

Stephani & Weissenberger

ALABAMA EVIDENCE

2015 Courtroom Manual

*Including Complete Coverage of the
Alabama Evidence Code*

*With publication of this manual, all prior editions
are obsolete and should be discarded.*



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ALABAMA EVIDENCE

2015 Courtroom Manual

A.J. STEPHANI

Adjunct Professor, University of Cincinnati

Adjunct Professor, Xavier University

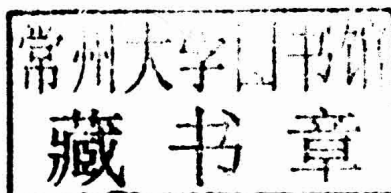
GLEN WEISSENBERGER

Professor of Law Emeritus, University of Cincinnati

Former Dean, DePaul University College of Law

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Paul R. Johnson, J.D. at 1-800-306-5230, Ext. 3355

Email: paul.r.johnson@lexisnexis.com

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Editorial Offices

630 Central Ave., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

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Effective Through July 1, 2014

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ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the State of Alabama, to the extent and with the exceptions stated in rule 1101.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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.

Rule 104. Preliminary Questions

(a) *Questions of Admissibility Generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy Conditioned on Fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition or may admit that evidence subject to the introduction of evidence sufficient to support such a finding.

(c) *Hearing or Presence of Jury.* In criminal cases, hearings on the admissibility of confessions or evidence alleged to have been obtained unlawfully shall be conducted out of the presence of the jury. Hearings on other preliminary matters shall be conducted out of the hearing and presence of the jury when interests of justice require.

(d) *Testimony by Accused.* The accused does not, by testifying at a preliminary hearing on the admissibility of a confession, become subject to cross-examination as to other issues in the case.

(e) *Weight and Credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of Writings or Recorded Statements

When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope of Rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of Facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When Discretionary.* A court may take judicial notice, whether requested or not.

(d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to Be Heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing Jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

(a) *Conclusive and Rebuttable Presumptions.* Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.

(b) *Types of Rebuttable Presumptions.* Every rebuttable presumption is either:

(1) A presumption that affects the burden of producing evidence by requiring the trier of fact to assume the existence of the presumed fact, unless evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof by imposing upon the party against whom it operates the burden of proving the nonexistence of the presumed fact.

(c) *Procedural Impact.* Unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

(d) *Inconsistent Presumptions.* If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight, neither presumption applies.

Rule 302. Applicability of Federal Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which Federal law supplies the rule of decision is determined in accordance with Federal law.

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United

States, or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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

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

(1) **CHARACTER OF ACCUSED.** 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.

(b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Amended, effective 10/1/13).

Rule 405. Methods of Proving Character

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

(b) *Specific Instances of Conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(Amended, effective 10/1/13).

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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.

(Amended, effective 10/1/13).

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

(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.

(Amended, effective 10/1/13).

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere in a federal court or criminal proceeding in another state;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible: (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the

statement was made by the defendant under oath, on the record and in the presence of counsel, or (iii) in any subsequent proceeding wherein voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers are offered as prior inconsistent statements.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Admissibility of Evidence Relating to Past Sexual Behavior of 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 guard-

ian 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.

(Amended, effective 10/1/13).

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 502. Attorney-Client Privilege

(a) **Definitions.** As used in this rule:

(1) "Client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, that is rendered professional legal services by an attorney, or that consults an attorney with a view to obtaining professional legal services from the attorney.

(2) "Representative of the client" is: (i) a person having authority to obtain professional legal services or to act on legal advice rendered on behalf of the

client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client,

(3) "Attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) "Representative of the attorney" is a person employed by the attorney to assist the attorney in rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication.

(b) **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among attorneys and their representatives representing the same client.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney, or the attorney's representative, at the time of the communication may claim the privilege, but only on behalf of the client. The attorney's or the representative's authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **FURTHERANCE OF CRIME OR FRAUD.** If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what

the client knew or reasonably should have known to be a crime or fraud;

(2) **CLAIMANTS THROUGH THE SAME DECEASED CLIENT.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) **BREACH OF DUTY BY AN ATTORNEY OR CLIENT.** As to a communication relevant to an issue of breach of duty by an attorney to the client or by a client to the client's attorney;

(4) **DOCUMENT ATTESTED BY AN ATTORNEY.** As to a communication relevant to an issue concerning the intention or competence of a client executing an attested document to which the attorney is an attesting witness, or concerning the execution or attestation of such a document;

(5) **JOINT CLIENTS.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients.

Rule 503. Psychotherapist-Patient Privilege

(a) *Definitions.* As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is: (A) a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be, while regularly engaged in the diagnosis or treatment of mental or emotional conditions, including alcohol or drug addiction, or (B) a person licensed as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) *General Rule of Privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the

patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) *Exceptions.*

(1) **PROCEEDINGS FOR HOSPITALIZATION.** There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist has determined, in the course of diagnosis or treatment, that the patient is in need of hospitalization.

(2) **EXAMINATION BY ORDER OF COURT.** If the court orders an examination of the mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **ACCUSED IN CRIMINAL CASE.** There is no privilege under this rule as to an accused in a criminal case who raises the defense of insanity.

(4) **BREACH OF DUTY ARISING OUT OF PSYCHOTHERAPIST-PATIENT RELATIONSHIP.** There is no privilege under this rule as to an issue of breach of duty by the psychotherapist to the patient or by the patient to the psychotherapist.

(5) **CHILD CUSTODY CASES.** There is no privilege under this rule for relevant communications offered in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure.

Rule 503A. Counselor-Client Privilege

(a) *Definitions.* As used in this rule:

(1) The term "client" means a person who, for the purpose of securing professional counseling services, consults with a licensed professional counselor or a certified counselor associate. It also means a person who, for the purpose of securing counseling services as the result of either sexual assault or family violence, consults with a victim counselor.

(2) A "licensed professional counselor" is any person who holds himself or herself out to the public by any title or description of services incorporating the

words “licensed professional counselor” or “licensed counselor”; who offers to render professional counseling services to individuals, groups, organizations, corporations, institutions, government agencies, or the general public, implying that the person is licensed and trained, experienced or expert in counseling; and who holds a current, valid license to engage in the private practice of counseling.

(3) A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional counseling services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication.

(4) “Counselor associate” is any person who has been certified by the Alabama Board of Examiners in Counseling to offer counseling services under the supervision of a licensed professional counselor.

(5) “Counseling services” consist of all acts and behaviors that constitute the “practice of counseling” as that term is defined in this rule.

(6) The “practice of counseling” involves the rendering or offering to render counseling services such as, among others, the following methods and procedures employed by the counseling profession:

(A) Counseling. Assisting a person, through the counseling relationship, to develop understanding of personal problems, to define goals, and to plan action reflecting the person’s interests, abilities, aptitudes, and needs as these are related to personal-social concerns, education progress, and occupations and careers.

(B) Appraisal Activities. Selecting, administering, scoring and interpreting instruments designed to assess an individual’s aptitudes, attitudes, abilities, achievements, interests, and personal characteristics, but not including the use of projective techniques in the assessment of personality.

(C) Counseling, Guidance, and Personnel Consulting. Interpreting or reporting upon scientific fact or theory in counseling, guidance, and personnel services to provide assistance in solving some current or potential problems of individuals, groups, or organizations.

(D) Referral Activities. The evaluating of data to identify problems and to determine advisability of referral to other specialists.

(E) Research Activities. The designing, conducting, and interpreting of research with human subjects.

(F) Victim Counseling. The providing of counseling to victims for any emotional or psychological

impact resulting from a sexual assault or family violence.

(7) “Victim counselor” means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor’s office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.

(8) “Sexual assault” includes any sexual offense set out in Ala. Code 1975, §§ 13A-6-60 through 13A-6-70.

(9) “Family violence” means the occurrence of one or more of the following acts between family or household members:

(A) Attempting to cause or causing physical harm.

(B) Placing another in fear of imminent serious physical harm.

(10) The designation “family or household members” encompasses children, spouses, former spouses, persons of the opposite sex living as spouses now or in the past, or persons 60 years of age or older living in the same household and related by blood or marriage.

(11) “Victim counseling center” means a private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence.

(b) *General Rule of Privilege.* A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating the rendition of counseling services to the client.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the client, the client’s guardian or conservator, or the personal representative of a deceased client. The person who was the licensed counselor, counselor associate or victim counselor at the time of the communication is presumed to have the authority to claim the privilege, but only on behalf of the client.

(d) *Exceptions.*

(1) PROCEEDINGS FOR HOSPITALIZATION. In proceedings to hospitalize the client for mental illness, there is no privilege under this rule for communications relevant to an issue in those proceedings if the counselor or counselor associate has determined, in the

course of counseling, that the client is in need of hospitalization.

(2) **EXAMINATION BY ORDER OF THE COURT.** If the court orders an examination of the mental or emotional condition of a client, whether a party or witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.

(3) **WHEN THE CLIENT'S CONDITION IS AN ELEMENT OF A CLAIM OR DEFENSE.** There is no privilege under this rule as to a communication relevant to an issue regarding the mental or emotional condition of the client, in any proceeding in which the client relies upon the condition as an element of the client's claim or defense, or, after the client's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(4) **BREACH OF DUTY ARISING OUT OF THE COUNSELOR-CLIENT RELATIONSHIP.** There is no privilege under this rule as to an issue of breach of duty by the counselor, counselor associate, or victim counselor to the client or by the client to the counselor, counselor associate, or victim counselor.

(5) **VICTIM COUNSELING IN CIVIL CASES.** There is no privilege under this rule in civil cases as to a communication made to facilitate victim counseling when the person conducting the counseling is neither a licensed professional counselor nor a counselor associate, except that under no circumstances may a victim counselor or a victim be compelled to provide testimony in any proceeding that would identify the name, address, location, or telephone number of a "safe house," abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding, unless the facility is a party to the proceeding.

Rule 504. Husband-Wife Privilege

(a) *Definition of "Confidential" Communication.* A communication is "confidential" if it is made during marriage privately by any person to that person's spouse and is not intended for disclosure to any other person.

(b) *General Rule of Privilege.* In any civil or criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying as to any confidential communication made by one spouse to the other during the marriage.

(c) *Who May Claim the Privilege.* The privilege may be claimed by either spouse, the lawyer for either

spouse in that spouse's behalf, the guardian or conservator of either spouse, or the personal representative of a deceased spouse. The authority of those named to claim the privilege in the spouse's behalf is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) **PARTIES TO A CIVIL ACTION.** In any civil proceeding in which the spouses are adverse parties.

(2) **FURTHERANCE OF CRIME.** In any criminal proceeding in which the spouses are alleged to have acted jointly in the commission of the crime charged.

(3) **CRIMINAL ACTION.** In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either, or (D) a third person if the crime is committed in the course of committing a crime against any of the persons previously named in this sentence.

Rule 505. Communications to Clergymen

(a) *Definitions.* As used in this rule:

(1) A "clergyman" is a duly ordained, licensed, or commissioned minister, pastor, priest or rabbi, or practitioner of any bona fide established church or religious organization; the term "clergyman" includes, and is limited to, any person who regularly, as a vocation, devotes a substantial portion of his or her time and abilities to the service of his or her church or religious organization.

(2) A communication is "confidential" if it is made privately and is not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) *General Rule of Privilege.* If any person shall communicate with a clergyman in the clergyman's professional capacity and in a confidential manner, then that person or the clergyman shall have a privilege to refuse to disclose, and to prevent another from disclosing, that confidential communication.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the communicating person, by that person's guardian or conservator, or by that person's personal representative if that person has died, or by the clergyman.

Rule 506. Political Vote

(a) *General Rule of Privilege.* Every person has a privilege to refuse to disclose the tenor of such

person's vote at a political election conducted by secret ballot.

(b) *Exceptions.* This privilege does not apply if the vote was cast illegally or if disclosure is compelling pursuant to election laws.

Rule 507. Trade Secrets

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Rule 508. Secrets of State and Other Official Information: Governmental Privileges

(a) *Claim of Privilege Under Federal Law.* If the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) *Privileges Recognized Under State Law.* No other governmental privilege is recognized except as created by the Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama.

(c) *Effect of Sustaining Claim.* If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, such as striking the testimony of a witness, declaring a mistrial, making a finding upon such an issue as to which the evidence is relevant, or dismissing the action.

Rule 509. Identity of Informer

(a) *Rule of Privilege.* The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished to a law enforcement officer information relating to or assisting in an investigation of a possible violation of a law.

(b) *Who May Claim.* The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished or the public entity bringing the prosecution.

(c) *Exceptions.* (1) **VOLUNTARY DISCLOSURE; INFORMER AS A WITNESS.** No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed, by a holder of the privilege or by the

informer's own action, to those who would have cause to resent the communication or if the informer appears as a witness for the prosecution.

(2) **TESTIMONY ON RELEVANT ISSUE.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case, and the privilege has been invoked, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply with an order to disclose the informer's identity, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required, prohibiting the prosecuting attorney from introducing specified evidence, or dismissing charges. In fashioning appropriate relief in civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved, to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the public entity asserting the privilege. During an in camera showing, for the purpose of determining the applicability of the present privilege, no party should be present, but in its discretion, the court may allow counsel for any party and counsel for the public entity to be present.

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;
- (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.

(Amended, effective 10/1/13).

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

A claim of privilege is not defeated by a disclosure which was: (a) compelled erroneously or (b) made without opportunity to claim privilege.

Rule 512. Comment Upon or Inference from Claim of Privilege in Criminal Cases; Instruction

(a) *Comment or Inference Not Permitted.* In a criminal case, the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming Privilege Without Knowledge of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Rule 512A. Comment Upon or Inference from Claim of Privilege in Civil Cases

(a) *Comment or Inference Permitted.* In a civil action or proceeding, a party's claim of a privilege, whether in the present action or proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn from the claim.

(b) *Claim of Privilege by Nonparty Witness.* The claim of a privilege by a nonparty witness in a civil action or proceeding is governed by the same principles that are applicable to criminal cases by virtue of Rule 512.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Rule 604. Interpreters

Interpreters are subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) *At the Trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into Validity of Verdict or Indictment.*

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any

party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

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

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

(Amended, effective 10/1/13).

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General Rule.* For the purpose of attacking the credibility of a witness,

(1) (A) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially out-

weighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of Pardon, Annulment, or Equivalent Procedure.* Evidence of a conviction is admissible under this rule even if the conviction has been the subject of a pardon, annulment, or equivalent procedure.

(d) *Juvenile or Youthful Offender Adjudications.* Evidence of juvenile or youthful offender adjudications is not admissible under this rule.

(e) *Pendency of Appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by Court.* The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time and, (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination.* The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness, except when a party calls an adverse party or an officer, a director, or a managing agent of a public or private corporation or a partnership or association that is an adverse party, or a witness identified with an adverse party. In those excepted situations, cross-examination by the adverse party may be only upon the subject matter of the witness's examination-in-chief or upon the witness's credibility.

(c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness, except when justice requires that they be allowed. Leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing Used to Refresh Memory

(a) *General Rule.* Any writing may be used to refresh the memory of a witness.

(b) *Production of Writing Used to Refresh Memory.* If while testifying a witness uses a writing to refresh his or her memory, then an adverse party is entitled, upon request, to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions of it relating to the witness's testimony. If it is claimed, in opposition to such a request, that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not delivered pursuant to the order under this rule, the court shall make any order justice requires, except that in a criminal case if the prosecution does not comply, the order shall be one striking the testimony of the witness whose memory was refreshed or, if the court in its discretion determines that the interests of justice so require, the order shall be one dismissing the indictment or other charging instrument or declaring a mistrial.

Rule 613. Prior Statements of Witnesses

(a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the circumstances of the statement and is afforded an opportunity to admit or to deny having made it. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by Court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by Court.* The court may inter-

rogate witnesses, whether they were called by the court or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of: (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a victim who is unable to attend, the victim's guardian, or the victim's family.

Rule 616. Impeachment by Evidence of Bias, Prejudice, or Interest

A party may attack the credibility of a witness by presenting evidence that the witness has a bias or prejudice for or against a party to the case or that the witness has an interest in the case.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

- (1) The testimony is based on sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to nonjuvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under Ala. Code 1975, § 36-18-30.

(c) Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

(Amended, effective 1/1/12).

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.

(Amended, effective 10/1/13).

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause, why expert witnesses should not be appointed, and may request the parties to submit