Alabama Rules of Evidence

Article I. General Provisions

Rule 103.

Rulings on evidence.

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) OBJECTION. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) OFFER OF PROOF. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights in a case in which the death penalty has been imposed, even if they were not brought to the attention of the court.

Advisory Committee's Notes

Section (a). Effect of ruling. This subsection, identical to Federal Rule of Evidence 103(a), continues the Alabama doctrine that an evidence ruling is not assignable as error unless (1) a substantial right is affected and (2) the nature of the error is brought to the attention of the trial court in the manner prescribed in Rule 103(a)(1) or Rule 103(a)(2). Section (a) continues the historic "harmless error rule," as well as the traditional judicial applications of that principle. See *Dinmark v. Farrie*r, 510 So.2d 819 (Ala.1987); *Allison v. Lee*, 333 So.2d 149 (Ala.Civ.App.1976). Compare Ala.R.App.P. 45 (an appellate court will not reverse unless "it should appear that the error complained of has probably injuriously affected substantial

rights"); Ala.R.Civ.P. 61 (a reviewing court is to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). See also Colo. Rev. Stat. § 33-103(a) (1984); N.C. Gen. Stat. § 8c-1-103(a) (1986).

This rule's recognition of the harmless error principle is not an invitation for trial courts to ignore the rules of evidence. A court should not admit evidence on the conclusion that although it is improper to admit the evidence, its admission is acceptable if it will not affect a substantial right.

Subsection (a)(1). Objection. This subsection embraces preexisting Alabama law regarding the actions a party must take at trial in order to complain that the trial court erred in admitting evidence. The complaining party is required at trial to formally object or move to strike. *Bell v. State*, 466 So.2d 167 (Ala.Crim.App.1985); *Standridge v. Alabama Power Co*., 418 So.2d 84, 88 (Ala.1982). See *Ex parte Marek*, 556 So.2d 375 (Ala.1989) (a motion for mistrial, specifically stating grounds and lodged immediately after the question is asked, preserves error for appellate review). The objection or motion to strike must be timely. This means that usually, although not invariably, the objection or motion to strike must be made after a question is asked but before the witness answers. *Davis v. Southland Corp*., 465 So.2d 397 (Ala.1985) (objection appeared three pages later in the transcript); *Bryant v. State Farm Fire & Casualty Ins. Co*., 447 So.2d 181 (Ala.1984) (dealing with motion to strike). See *Southern Cement Co. v. Patterson*, 271 Ala. 128, 122 So.2d 386 (1960) (recognizing that a timely objection may be made after an answer in some circumstances). Additionally, the objection or motion must state a specific ground of objection, unless it is apparent from the context. *Holt v. State Farm Mut. Auto. Ins. Co*., 507 So.2d 388 (Ala.1986); *Davis v. Southland Corp*., 465 So.2d 397 (Ala.1985). As in prior Alabama practice, no specific ground of objection is required if the matter to which the objection or the motion to strike is addressed is patently illegal or irrelevant. See *Huntsville Knitting Mills v. Butner*, 200 Ala. 288, 76 So. 54 (1917); *Johnston v. Johnston*, 174 Ala. 220, 57 So. 450 (1912) (use of the word "illegal"); *Bufford v. Little*, 159 Ala. 300, 48 So. 697 (1909) (use of the words "illegal, irrelevant and incompetent"). See also M. Ladd, *Objections, Motions and Foundation Testimony*, 43 Cornell L.Q. 543, 546 (1958) (the author concludes that language like that used in Alabama pre-rules decisions – e.g., "patently illegal and irrelevant" – is, in effect, the same as that used in the federal rule). See generally C. Gamble, McElroy's Alabama Evidence § 426.01 (4th ed. 1991).

Subsection (a)(2). Offer of proof. This subsection is identical to Fed.R.Evid. 103(a)(2). It continues the preexisting Alabama practice under which the party offering the evidence generally may not argue that the trial court erroneously excluded it unless a substantial right of the offering party is affected (see Rule 103(a)), and unless the proponent discloses at trial, by an "offer of proof," the substance of the evidence. *Ensor v. Wilson*, 519 So.2d 1244 (Ala.1987); *White v. State*, 48 Ala.App. 111, 262 So.2d 313 (1972); *Redwine v. State*, 258 Ala.196, 61 So.2d 724 (1952). An offer of proof customarily includes calling the court's attention to the expected answer and explaining the relevancy of that answer. *White v. State*, 48 Ala.App. 111, 262 So.2d 313 (1972). The purpose of this requirement is both to better enable the trial judge to consider the claim for admissibility and to better apprise the reviewing court of what occurred in the trial below. No offer of proof is required when the nature of the evidence is apparent from the context in which questions were asked. *Walton v. Walton*, 409 So.2d 858 (Ala.Civ.App.1982) (expected answer was indicated by the wording of the question); *Killingsworth v. Killingsworth*, 283 Ala. 345, 217 So.2d 57 (1968). Nothing in this rule affects preexisting Alabama authority under which the trial court will not be placed in error for

sustaining an objection when the proponent of the evidence fails to identify which of several multiple parties the evidence is admissible against. *Kriewitz v. Savoy Heating & Air Conditioning Co*., 396 So.2d 49 (Ala.1981). Compare Ala. Code 1975, § 12-21-138 (superseded by this rule). See also C. Gamble, McElroy's Alabama Evidence § 425.01 (4th ed. 1991).

Section (b). Record of offer and ruling. This section recognizes the discretionary power of the trial court to supplement an offer of proof or an objection with clarifying statements. These may indicate the character and form of offered evidence, the objection made regarding the offered evidence, and the ruling thereon. This discretion is consistent with traditional Alabama practice, which recognizes the trial judge's role as more than merely a referee. See *Davis v. Davis*, 474 So.2d 654 (Ala.1985); *Pouncey v. State*, 24 Ala.App. 326, 136 So. 741, cert. denied, 223 Ala. 431, 136 So. 743 (1931). The language used in expressing this concept is virtually the same as that in Ala.R.Civ.P. 43(c), which provides: "The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon."

The last sentence of the section provides that the trial court may direct that an offer of proof be made in question and answer form. This is inconsistent with, and thus supersedes, the last sentence of Ala.R.Civ.P. 43(c), which provided that, at least in nonjury cases, the trial judge was required, if requested, to take and report the evidence in full, unless it clearly appeared that the evidence was inadmissible or that the witness was privileged.

Section (c). Hearing of jury. This section declares the preexisting Alabama practice of vesting the trial judge with the discretion to require that an offer of evidence, along with the accompanying arguments, be made outside the hearing of the jury. See *Birmingham Nat'l Bank v. Bradley*, 108 Ala.205, 19 So. 791 (1895); *Shiflett v. State*, 38 Ala.App. 662, 93 So.2d 523, cert. denied, 265 Ala. 652, 93 So.2d 526 (1957). Consistent with this principle is that strong line of evolving Alabama precedent that encourages Alabama judges to use the motion in limine as a pretrial mechanism for preventing the jury's hearing potentially prejudicial evidence before the court has ruled on its admissibility. See, e.g., *Mason v. New*, 475 So.2d 854 (Ala.1985); *Acklin v. Bramm*, 374 So.2d 1348 (Ala.1979). See also C. Gamble, *The Motion in Limine: A Pretrial Procedure that has Come of Age*, 33 Ala.L.Rev. 1 (1981).

Section (d). Plain error. This rule continues preexisting Alabama law. An appellate court, reviewing a case in which the death penalty has been imposed, may notice plain error even if it was not brought to the attention of the trial court. Ala.R.App.P. 39(k) (applicable to the Alabama Supreme Court); Ala.R.App.P. 45A (applicable to the Alabama Court of Criminal Appeals); Ala. Code 1975, § 12-22-241 (automatic appeal statute). Plain error may not be noticed, of course, unless it has or probably has adversely affected the substantial rights of the appellant. *Reed v. State*, 407 So.2d 153 (Ala.Crim.App.1980), rev'd on other grounds, 407 So.2d 162 (Ala.1981). Stated differently, reversal may be based upon a plain error that was not brought to the attention of the trial court if that error was seriously prejudicial. *Ex parte Dill*, 600 So.2d 372 (Ala.1992), cert. denied,__ U.S. __, 113 S.Ct. 1293 (1993).

Adoption of section (d) constitutes a rejection of the general "plain error doctrine" found in the Federal Rules of Evidence, under which a party in all cases may claim error on appeal, even after failing to properly call the error to the trial court's attention, if the alleged error affected substantial rights. See Fed.R.Evid. 103(d); *United States v. Cannington*, 729 F.2d 702

(11th Cir.1984). This section continues the Alabama rule that matters not raised at the trial level may not be asserted for the first time on appeal except in death penalty cases. See *Jackson v. State*, 260 Ala. 641, 71 So.2d 825 (1954); *McGinnis v. State*, 382 So.2d 605 (Ala.Crim.App.1979), cert. denied, 382 So.2d 609 (Ala.1980). See also C. Gamble, McElroy's Alabama Evidence § 426.01 (4th ed. 1991).