection (b)(2), evidence of specific instances of sexual behavior involving the complaining witness and the accused is admissible if offered by the accused to prove consent or if offered 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 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, subsection (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 section (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 a rule of evidence 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). Procedure to Determine Admissibility. Section (c) sets forth the procedures that must be followed in determining whether evidence may be introduced pursuant to one of the section (b) exceptions. Although the procedures track those contained in the former 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 subsection (d)(1) of the former rule, which stated only that the "defense shall notify the court of [its] intent" to introduce evidence under rule.

Second, unlike subsection (d)(1) of the former Alabama rule, which stated that 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 to present evidence pursuant to the rule 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 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 requirement in the former rule that the court conduct an in camera hearing on the motion. This requirement is intended to ensure 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). Definitions. 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 definition for "evidence relating to past sexual behavior" found in the former rule has been deleted as unnecessary because 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.

APPENDIX K

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) the disclosed and undisclosed communications or information 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 the procedure set out in 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 in which 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 Alabama 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.

APPENDIX L

Advisory Committee's Notes to Amendment to Rule 510 Effective October 1, 2013

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 to 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 the original paragraph of Rule 510, 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 the work-product doctrine and 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.

Subsection (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 notes accompanying Federal Rule 502(a) provide 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 Notes).

Subsection (b)(2). Inadvertent Disclosure. Subsection (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 that "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 subsection is intended to apply in the absence of a court order or a 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 Amendment) ("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 following the 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 provide:

> "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 Notes).

Subsection (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's 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 in which it occurred. Stated differently, the law that is the most protective of privilege and work-product should be applied.

Subsection (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 nonparties in a subsequent Alabama proceeding. Rule 510(b)(4), like its federal 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).

Subsection (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 an agreement is binding only on the parties unless it is incorporated into a court order as provided in Rule 510(b)(4).

Subsection (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).

APPENDIX M

Rule 608(b), Alabama Rules of Evidence

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's 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.

APPENDIX N

Advisory Committee's Notes to Amendment to
Rule 608(b) Effective October 1, 2013

Rule 608(b) has been amended by replacing the word "credibility" with the phrase "character for truthfulness," 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's own unconvicted conduct. See Hathcock v. Wood, 815 So. 2d 502, 508 (Ala. 2001); J.B. Hunt Transp., 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's character for truthfulness. As observed in the advisory committee's notes to the 2003 amendment to the federal rule, the preclusion applies "only when the sole reason for proffering that evidence is to attack or support the witness's 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 the original Advisory Committee's Notes to this rule, "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, the prohibition in Rule 608 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 United States v. Brown, 547 F.2d 438, 445 (8th Cir. 1977) (extrinsic evidence to show bias); Lewy v. Southern Pacific Transp. Co., 799 F.2d 1281, 1298 (9th Cir. 1986) (same); Carson v. Polley, 689 F.2d 562, 574 (5th Cir. 1982) (extrinsic evidence to contradict); Kasuri v. St. Elizabeth Hosp. Med. Ctr., 897 F.2d 845, 854 (6th Cir. 1990) (extrinsic evidence of prior inconsistent statement); and United States v. Lindstrom, 698 F.2d 1154, 1162 n.6 (11th Cir. 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 the original Advisory Committee's Notes to Rule 608. 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).

APPENDIX O

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.

APPENDIX P

Advisory Committee's Notes to Amendment to
Rule 703 Effective October 1, 2013

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 allowed admission of 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 at 579 (emphasis omitted). The amendment is consistent with this exception. Hearsay that is not trustworthy would not satisfy the "reasonably relied upon" requirement of the amended rule.

The last sentence of Rule 703 is identical to the sentence added to Federal Rule 703 by amendment in 2000, and it 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 notes accompanying the 2000 amendment to Federal Rule 703 provide 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 does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

"Nothing in this Rule restricts the presentation of underlying expert facts or data when 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 Notes).

APPENDIX Q

Rule 801(d), Alabama Rules of Evidence

The following definitions apply under this article:

(d) Statements That 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.

(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 subsection (C), the agency or employment relationship and scope thereof under subsection (D), or the existence of the conspiracy and the participation therein of the declarant and the party

against whom the statement is offered under subsection (E).

APPENDIX R

Advisory Committee's Notes to Amendment to
Rule 801(d) Effective October 1, 2013

Rule 801(d)(1) has been amended to add subsection (C). This reverses Alabama's original rejection of the principle 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 ensures that if any discrepancy occurs between the witness's 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.

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 matters to be established by a preponderance of the evidence.

This amendment extends the reasoning of Bourjaily to statements offered under subsections (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 subsection (C) and the existence of agency or employment relationship and the scope thereof under subsection (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 permitted under Rule 801(d)(2) 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 conspirator's statement in proving the existence of a conspiracy. Additionally, regarding 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, 361 (Ala. 2000), the Alabama Supreme Court reviewed the issue of proving agency and, citing several cases that predate the adoption of the Alabama Rules of Evidence, held:

> "'"[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) ...)."

APPENDIX S

Rule 803(6), Alabama Rules of Evidence

(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.

APPENDIX T

Advisory Committee's Notes to Amendment to Rule 803(6) Effective October 1, 2013

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 caselaw 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 (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 adoption of Rule 902(11) and (12), and previously existing Rule 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 what 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).

APPENDIX U

Rule 804(b), Alabama Rules of Evidence

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

(1) Former Testimony. Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.

(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.

(3) Statement Against Interest. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) Statement of Personal or Family History. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(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.

APPENDIX V

Advisory Committee's Notes to Amendment to
Rule 804(b) Effective October 1, 2013

Rule 804(b)(2) is amended to allow its use in civil and criminal cases. Because 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.

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). 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 when the party against whom the statement is offered "caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result." 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 when defendant ordered others to kill witnesses, supplied weapons in one killing, and personally participated in another); and 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. Compare 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, 444 Mass. 426, 541 n. 23, 830 N.E.2d 158, 171 n.23 (2005) (putting forth the idea to avoid testifying by use of 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, 554 U.S. 353, 367 (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-evidence 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)).

APPENDIX W

Rule 902(11) and (12), Alabama Rules of Evidence

(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 section 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.

APPENDIX X

Advisory Committee's Notes to Adoption of Rule 902(11) and (12) Effective October 1, 2013

Sections (11) and (12) have been added to Rule 902 to keep this rule consistent with Fed. R. Evid. 902, which was amended in 2000. The amendment adds two new sections 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 effective October 1, 2013).

The intent behind the addition of Rule 902(11) and (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 adoption of Rule 902(11) and (12), the amendment to Rule 803(6), and previously existing Rule 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 these sections, 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 requirements in Rule 902(11) and (12) are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

APPENDIX Y

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 and Adoption of New Rules. In a proceeding to which Rule 1101 would make these rules applicable, an amendment to these rules or the adoption of a new rule shall apply if the proceeding begins on or after the effective date of the amendment or adoption.

APPENDIX Z

Advisory Committee's Notes to Amendment to Rule 1103 Effective October 1, 2013

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 to which "proceedings" amendments to the Alabama Rules of Evidence or a new rule will apply, based on the effective date of the amendment or the adoption of a new rule.

Section (b) provides that amendments to the rules of evidence and new rules shall apply to any "proceeding" begun on or after the effective date of the amendment or adoption, without regard to when the action was filed. Conversely, an amendment or new rule will have no application in a "proceeding" begun before the effective date of the amendment or adoption and completed on or after that date. As noted in the Court Comment that 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." 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."); and 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.").