How to Successfully Make and Manage Objections at Trial in Alabama

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By:

Benjamin E. Baker

James P. Rea

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OBJECTIONS AT TRIAL

I. RULES OF EVIDENCE

A. Relevant State and Federal Rules

Mastering the rules of evidence, whether in state or federal court, is an essential tool in being an effective advocate for your client. With a standing knowledge of the relevant rules of evidence, you can make effective objections which will dictate the substance, course and outcome of the trial. A form of the Federal Rules of Evidence was adopted by the State of Alabama on July 19, 1995. Alabama's newly adopted Rules of Evidence became effective on January 1, 1996. However, one should not overemphasize the impact of the federal model on the Alabama Rules of Evidence. It is important to note that they are not clones of each other. There are numerous instances when it was decided to reject a particular federal principle and abide by the pre-existing Alabama evidence rule. Therefore, in a very real sense, the Alabama Rules of Evidence are not the Federal Rules of Evidence. The following are the major instances in the areas of evidence and objections when rejection or modification of the corresponding federal rule occurred:

Rule 103(d) - Plain Error)
)
Rule 104(c) - Hearing or Presence of Jury) Excluded
)
Rule 104(d) - Testimony by Accused)

Rule 106 - Remainder of Writings or Recorded Statements

Both the federal and state versions of the "completeness doctrine" permit one party to offer portions of a writing or recording which are relevant to portions already offered by the opponent. Alabama. R. Evid. 106; Fed. R. Evid. 106; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct.

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439, 102 L.Ed.2d 445 (1988); *Stockard v. State*, 391 So.2d 1049 (Ala. Crim. App. 1979).

The Alabama Rule of Evidence 106, however, rejects the federal expansion to include the right to offer entirely separate writings or recordings to be considered contemporaneously with an already admitted writing or recorded statement, and maintains the "completeness doctrine" within its original boundaries. Ala. R. Evid. 106 advisory committee's notes; *Lambert v. Beverly Enters,* Inc., 695 So.2d 44 (Ala. Civ. App. 1997); *Hargress v. City of Montgomery*, 479 So.2d 1137 (Ala. 1985). Alabama Rule 106, for example, has no impact upon instances when the completeness doctrine is applied to unrecorded conversations. Therefore, if one party proves any part of an unrecorded oral conversation or statement, the other party has the right to prove the relevant remainder of it. *Abram v. State*, 574 So.2d 986 (Ala. Crim. App. 1990).

The Alabama Rule of Evidence 106, applying only to writings or recorded statements, allows the opposing party to rebut the portion of the same writing or recording admitted to enter in the remainder, or portions thereof, of the writing or recorded statement. Ala. R. Evid. 106; *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). For example, if only a part of a deposition is offered by one party, an adverse party may require introduction of so much of the remainder as is relevant to that portion brought out originally. *See also,* Ala. R. Civ. P. 32(a)(4).

Rules 404(a)(1) - Character of Accused & 405(a) - Reputation or Opinion

Historically, the accused, under Alabama's "mercy rule", has been authorized to prove his good character by calling a character witness to relate the accused's general reputation, either as a whole or with regard to a trait pertinent to the charged crime. *R.D. v. State*, 706 So.2d 770 (Ala. Crim. App. 1981). *See* McElroys § 27.01(1).

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By contrast, in federal court, evidence of a person's character as a whole is not admissible for this purpose. Fed. R. Evid. 404(a). Fed. R. Evid. 404(a)(1) limits proof of an accused's good character to a "pertinent trait". Fed. R. Evid. 404(a)(1). Additionally, in federal court, the character witness may be asked to give his personal opinion as to the accused's character for a pertinent trait. Fed. R. Evid. 405(a); *Michelson v. United States*, 335 U.S. 469 (1948).

Both of the federal differences were rejected in the Alabama Rules of Evidence. Under the Alabama Rule of Evidence 404(a)(1), the accused is left with reputation in the community as the only form of character proof. Ala. R. Evid. 404(a)(1). Unlike the corresponding Federal Rule of Evidence, the Alabama Rule does not permit a character witness to give a personal opinion of the accused's character. Ala. R. Evid. 404(a)(1); *See* McElroy § 27.01(1). The character witness may testify as to reputation only, either as a whole or a pertinent trait. Ala. R. Evid. 405(a); *Chunn v. State*, 402 So. 2d 1139 (Ala. Crim. App. 1981). However, before doing so, the proper foundation is required. Before a character witness may relate the accused's general reputation, he first must show that the he has sufficient contacts with the community to know the accused reputation in the community. Ala. R. Evid. 405(a) advisory committee's notes. Second, it must be shown that the accused has sufficient contacts with the community to have generated a general reputation in the community. *See* McElroy §§ 26.02(5), 27.01(2); *See also, Steele v. State*, 389 So. 2d 591 (Ala. Crim. App. 1980).

Rule 412 - Admissibility of Evidence Relating to Past Sexual Behavior of Complaining Witness in Prosecution for Criminal Sexual Conduct

The historic admission of a victim's sexual character, as a means of proving consent, has been limited significantly by "rape shield" statutes adopted on both the State and Federal levels. The

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federal statute was incorporated into the Federal Rules of Evidence. Fed. R. Evid. 412; *U.S. v. Duncan*, 855 F.2d 1528 (11th Cir. 1988). The Federal Rule of Evidence 412 applies to both criminal and civil proceedings and is aimed at safeguarding the alleged victim against invasion of privacy, potential embarrassment or sexual stereotyping from evidence of her past sexual behavior. However, evidence may be offered to rebut a claim or defense or prove false prior claims. *U.S. v. Duncan*, 855 F.2d 1528 (11th Cir. 1988).

The Alabama Rules of Evidence, however, decided to incorporate Alabama's own rape shield statute, rejecting the federal version. Ala. R. Evid. 412.; See Ala. Code § 12-21-203. Alabama's preexisting statute provided for the general exclusion of evidence regarding the past sexual behavior of a victim of criminal sexual conduct has been rewritten with slight modifications, as Ala. R. Evid. 412; *See* McElroy § 32.01. Alabama Rule of Evidence 412 shields the victim from any evidence of his or her marital history, mode of dress, general reputation for promiscuity, or sexual morals contrary to the community standards. *Jackson v. State*, 375 So.2d 1271 (Ala. Crim. App. 1979). Alabama Rule of Evidence also precludes testimony of a character witness' opinion of the victims's character for such traits. Ala. R. Evid. 412(a)(3). Advisory committee's notes. Accordingly, Alabama's Rule 412 substantially differs from its federal counterpart. Alabama's Rule of Evidence 412 maintains a complete exclusion of all prior sexual behavior in any prosecution for criminal assault and is limited to criminal proceedings, where the federal rule applies in both criminal and civil proceedings.

Rule 606(b) - Upon Inquiry into Validity of Verdict or Indictment

The Federal Rules of Evidence exclude juror testimony, at least regarding matters or statements occurring during jury deliberations, when offered either to attack or support the juror's

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own verdict.

However, Alabama historically has held jurors incompetent when attacking the verdict but allow the testimony when offered to testify in support of the verdict. *Volkswagen of Am., Inc. v. Marinelli*, 628 So.2d 378, 388 (Ala. 1993); *Jones v. State*, 224 So.2d 890, 894 (Ala. 1969). The more expansive federal form of the preclusion was rejected in favor of pre-existing Alabama law.

Rule 608(b) - Specific Instances of Conduct

The Federal Rules of Evidence contain a method of impeachment, unknown to the common law of Alabama, which permits asking a witness about that witness' own prior, nonconvicted acts which are relevant to untruthfulness on cross examination. Alabama Rule of Evidence 608(b) rejected the federal model's broader method of impeachment.

Alabama Rule of Evidence 608 establishes the principle that a witness' specific acts that have not been the basis of a criminal conviction may not be asked about or proved by extrinsic evidence when evidence of them is offered to atack or to uport credibility. Rule 608 precludes evidence of acts, for which there has been no conviction, when such is offered to prove whether the witness committing the act is telling the truth. Ala. R. Evid. 608(b).

An nonconvicted act may be used to impeach, but only if they qualify under one of the traditional grounds of impeachment such as bias or inconsistency. *See* McElroy §149.01(1), §155.02(3). However, anytime a witness has testified to another's truthfulness or untruthfulness, it is proper to cross-examine such witness' character for truthfulness and untruthfulness, without the availability of extrinsic evidence. Ala. R. Evid. 608(b).

Rule 609(d) - Juvenile Adjudications

The Federal Rules of Evidence introduce one instance when a juvenile conviction may be

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used to impeach. This arises in a criminal case when the witness is not the accused, the conviction would qualify for impeachment if the witness were an adult, and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

This exception to the rule precluding impeachment by juvenile conviction was rejected and the Alabama Rules of Evidence continue the pre-existing law of absolute exclusion from preexisting Alabama law, as embodied in both a statute and the decisions interpreting that statute. *See Copeland v. State Farm Mutual Ins.*, 536 So.2d 931 (Ala. 1988).

Rule 611(b) - Scope of Cross-Examination

Federal courts permit a "limited" cross-examination. This means that the scope of one's cross-examination of the opponent's witness permits two types of questions: (1) any question relevant to any matter brought out through the witness on direct-examination and (2) any question relevant to credibility. Fed. R. Evid. 611(b) advisory committee's notes.

The Alabama Rules of Evidence chose to continue Alabama's historic "wide-open" cross-examination. This more generous principle permits any question on cross that is either relevant to an issue in the case or relevant to credibility. Ala. R. Evid. 611(b). However, "limited" cross-examination does apply under the Alabama Rules of Evidence when one cross-examines his or her own party or a witness identified with his or her party, who was called and directly examined by his opponent. *Alabama Power Co. v. Brooks*, 479 So.2d 1169 (Ala. 1985); *See also* McElroy § 438.01(1).

Rule 611(c) - Leading Questions

The Alabama Rules of Evidence provide that leading questions are always permitted on cross-examination, without exception. Ala. R. Evid. 611(c); Ala. Code § 12-21-138 (1990).

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The Federal Rules of Evidence, in contrast, vest the trial judge with discretion to deny leading questions on cross-examination. For example, cross-examination of a party by his own counsel after being called by the opponent, similar to re-direct, or of an insured defendant who proves to be friendly to the plaintiff may be allowed. Fed. R. Evid. 611(c).

Rule 612 - Writing Used to Refresh Memory

Alabama Rule of Evidence 612 differs from the federal model in several respects. First, subsection (a), which is not found in the Federal Rules of Evidence, was added in order to change the practice in Alabama that any writing used to refresh memory must have been either written or seen by the witness while the matter was fresh in the witness's mind and that the witness then knew it to be correct. Ala. R. Evid. 612. Section (a) now permits the use of any writing for refreshing a witness's memory. Ala. R. Evid. 612 advisory committee's notes. This differs from the pre-existing Alabama practice by which a writing used to refresh, under the doctrine of "present recollection revived," was required to meet the same prerequisites as were required of a document admitted under "past recollection recorded." This addition is intended to adopt the traditional American rule that any writing, without meeting any required characteristics, may be used to refresh a witness's memory. *See generally, United States v. Riccardi*, 174 F.2d 883 (3d Cir. 1949)(classic case explaining the difference between refreshing memory and past recollection recorded and that the material is not being used merely as a subterfuge to suggest to the witness the testimony expected of him).

A second difference between the Alabama Rule and the corresponding Federal Rule lies in the breadth of access afforded to a writing used to refresh the opponent's memory. Both the federal

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and Alabama versions continue a litigant's historic right to see, inspect and use a writing used to refresh while testifying. Ala. R. Evid. 612(b); Fed. R. Evid 612(b). However, Alabama rejects the federal expansion which grants these same access rights to writings used to refresh a prospective witness' memory before testifying. Ala. R. Evid. 612 advisory committee's notes; McElroy § 116.02(7).

Rule 613(b) - Extrinsic Evidence of Prior Inconsistent Statements of Witness

Extrinsic evidence of a witness' prior inconsistent statement gains admissibility under traditional Alabama common law, but only if the witness is first confronted on cross-examination with the statement and given an opportunity to admit or deny it. *Ex parte Hooper*, 585 So.2d 137 (Ala. 1987); *Green v. State*, 171 So. 643, 644 (Ala. 1937). The Federal Rules of Evidence relax this requirement and permit such evidence, so long as the witness is afforded, at some point in the trial, an opportunity to explain or deny the statement. Fed. R. Evid. 613.

No such relaxation is incorporated into the Alabama version. Rather, the pre-existing Alabama principle that a proper predicate must be established, by confronting the witness with the prior inconsistent statement, before offering extrinsic evidence to prove it, is continued. Ala. R. Evid. 613(b); *See* also, Ala. R. Evid. 613(b) advisory committee's notes. Before the extrinsic evidence can be admitted under the Alabama Rule, the witness must first be afforded an opportunity to deny that the prior statement was made. *See Perry v. Brakefield*, 534 So.2d 602 (Ala. 1988).

Rule 703 - Bases of Opinion Testimony by Experts - Treatises

The Federal Rules of Evidence allows an expert to base an opinion upon inadmissible matters, such as hearsay, if it is a type reasonably relied upon by similar experts in the particular field.

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Alabama courts have consistently rejected pressure to adopt this principle by case law. *See Ex parte Wesley*, 575 So. 2d 127 (Ala. 1990); *Nash v. Cosby*, 574 So.2d 700 (Ala. 1990). It should be noted, however, that there are a number of instances when Alabama decisions have affirmed the admission of expert opinions based upon hearsay and other evidence that has not been admitted. *See, e.g.*, *Drummond Co. v. Bushel*, 641 So. 2d 1240 (Ala. 1994); *Volkswagen of Am., Inc. v. Marinelli*, 628 So. 2d 378 (Ala. 1993); *Ex parte Wesley*, 575 So. 2d 127 (Ala. 1990); *Sidewell v. Wooten*, 473 So. 2d 1036 (Ala. 1985). However, consistent with this case law rejection, the Alabama Rules of Evidence continue pre-existing law under which an expert may base his opinion on a report only if it has been admitted into evidence, thus rejecting the federal principle. Ala. R. Evid. 703 and advisory committee's notes. *See also* McElroy §§ 127.02(5), 130.01.

Rule 704 - Opinion on Ultimate Issue

This is currently an issue of great controversy for those who regularly practice in both federal and state courts. The Federal Rules of Evidence liberalize the opinion evidence concept in several regards. Accordingly, no such objection to a witness offering an opinion on the ultimate issue is recognized under the Federal Rules of Evidence. Fed. R. Evid 704.

Traditional Alabama evidence law precludes a witness from offering an opinion upon an ultimate issue in the case. *McLeod v. Cannon Oil Corp.*, 603 So.2d 889 (Ala. 1992); *Robinson v. State*, 574 So.2d 910 (Ala. Crim. App. 1990). Such opinions are deemed inappropriate because they permit the lay or expert witness to preempt the role of the trier of fact. *Burkett v. Loma Mach. Mfg., Inc.*, 552 So. 2d 134 (Ala. 1989). Opinions on ultimate issues, therefore, remain objectionable under the Alabama Rules of Evidence. Ala. R. Evid. 704.

It should be noted, however, that Alabama case law has been very liberal in affirming the

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admission of opinions that appear to go to the ultimate issue. Case law in Alabama can realistically be categorized as having drifted away from a literal application of the traditional "ultimate issue rule" and toward the test of whether the opinion will assist the trier of fact. *Harrison v. Wientjes*, 466 So.2d 125 (Ala. 1985). For example, opinions have been admitted as to insanity, handwriting and value, despite the fact that these often either constitute or coincide with the ultimate issue in the given litigation. *See* McElroy §§ 128.01, 128.02, 128.04. *Lawrence v. First Nat'l Bank of Tuscaloosa*, 516 so.2d 630 (Ala. 1987); *Ex parte Lee*, 506 So.2d 301, 303 (Ala. 1987); However, such opinions remain completely inadmissible if the opinion involves a legal definition or conclusion. *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986).

Rule 706(c) - Court Appointed Experts - Disclosure of Appointment

Federal practice vests discretion in the trial judge to inform the jury that an expert witness was appointed by the court. Fed. R. Evid. 706(c).

The Alabama Rules of Evidence, however, provide that such judicial appointment will not be disclosed to the jury. Ala. R. Evid. 706(c). Rejection of the federal principle was based upon the belief that such disclosure would cause the jury to give inordinate weight to the court's expert and to ignore the experts called by the parties. *Elliot v. State*, 266 So.2d 321, 322 (Ala. Crim. App. 1972) (stating that "the trial judge should avoid the appearance of having prejudged any testimony offered").

Rule 801(d)(1)(C) - Hearsay Exclusion - Prior Statements by Witness

A statement made by a person who recognizes and identifies the accused after observation of the accused, (for example, in a line-up) is rendered admissible under the Federal Rules of Evidence as nonhearsay when the person making the identification testifies at the trial or hearing

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and is subject to cross-examination concerning the statement.

Alabama has long held that such a statement would be admissible but, unlike the federal principle, not as substantive truth of the matter asserted. *See Whitmore v. Burge*, 512 So.2d 1320 (Ala. 1987). The pre-existing Alabama law continues to be valid and the Federal Rule was rejected.

Rule 803(16) - Hearsay Exception - Statements in Ancient Documents

The Federal Rules of Evidence adopt a shortened, twenty-year period for determining the necessary age of a document to qualify under the ancient documents exception to hearsay.

The drafters of the Alabama Rules of Evidence chose, in contrast, to continue the traditional thirty-year rule as the proper measure of the prerequisite age. This same thirty-year rule likewise appears in the ancient document exception to Alabama's authentication rule.

Rule 804(b)(1) - Hearsay Exception - Former Testimony Exception

The Alabama Rules of Evidence reject the federal version of the former testimony exception to the hearsay rule. Instead, Alabama Rule of Evidence 804(b)(1) is intended as a restatement of pre-existing Alabama law with regard to the former testimony exception to the hearsay rule.

Traditionally, Alabama has excluded from the hearsay rule former testimony if the declarant is unavailable. Ala. R. Enid. 804(b)(1). The threshold requirement for this admissibility of such testimony is that the declarant is unavialble. However, such testimony is only admissible if it was given under oath at a deposition or hearing, before an officer or tribunal vested with the legal authority to take sworn testimony, there was an opportunity for the adverse party to test the credibility through cross-examination, and such statements were given in litigation which is substantial the same as the present cause of action. Ala. R. Evid. 804(b)(1). *Nolen v. State*, 469 So.d 1326 (Ala. Crim. App. 1985). The party against whom the testimony is offered must have been a

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party to the prior criminal proceeding or have been a party to, or have a predecessor in interest, who was a party to the civil proceeding.

The federal counterpart differs from the Alabama Rule, in that it is not as stringent in it's applicability. Federal Rule of Evdience 804(b)(1) does not require the former proceeding to be "in litigation in which the issues and parties were substailally the same as in the present cause" as does the Alabama Rule. Fed. R. Evid. 804(b)(1); Ala. R. Evid. 804(b)(1).

Rule 804(b)(2) Hearsay Exception: Dying Declaration: Statement Under Belief of Impending Death

The dying declaration exception in Alabama would have undergone significant expansion if the federal model had been adopted. The Federal Rule allows the application of the hearsay exception to be applied in criminal prosecutions for homicide or civil proceedings upon the showing that the declarent believed that she was about to die and such statement concerned the cause or circumstances of the impending death. Fed. R. Evid. 804(b)(2). Such adoption in Alabama would have introduced the hearsay exception of dying declarations in civil cases. Ala. R. Evid. 802(b)(2).

The Alabama Rules of Evidence rejected this aspect of the federal expansion and continues to limit the dying declaration exception to criminal cases; as under preexisting Alabama law, the exception does not apply in civil cases. It should be noted, however, that other aspects of the federal rule have been adopted. No longer is it required, for example, that the declarant's death serve as the basis of the prosecution as previously under the common law of Ala. Application of this traditional requirement had the peculiar result of excluding the dying declaration of "A" in a prosecution for the death of "B" when both were killed in the same manner as the accused. *Allsupp v. State,* 72 So. 599 (Ala. Civ. App. 1916). Now, in Alabama the exception is applicable in any criminal case.

Rule 804(b)(3) - Hearsay exception - Declaration Against Interest

Alabama common law has historically limited the declaration against interest exception to hearsay statements which were, at the time of their making, against the pecuniary or proprietary interest of the declarant. *Lavett v. Lavett*, 414 So. 2d 907, 910 (Ala. 1982), overruled on other grounds by *McBride v. McBride*, 548 So. 2d 155, 157 (Ala. 1989).

The Federal Rules of Evidence expand this to include statements which would have subjected the declarant to civil and criminal liability or have rendered invalid a claim by the declarant against another party. Fed. R. Evid. 804(B)(3).

This expansion is rejected in the Alabama Rules of Evidence. Alabama Rule of Evidence 804(b)(3) continues to restate the pre-existing common law exception to the hearsay rule.

Rule 804(b)(5) Hearsay Exceptions: Other Exceptions

Rules 803 and 804 contain the exceptions to the hearsay rule. Rule 804 contains those exceptions which are inapplicable unless the declarant is unavailable. The Rule 803 exceptions, however, apply without regard to the availability of the person who made the statement. Even if a particular statement does not qualify under one of the enumerated exceptions, the Federal Rules of Evidence provide a "catchall" exception under which the judge nevertheless may admit the statement if it was made under circumstances guaranteeing trustworthiness equivalent to that assured by the other exceptions. Fed. R. Evid. 807. Federal Rule of Evidence 807 became effective December, 1997 and encompasses the "catchall" exception of the previous Fed. R. Evid. 803(24). The statement under the "catchall" exception must be offered to prove a material fact, possess probative value on the point for which it is offered that is greater than any other available evidence, and best

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serve the interests of justice by being admitted. Fed. R. Evid. 807.

Alabama's hearsay practice is categorized, in contrast to the Federal Rules, as a "closed system." This means that when an out-of-court statement fails to qualify under one of the existing exceptions and is offered to prove the truth of the matter asserted, it is inadmissible. No discretion is vested in the trial court to admit such a statement simply because it is trustworthy and the Alabama Rules of Evidence contain no such "catchall" exception.

Rules 1001(1) - Writings, 1001(2) - Original & 1002 - Requirement of Original

The Federal Rules of Evidence expand the best evidence rule, which previously only applied to writings, to include recordings and photographs.

Alabama Rules of Evidence rejected this federal expansion of the best evidence rule. In Alabama the best evidence objection continues to be viable only when secondary evidence is offered to prove the contents of a writing. For, example, tape recordings and re-recordings of taped conversation present no best evidence issue. *See O'Daniel v. O'Daniel*, 515 So.2d 1250 (Ala. 1987); McElroy's Alabama Evidence § 212.01 (4th ed 1991).

Rule 1004 - Admissibility of Other Evidence of Contents

Under the federal rules, once an original writing has been shown to be unavailable, the best evidence rule is satisfied and the door is opened to secondary proof as to the contents of the original.

This result is modified in Alabama by a principle known as "degrees of secondary evidence". Since secondary proof in the form of a copy is of the first degree, while oral testimony is of the second degree, the Alabama doctrine provides that one may not offer oral testimony as to the contents of an original writing without first producing or accounting for the unavailability of a known copy. *Williams v. Lyon*, 61 So. 299 (Ala. 1913).

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The Federal Rules of Evidence abandon this doctrine and provide that there are no degrees of secondary proof, meaning that all forms of secondary proof are equally admissible once the unavailability of the original has been shown. Ala. R. Evid. 1004.

The Alabama Rules of Evidence reject the federal example and continue to recognize that there are degrees of secondary evidence. Ala. R. Evid. 1004. It remains in Alabama, that one may not offer oral testimony as to the contents of a writing without first having to produce or account for the nonproduction of a copy that is reputed to exist. Ala. R. Evid. 1004.

B. Recent State and Federal Cases

Rule 802 - Hearsay

The Alabama Supreme Court ruled that three witnesses were permitted to testify that the victim had stated several weeks before her murder that the defendant had threatened to kill both herself and the other victim. The Court found this testimony relevant because it tended to negate the mitigating circumstances which the defendant was attempting to prove that he never contemplated killing anyone. The court found that the testimony was admissible because it was a statement of the "declarant's" then existing emotions or state of mind falling within one of the recognized exceptions to the rule of hearsay. Ex parte Dunaway, [Ms. 1980571, 8/20/00]____So.2d____(Ala. 1999).

The Court of Civil Appeals ruled that an accident report was inadmissible in that it violated the hearsay rule and did not fall into any exception because neither of the investigating officers was a witness to the accident and their report recounted the statements and conclusions of others. Stevens v. Stanford, 1999 WL 1000941, *3 (Ala.Civ.App.)

Evidence Admissibility

A photograph of the position of the decedent's body on the front seat of her vehicle was held

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to be relevant to the argument that she had died some time after the collision. The photographs apparently supported the plaintiff's argument that she did not die instantly in the collision and, therefore, the time of the collision could have occurred earlier than when the Defendant's suggested. Tillis Trucking Co., Inc. v. Moses, 1999 WL 6991, *3 (Ala. 1999).

The Court ruled that no expertise was necessary to compare the paint found on the damaged trailer and the bumper of the vehicle in question to see if the patterns of damage matched. The Court found that these were observations that anyone could make without expertise. Tillis Trucking Co., Inc. v. Moses at *6.

Rule 615 - Exclusion of Witnesses

Under Federal law, a party is not entitled to invoke "The Rule of Sequestration" of Rule 615 as a matter of right in oral depositions taken in civil cases.

II. Objecting to Physical Evidence

A. Admissibility

In order to offer writings, objects, and other real or demonstrative evidence into evidence, a proper foundation must be laid to show that the evidence is what the offering party purports it to be. Ala.R.Evid.901(a). The foundational showing has to be sufficient to "support a finding that the matter in question is what its proponent claims." Ala.R.Evid. 901(a). *See* McElroy § 379.01(2); United States v. Paulino, 13 F.3d 20 (1st Cir. 1994).

The necessary foundation required to authenticate evidence may be satisfied by direct proof with eyewitness testimony or by circumstantial evidence. *See* Ala.R.Evid. 901(b)(2) to (10). However, even though the offered evidence has been sufficiently authenticated for admission, the ultimate question of authenticity rests with the jury. Ala.R.Evid. 901 (a) advisory committee notes.

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B. Demonstrative Evidence

Demonstrative evidence is unique in that it does not have a historical connection to any of the transactions giving rise to the suit; demonstrative evidence is not the actual will that the decedent signed before his death or the very pistol the defendant used during the assault. Rather, demonstrative evidence is used as an illustration to assist in the oral testimony of a witness on the stand. Usually, demonstrative evidence includes models, diagrams, photographs, videotapes, and X-rays each requiring particular foundations before the trial court will permit their use.

In laying the foundation for a diagram or any other piece of demonstrative evidence including photographs etc., the sponsoring witness must testify that the evidence is generally a "true," "accurate," "good," or "fair" depiction of the scene or object shown. If the diagram is not to scale, the opposing counsel is entitled to a limiting instruction. The following are the elements of a proper foundation:

1. The diagram(photograph etc.) depicts a certain area or object.

2. The witness is familiar with that area or object.

3. The witness explains the basis for his or her familiarity with the area or object.

4. In the witness's opinion, the diagram (photograph etc.) is an accurate depiction of that area or object. Edward J. Imwinkelried, Evidentiary Foundations 89 (4th ed. 1998).

It is important to note that the usefulness of diagrams generally requires that the witness mark the diagram while he or she gives their oral testimony to help the jury to actually visualize the witness' testimony. Some judges however require that an exhibit be completely marked before it is formally offered into evidence and will not permit any further marking after the exhibit has been received into evidence. Therefore, counsel should inquire into a judge's preference before the trial

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begins.

When laying the foundation for a model, many jurisdictions require that the proponent affirmatively show that the witness needs the model to adequately explain his or her testimony. The foundation for the use of a model should include the following elements:

1. The witness needs the visual aid to explain his or her testimony.
2. The aid depicts a certain scene or object.
3. The witness is familiar with the scene or object.
4. The witness explains the basis for his or her familiarity with the scene or object.
5. In the witness's opinion, the aid is a "true," "accurate," "good," or "fair" model of the scene or object. Edward J. Imwinkelried, Evidentiary Foundations 92 (4th ed. 1998).

In some jurisdictions, models are used without marking them for identification which makes it difficult for the appellate court to understand the trial record. Therefore, marking the model for identification and formally offering it into evidence eliminates any confusion for the appellate court later.

C. Documentary Evidence

Documentary evidence is that evidence which has an actual historical connection to the case; it is the actual will that the decedent signed before his death or the actual pistol that the defendant used during the assault. The proponent of real or original physical evidence must demonstrate the object's connection with the case by identifying the physical evidence. Edward J. Imwinkleried, Evidentiary Foundations 93 (4th ed. 1998).

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If the proponent of a piece of evidence tries to prove the actual terms of a writing and the terms are material to the case, the proponent must produce the original writing unless he or she can prove that the original is unavailable through no fault of his own; this is called the Best Evidence Rule. The term "writing" is given a very broad definition within the rules of evidence and covers virtually every form of data compilation including all mechanical, magnetic, and electronic records. Ala.R.Evid. 1002.

The exceptions to the Best Evidence Rule provide that a duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Ala.R.Evid. 1003. The term "duplicate" is defined in Ala.R.Evid. 1001(3) to include "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, or by equivalent technique which accurately reproduces the original." According to the advisory committee notes, Ala.R.Evid 1003, just as the Federal Rules, exempts duplicates from the best evidence rule of preference for originals.

There are generally two methods of identifying physical evidence. The first method expressly permits identification of an object by its "distinctive characteristics" pursuant to Fed.R.Evid. 901(b)(4). If the evidence has a unique, one-of-a-kind characteristic, the characteristic makes the article readily identifiable. Here, the foundation is complete so long as the witness testifies that he or she previously observed the characteristic and presently recalls the characteristic. The elements of the foundation for ready identifiability are as follows:

1. The object has a unique characteristic.

2. The witness observed the characteristic on a previous occasion.

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3. The witness identifies the exhibit as the object.

4. The witness rests the identification on his or her present recognition of the characteristic.

5. As best he or she can tell, the exhibit is in the same condition as it was when he or she initially received the object. Edward J. Imwinkleried, Evidentiary Foundations 94-95 (4th ed. 1998).

The second method of identifying physical evidence is through the chain of custody. The links that make up the chain of custody are the people who actually handled the object; not those people who merely had access to the object. In order to establish the chain of custody of an object into evidence, the proponent must show the link's initial receipt of the object, ultimate disposition of the object, and safekeeping of the object between receipt and disposition. Ideally, the proponent should call each link to the stand in the sequence in which they handled the object. The proponent should mark the object for identification and hand it to the first link for identification and to every other intermediate link for identification as well. The foundation is complete when the last link identifies the object and the proponent formally tenders the object into evidence. The foundation for chain of custody is as follows:

1. The witness initially received the object at a certain time and place.

2. The witness safeguarded the object; the witness testifies to circumstances making it unlikely that substitution or tampering occurred.

3. The witness ultimately disposed of the object through retention, destruction or transfer to another person.

4. As best he or she can tell, the exhibit is the object he or she previously handled.

5. As best he or she can tell, the exhibit is in the same condition as it was when he or she initially received the object. Edward J. Imwinkleried, Evidentiary Foundations 95 (4th. ed. 1998).

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D. Common Objections to Physical Evidence and How to Refute Them.

Earlier, this paper laid out guidelines to follow when laying a proper foundation for evidence before formally offering it into the record as evidence. The purpose of that discussion was so the proponent at trial will know how to refute or later raise the most common objection: lack of authentication. On the same note, it is important to remember that all the authentication in the world will not render evidence admissible if it is irrelevant, constitutes hearsay or violates the best evidence rule. And, further, the question of authenticity is a preliminary question for the trial judge and the issue of authenticity or genuineness is for the jury.

When raising objections to demonstrative evidence, whatever it is, it is necessary to consider the following:

- Carefully examine the foundation for any deficiencies.
- Is the information in the exhibit inaccurate or misleading?
- Are the captions prejudicial or inadmissible in themselves?
- Is the scale of the exhibit, or any portion of it, inaccurate or misleading? Is the exhibit so large that it is prejudicial?
- Is the exhibit merely cumulative of oral testimony, instead of being explanatory?

It is best to limit your Best Evidence objections to situations where proof of the terms of a writing is central to a key issue in the case. A judge will rarely require the original of a document that has only incidental relevance. Documents that should bear Best Evidence scrutiny include wills, deeds, judgment, and contracts. If your opponent objects to your evidence as a violation of the Best Evidence Rule your response could include one of the following:

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- Argue that the objector must raise a genuine claim of inaccuracy.

- Contend that the original is unavailable through no serious fault of your clients.

- Submit the terms of the writing are not in dispute, or that the writing itself is collateral to the issues in the case. This will force the opposing counsel to show why he wants you to produce the original.

The following are but a few examples of objections and possible responses relating specifically to a portion of Ala.R.Evid 901:

1. Testimony of a witness with first hand knowledge is the primary way to establish authentication or identification. Fed.R.Evid.901(b)(1). This method is best illustrated when a photograph is authenticated by a witness' testimony that the photograph correctly reflects the facts as the witness saw them. Swedenberg v. Phillips, 562 So.2d. 170 (Ala. 1990).

Possible Objections to Testimony of a Witness with Knowledge:

The evidence is inadmissible because no foundation has been established to show that it is what the adverse party purports it to be.

No foundation has been laid to show that this letter was indeed in the handwriting of the purported author; therefore, it should be excluded.

This photograph is inadmissible because the witness on the stand has not testified that it correctly depicts the facts as the witness saw them.

Possible Responses to Objections:

Point out that a foundation has been established to prove that the evidence is what you purport it to be.

The witness on the stand saw the purported author sign the document and therefore it has been properly authenticated.

2. A lay witness may give an opinion as to the genuineness of an individual's

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handwriting based upon his or her familiarity with it. Ala.R.Evid. 901(b)(2). A lay witness' authentication of the handwriting of another individual may consist of testimony involving the witness' having seen the purported author write the document. Allred v. Elliott, 71 Ala. 224 (1881). But, more commonly, a witness is asked if he or she has seen the purported author write and, then, whether the document exhibited to the witness is in that handwriting. Another possibility is that the witness has corresponded with the purported author and is familiar with his handwriting that way.

Possible Objections to a Non-expert Opinion on Handwriting.

No foundation has been established to show that the handwriting is actually that of the purported author.

Offer of the letter should be refused because no sufficient predicate has been laid to show authenticity or genuineness.

If the written document being proffered is a copy, then you should consider the best evidence rule objection.

And, since the evidence begin proffered is of a statement made outside the present trial, it may violate the hearsay rule.

Possible Responses to Objections:

Argue that the ultimate issue of authenticity is with the jury and that your foundational showing is sufficient evidence of authenticity to justify the document's admission.

Argue that the witness testified to seeing the purported author write and that the witness would recognize the writing again and that the questioned document is in the person's handwriting thus establishing authenticity.

If the objection is hearsay, the document may fall within one of the hearsay exceptions under Ala.R.Evid. 803.

3. When the genuineness of a writing is at issue, authentication may be accomplished by comparing an admitted or proved specimen with the one in question. Ala.R.Evid. 901(b)(3). This

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comparison may be made by an expert or by the trier of fact directly so that the jury can make its own determination of authenticity. Ala.R.Evid. 901(b)(3). Furthermore, nothing in the rule precludes a lay witness with a preexisting familiarity with the purported author's handwriting from making a comparison as well. Ala.R.Evid. 901 (b)(3) advisory committee notes.

Possible Objections to Comparison with an Authenticated Specimen:

The witness on the stand does not have the prerequisite familiarity with the purported author's handwriting to offer an opinion as to its authenticity based upon a comparison with an authenticated specimen.

No foundation that establishes that this document is genuine.

No predicate has been laid to prove that this document is in the handwriting of the purported author.

Object the qualification of the expert.

Possible Responses to Objections:

Argue that you have laid a proper foundation showing that the lay witness has a familiarity with the purported author's handwriting and that the witness may offer an opinion as to the document's genuineness.

If an authenticated specimen of this author's handwriting has already been admitted, offer the questioned document so that both may be admitted as a basis for the jury to make its own decision as to whether they are both in the same handwriting.

If an objection is made regarding the qualifications of the expert witness, it is important to note that an expert's expertise in handwritings may arise from practical experience as well as from formal training. Bridgeforth v. Sharpe, 220 Ala. 188, 124 So. 416 (1929).

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III. OBJECTING TO THE ORAL TESTIMONY

A. Competence and Reliability

Most courts in Alabama recognize Alabama Rule of Evidence 601 as calling for the presumptive competency as to all witnesses. There are several arguments that can be made to challenge a witness's competency and/or reliability. The witness' lack of personal knowledge under Rule 602 can be very effective in disqualifying a witness's testimony. The witness's inability to understand the oath due to incompetency under Rule 603, lack of relevance of the witness's testimony under Rule 401, or the potential that the testimony is overly prejudicial, a waste time and/or commutative under Rule 403 may all provide avenues to object to the competency and reliability of witness testimony. If a witness is noticeably argumentative, hostile or abusive his testimony can be precluded within the judge's discretion under Alabama Rule 104. Similarly, if the witness is a child, the presumption of competency may be overcome by the trial court's examination of a child witness. *Blume v. Durrett*, 703 So.2d 986 (Ala. Civ. App. 1997).

However, because most witnesses are going to be able to testify under Alabama Rule 601, the attorney's strategy turns to affecting the impact of the testimony either with proof of the incompetency or proper objections.

B. Objections During Examinations of the Witnesses

It is always better to make an objection prior to the examination of the witness, outside of the presence of the jury, as most jurors, and some judges, dislike objections. Accordingly, it is preferred that many evidentiary or testimony matters be taken care of prior to trial through effective use of stipulations and motions-in-limine.

Objections to testimony and evidence at trial is a rule of efficiency. The purpose of objecting

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is to signal the judge that a piece of evidence or substance of testimony is, or is not, admissible. If the opportunity to object was not in place, a trial court would have to rule upon every question, answer and item of evidence before it reached the jury.

The primacy in the area of objecting is deciding when to object. You must always ask, "Is the exclusion of such evidence going to hurt or contribute to my theory of the case?" Even if it is going to be harmful to your case, in the absence of an objection, you may be better able to effectively explain the damaging evidence.

Another essential compiled in your "split-second" decision to object is, "Will this [objectionable] evidence eventually be admissible?." If the question is improper simply due to its form, it is futile to object. The anticipated answer will eventually come in upon rephrasing.

A good example regarding the effectiveness and acceptability of objecting is in the area of leading. If an attorney is persistent in his leading a witness an objection is warranted. However, if the "few" leading questions are only permitting evidence that would otherwise be admissible, an objection is superfulous.

There are several different manners and forms of making an objection. Some attorneys feel compelled to make speaking objections. Some attorneys do not object at all. The objection/grounds methods is still most acceptable, leaving the judge to request further information, if necessary. Regardless of your form, the importance in objecting is timing. One must wait until the ripe moment to object. A hearsay objection to the question, "Did she speak to you regarding the accident?" is untimely since no out-of-court statements are being offered. The timeliness requirement is satisfied only if the objection is raised at the point during the trial when the offering of improper evidence is clear. *General Motors Corp. v. Johnson*, 592 So. 2d 1054 (Ala. 1992).

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If a course of questions is regarding an objectionable matter, repeat your objections to preserve your record. Do not be intimidated by making repeated objections. An efficient way to handle such a situation is to request that you have a "standing objection" to this line of questioning. *In re Powers*, 523 So. 2d 1079 (Ala. Civ. App. 1988). However, if the question is rephrased a new objection should be raised. *Marsh v. St. Margaret's Hosp.*, 535 So.2d 147 (Ala. 1988).

Traditionally in Alabama, 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. Ala. R. Evid. 103(a)(1) advisory committee's notes. There are several different common objections which are effective during the examination of a witness. This does not include the multitude of evidentiary objections, based on the Alabama Rules of Evidence (i.e. hearsay). Included in common speaking objections are improper speculation, improper opinion, improper conclusion, and improper characterization.

Improper speculation occurs when a witness theorizes about a matter to which the evidence is not sufficient for that witness to possess that certain knowledge. Ala. R. Evid. 602. For example, this situation arises when the witness is asked to estimate the temperature in a room or the distance a car skidded. In response, the witness is required to guess or estimate. Another form of improper speculation is when the witness is asked to describe what another persons was thinking. Allowing a witness to testify on another persons thoughts allows that witness to put an improper spin on the facts.

Improper Opinion is what the witness thinks, believes or infers regarding a fact or issue in dispute which is not based on personal knowledge of the fact itself. Ala. R. Evid. 701 et seq. Some opinion evidence is problematic, and objectionable, because the testimony deals with a disputed

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question that the trier of fact must resolve. The Alabama Rule of Evidence 701 states that, "[i]f 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 perceptions of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Ala. R. Evid. 701. Testimony and evidence which does not fall within such parameters should be objected to and properly excluded.

Improper Conclusion is objectionable in most circumstances because the witness bases the conclusion on inferences. The key question is the reliability of inferences. Similarly, with improper characterizations, the key question is reliability. Improper characterization refers to a witness' tainted description of events, persons, or things. In both the cases of improper conclusion and improper characterization, an attorney must make timely objections to preserve the reliability of the testimony and avoid any prejudice from a testifying witness' own beliefs or feelings. Ala. R. Evid. 103(a).

C. The Defensive, Elusive, or Hostile Witness

Usually, the witness which you call on direct examination is cooperative in developing your case through the presentation of testimony. However, a different situation arises when you are confronted with an adverse witness who is defensive. To be an adverse witness, such witness favors your opponent. Alabama's statutory provision allowed leading questions only "when, from the conduct of the witness or other reason, justice requires it." Ala. Code 1975, § 12-21-138 (superseded by the adoption of Rule 611(c). Under the Alabama Rule of Evidence 611(c), an adverse witness is described as "a witness identified with an adverse party". Rule 611(c) enlarges the traditional Alabama position, and allows leading questions during direct where justice requires that they be

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allowed and grants the trial judge discretion for the determination. Rule 43(b) of the Ala. R. Civ. P., permits leading questions on direct examination "when justice requires." Under 611(c), leading questions should always be permitted on cross-examination. Ala. R. Evid. advisory committee's notes.

It is usually not recommended to call an adverse witness unless it is essential to prove your claim or defense. However, sometimes a witness which otherwise is not adverse becomes defensive or elusive during your examination. At such time you can request the court to let you treat the witness as adverse. This is accomplished by you either calling the witness as an adverse witness or informing the court in midst of the testimony that you wish to treat this witness of as adverse. After informing the court, you may proceed under Fed. R. Evid. 611(c) to examine the witness as if you are on cross-examination with leading questions. This can be effective if you have adequate ammunition to prove that the witness' deposition testimony proves more favorable to you than the testimony which is presented in court that day. *See* McElroy § 121.05(12)

Whether it is nerves, emotions, dislike for the adverse party or attorney or just a reluctance to be in court, some witnesses will not be completely candid on the stand when testifying. If confronted with an elusive witness the key to overcoming their resistance is repeat, repeat, repeat. If a witness refuses to answer, or answers unresponsively to your questions, calmly repeat the same question to the witness. You may ask if the witness understood the question, but usually that is futile. Simply continue to repeat the question until the witness gives a responsive answer. If the witness refuses to accommodate you, request the judge to instruct the witness to answer the question. However, "telling on the witness" and requesting assistance from the judge should be used sparingly, as it does not reflect favorably upon the jury.

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A different situation arises when a witness becomes hostile to you on the stand. In such an event, the 611(c) applies and permits you to examine that witness as if on cross-examination, under the province that leading questions are "necessary to develop the witness's testimony." In certain situations you may be called upon to prove the witness's hostility. In such situations, after the witness has surprised you by giving inconsistent or unexpected answers and you are unable to refresh the memory of the witness (Ala. R. Evid. 612), ask enough questions to indicate that your surprise is apparent, request "sidebar" and explain to judge using pre-trial interview documents or prior depositions and statements that you anticipate the witness' testimony to be substantially different. Additionally, if permissible, you may take the witness on voir dire regarding the prior inconsistent statements; if the witness admits making the prior statements, you have demonstrated hostility. Resume questioning, as if on cross-examination and have the witness admit to the prior inconsistent statements in the presence of the jury. *See* McElroy § 121.05(7).

D. Common Objections to Oral Testimony and How to Respond to Them

As each case is its own species, it is impossible to give a list of what objections are proper in all circumstances. The mode of the trial is within the control of the court. Rule 611(a). However, through effective use of objections, an advocate can manage the presentation of testimony and evidence to the jury. The key to use objections effectively is planning. The attorney, in preparing for trial, should consider the potential objections to testimony and evidence which have been identified through prior discovery and pre-trial compliance.

Many common objections during trial do not pose any great legal quandary. Most objections do not call for responses or arguments, and are disposed of promptly by the judge. However, when responding to the judge concerning an objection is appropriate, an effective attorney needs to give

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the judge a valid reason for a ruling in his favor.

Some of the common objections are as follows:

Narrative Testimony - Rule 611(a)(1)

It is proper to object to narrative testimony, as it prevents the opportunity to object to possibly irrelevant, prejudicial matter or impermissible matter being heard in the presence of the jury. If such matter is presented to the jury you must also request that such be stricken from the record and that a curative instruction be given.

In response to an objection that the witness is giving an answer in a narrative form, the attorney should remind the court that it is within the broad discretion of the court to permit the witness to narrate, or possible that it is permissible (i.e. background) or more effective than a question and answer form.

Unresponsive Answer by Witness - Rule 611(a)(2)

This is an effective objection to prevent the witness from elaborating on evidence which may be unfavorable or damaging to your client. If the objection is sustained, it should be properly followed by a motion to strike the answer and a curative jury instruction for the jury to disregard the unresponsive answer. *Collins v. State*, 364 So. 2d 368 (Ala. Crim. App.), *cert. denied.*, 364 So.2d 374 (Ala. 1978). This objection should be used sparingly as it can bring unnecessary jury attention and focus to damaging testimony.

In response to such an objection, the questioning party may argue that the answer is responsive and relevant and that the witness should be granted the right to explain all matters within her personal knowledge.

Be careful, a party securing a responsible answer cannot utilize §611(a)(2) to withdraw or

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exclude the answer simply because it is favorable to the other party. *Collins v. State*, 364 So. 2d 368 (Ala. Crim. App.), *cert. denied.*, 364 So.2d 374 (Ala. 1978); *Western Ry. of Al. v. Price*, 68 So. 278 (Ala. 1915).

Leading - Rule 611(c)

The leading objection can come in many forms. Sometimes it is phrased as "argumentative", "assuming facts not in evidence" and "testifying". However it is phrased, the leading objection can be used to the attorney's benefit or detriment. Although leading is generally impermissible on direct examination of witnesses, it is allowed in numerous situations including:

- background or preliminary matter - *McCurley v. State*, 455 So.2d 1014 (Ala. Crim App.1984)
- witness is hostile - *Cloud v. Moon*, 273 So.2d 196 (Ala. 1973)
- witness has surprisingly testified in detriment to a client's case
- witness is a child or immature age - *Peeples v. State*, 282 So.2d 65 (Ala. 1973)
- physical condition of witness - *Trammell v. State*, 298 So.2d 666 (Ala. 1974)
- mental condition of witness -*Trammell v. State*, 298 So.2d 666 (Ala. 1974)
- to develop the witness testimony due to failed memory
- witness with communication problems (ie. interpreter)
- on cross-examination - Ala. R. Evid 611(c); Ala.Code §12-21-138

In response to a leading objection an attorney is presented with the option of rephrasing or requesting discretion from the judge to permit leeway. Ala. R. Evid. 611(c).

Improper Foundation - Rule 701

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Lay or expert opinion testimony

This is an effective objection to challenge lay witness opinion testimony on conversations or other tangible evidence. Alabama has historically recognized a number of subjects which a lay witness is permitted to offer an opinion as satisfying the helpfulness test under Alabama Rule of Evidence 701. Included in the allowable areas are:

- sanity - *Jones v. Moore*, 322 So.2d 682 (Ala. 1975).

- insanity - *Ex parte Lee*, 506 So.2d 301 (Ala. 1987).

- bodily condition of another

- apparent bodily condition of another

- value of personal and real property - *Larry Salvage Chevrolet, Inc. v. Richards*, 470 So.2d 1168 (Ala. 1985)(automobile); *W.T. Ratliff Co. v. Henley,* 405 So.2d 141 (Ala. 1981)(land)

- intoxication - *Burke v. Tidwell*, 101 So. 599 (Ala. 1924)

Additionally, experts may utilize numerous things, including observations and hearsay statements, in forming their opinions which will assist the trier of fact. *Drummond Co. V. Boshell*, 641 So. 2d 1240 (Ala. 1994). Additionally, an expert witness with personal knowledge of the facts may give a lay opinion, under Rule 701 even if not qualified under Rule 702 to give an expert opinion.

Authentication - Rule 901, 902

Ala. R. Evid. 901 covers the area of authentication and identification of evidence. There remains the requirement that the proponent of real or demonstrative evidence lay the proper foundation prior to it being admissible. The proper foundation must show what that the evidence is what it is represented to be. *See* McElroy § 319.01 et seq. For example, even of an item of

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demonstrative evidence is otherwise probative of a material issue in the case, the item is admissible only if it is what the offering party claims it to be. *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989); Ala. R. Evid. 901(a) advisory committee's notes.

Alabama Rule of Evidence 901(b) lists illustrative applications of the general that an item must be authenticated prior it being admissible. Ala. R. Evid. 901(b). The list provided in Rule 901(b) is not intended to be exclusive, rather it is meant to guide the application of the general rule and is intended to leave "room for growth and development in this area of the law. Ala. R. Evid. 901(b) advisory committee's notes; For application to federal cases *see, Bury v. Marietta Dodge*, 692 F.2d 1335 (11th Cir. 1982).

Rule 902 of the Alabama Rules of Evidence covers the area of self-authentication, meaning that no extrinsic proof is necessary to authenticate or identify the evidences being offered. Ala. R. Evid. 902. Any document or record covered and offered under 902 must satisfy other evidentiary concerns, such as the hearsay rule and the best evidence rule.

However, compliance with the authentication and identification requirements does not necessarily render the item of evidence admissible. As previously noted, the offered evidence must also satisfy other evidentiary rules, such as those dealing with the best evidence requirements, hearsay, and relevancy. *See Atmore Farm & Power Equip. Co. v. Glover*, 440 So.2d 1042 (Ala. 1983).

It is imperative that the attorney object to improper foundation or identification if the subject evidence is not properly authenticated. If the objection is untimely, it is waived, and the otherwise inadmissible evidence can be utilized. Ala. R. Evid. 103(a).

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The "Answer Yes or No Objection"

This is a common objection heard on cross-examination of your witness. The opposing counsel will request the judge to instruct the witness to answer the question only with a "yes" or "no". Whether a witness is required to answer yes or no is a matter within the trial court's discretion. *Williams v. State*, 293 So.2d 324 (Ala. 1974); *See McElroy* § 121.02.

IV. EXPERT WITNESSES

A. Impact of Kumho Tire on Daubert

Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.ed.2d 469 (1993), and the cases following it, has been analogized to Pandora's box in the area of expert qualification and admissibility of testimony. *See* Sean O'Connor, *The Supreme Court's Philosophyof Science: Will the Real Karl Popper Please Stand Up?*, 35 Jurimetrics J., 263 276 (1995). Following the 1993 *Daubert* decision, the Supreme Court left unanswered the crucial question, to exactly what type of expert opinion does *Daubert* apply. Rule 702 of the Federal Rules of Evidence pertains to the admissibility of expert testimony in the area of "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. The court in *Daubert* expressly addressed the meaning of "scientific knowledge", but not technical or other specialized knowledge. *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993). By not directly addressing the problem of technical or other specialized knowledge, the Supreme Court in *Daubert* left open a fissure for confusion and uncertainty to promulgate.

According to *Daubert*, a Rule 702 evidentiary hearing entails a consideration of the expert's qualifications, the scientific validity of his testimony, and the relationship of the testimony to the specific issue at trial. *Daubert*, 509 U.S. at 590. In *Daubert*, the Court held that Federal Rule of

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Evidence 702 imposes a special "gatekeeping" obligation upon the trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable."*Daubert*, 509 U.S. at 590. For a court to evaluate "scientific knowledge" to ascertain scientific validity, the *Daubert* Court offered four guidelines for the judge to perform the "gatekeeping" function to determine the admissibility of expert testimony:

(1) Testability - Is the subject testimony falsifiable or testable?;

(2) Peer Review - Has the subject testimony been subjected to peer review?;

(3) Error Rates - Is the subject testimony derived from techniques with known error rates?; and

(4) *Frye* Test - Has the subject testimony been generally accepted either in terms of its methodology or conclusions? *Daubert*, 509 U.S. at 593-594.

However, the question remained following *Daubert*, to what type of experts and knowledge do we apply these factors under Rule 702. Following *Daubert*, it had been argued that the *Daubert* factors only apply to "scientific opinions" and not to experts who base their opinion on experience or observations. Until the decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143, L.Ed.2d 238 (1999), there had been split among the circuits as to which experts should be subjected to the *Daubert* approach. Compare, e.g. *Watkins v. Telsmith, Inc.* 121 F.3d 984 (C.A.5 1997) with, e.g., *Compton v. Subaru of America, Inc.* 82 F.3d 1513 (C.A. 10 1996). In *Kumho*, the Court held that the Eleventh Circuit was incorrect when it held that Supreme Court limited it's 1993 *Daubert* holding to the scientific context. *Kumho Tire*, 119 S.Ct. at 1173. The *Kumho* Court stated that the *Daubert* factors may indeed apply to all experts as set forth in Federal Rules of Evidence 702 and the "gatekeeping" determination espoused in *Daubert* is not confined to scientific knowledge alone. *Id.* at 1175.

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In the *Kumho* case, the plaintiffs alleged that a defect in the right rear tire caused it to blow, killing one passenger and injuring several others. *Carmichael v. Samyang Tires, Inc.* 923 F. Supp. 1514, 1518-1519 (S.D.Ala. 1996). The plaintiffs attempted to offer expert testimony, from an engineer, on the tire defectiveness. *Id.* at 1520. The district court excluded the testimony of the engineering expert and granted summary judgment, finding that, based on the *Daubert* factors, the expert's methodology failed under Fed. R. Evid. 702 and that the testimony was unreliable. *Id.* at 1521-1522. The Eleventh Circuit reversed, holding that the tire experts testimony was "outside the scope of *Daubert*", and therefore admissible. *Carmichael v. Samyang Tires, Inc.*, 131 F.3d 1433, 1436 (1997). The Eleventh Circuit based its reversal and remand on the premise that a *Daubert* analysis applies only where an expert relies on the application of scientific principles, rather than "on skill- or experience-based observation." *Id.* at 1435-1436. Certiorari was granted to answer the question of whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon scientific knowledge, but rather upon "technical" or "other specialized" knowledge. *Kumho Tire*, 119 S.Ct. at 1173. Specifically, the court was petitioned to decide whether a trial court may consider *Daubert's* specific factors when determining the admissibility of an engineering expert's testimony. *Id.* at 1173.

The United States Supreme Court, upon review of *Kumho*, held that the *Daubert* factors may indeed apply to all experts as set forth in the Federal Rules of Evidence 702 and that the underlying rationale of *Daubert's* "gatekeeping" function is not limited to solely "scientific knowledge." *Id.* at 1176. Additionally, the *Kumho* Court stated, that the *Daubert* factors are flexible and do not constitute a "definitive checklist or test." *Id.* at 1175. The Court stated that they could neither rule out, nor rule in, for all cases and for all times the applicability of the *Daubert* factors, since too much

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depends on the particular circumstances of the particular case at issue. *Id.* at 1175-1176. Accordingly, the gatekeeping function of *Daubert* is tied to the facts of the case, which will determine the appropriate factors to be utilized in evaluating an expert witness. *Id.* at 1176. The Court held that the District Court's determination to exclude the engineering experts testimony, based upon the unreliability of the methodology employed, was reasonable, since it fell outside the range of where experts may differ. *Id.* at 1177.

The *Kumho* Court also noted that it would be difficult for judges to administer this rule attempting to draw a distinction between scientific and other specialized knowledge. *Id.* at 1176. Accordingly, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in its respect to its ultimate reliability determination. *Id.* at 1175; *See General Electric Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury, whether the testimony reflects scientific, technical, or other specialized knowledge. *Id.* at 1174-1175. Additionally, the *Kumho* Court stated that Rules 702 and 703 grant an expert witness latitude in testifying, because such testimony will have a reliable basis in the knowledge and experience of his discipline. *Id.* at 1176. This latitude afforded to expert witnesses is equally applied to both scientific and specialized knowledge experts. *Id.* at 1174. This is to ensure that an expert, whether basing his testimony upon professional studies or upon personal experience, portrays in the courtroom the "same level of intellectual rigor" that characterizes the practice of an expert in the relevant field. *Id.* at 1176.

Although the *Daubert* standards have been adopted in many states, Alabama maintains the "general acceptance" *Frye* standard in determining the admissibility of expert testimony. If the

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subject of the expert's testimony is not generally accepted within the relevant scientific community, then the testimony can be excluded. *Frye v. United States*, 293 F. 1013, 54 App. D.C. 46 (1923); *Baker v. Edgar*, 472 So.2d 968 (Ala. 1985); *Paragon Eng'g, Inc. v. Rhodes*, 451 So.2d 274 (Ala. 1984).

B. Qualifications

The patent and practical effect of the *Kumho* decision is that attorney's must select experts who can meet the *Daubert* test. Moreover, the attorney is charged with preparing that expert witness more thoroughly than in the past to answer the questions confronted by the *Daubert* and *Kumho* standards. Although the *Kumho* decision requires the judges to be extremely flexible in determining the adequacy of exert testimony, the attorney must closely scrutinize his cases and carefully prepare his experts for depositions, reports and trial.

In light of the *Daubert* and *Kumho* cases, the following suggestions will assist the attorney in preparing and qualifying his expert:

Language - When an expert is preparing his report or his testimony for deposition or trial it is helpful if the language used in *Kumho* is utilized by the expert. Your expert should state the following:

- his opinion is reliably based on the knowledge within the relevant scientific community;
- his theory or methodology enjoys general acceptance with the scientific community;
- a solid rationale of why this methodology was selected and used in evaluating this case;
- his theory, technique, or methodology has been or can be tested. If it has been tested state the particulars of such testing;

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- his methodology being used has been subjected to peer review and publication, with supporting citations;

- the particular rates of error of his methodology and that the proper use of the methodology limits such rate of error; and

- alternative criteria by which to judge the reliability of the expert testimony and to show that the methodology is being applied in a generally accepted manner and is generally accepted in that particular discipline.

Methodology - It is important that the expert clearly identify the methodology employed and be ready to defend that methodology through its general acceptance in the field in its use to resolve a particular issue. The expert may also wish to prepare to show how the methodology is utilized, repeated and the success and error rate accompanying it.

Additionally, it is most effective if it can be shown that your expert is utilizing and relying upon the same methodology or techniques used by the opposing party or their experts.

Publishing and Peer-Review -

Since most experts, including medical doctors and accountants, do not publish regularly it is essential that your expert have several supporting peer reviewed articles or books showing and explaining the methodology which they utilize. Being able to establish that peer-reviewed articles endorse or use the same methodology should persuade a judge that your expert's methodology is generally accepted and being applied in a manner approved by his discipline.

Testing - This is primarily important in the products liability area of alternative designs. Either through computer modeling or building the alternative design itself, testing of the alternative designs is extremely important in overcoming the *Daubert/Kumho* factors in proving that the alternative design would have prevented the injury.

Experience - An expert will not simply be able to offer testimony based solely on their experience. The expert will first have to demonstrate how his/her experience is in conformity with the field of expertise.

The above suggestions are not the "end-all" determinative factors which must be met to qualify an expert witness. It is always important to remember that following *Kumho*, the *Daubert*

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test is flexible. The expert offering testimony, or the attorney qualifying him, will no longer be subjected to the arbitrary use of the four factor test set out in the *Daubert* opinion. Any number of factors are permissible to effectively qualify your expert witness and exploration is encouraged.

The Federal Rule has provided guidance in state proceedings. In fact, the Alabama Rule for the testimony of experts is identical to the Federal Rule 702. Ala. R. Evid. 702. Hence, a witness must be qualified as an expert before he can give an opinion as expert. *Townsend v. General Motors Corp.*, 642 So.2d 411 (Ala.1994).

To qualify as an expert, a witness must have such knowledge, skill, experience or training that the witness' opinion will be considered in reason as giving the trier of fact light upon the question to be determined. Ala. R. Evid. 702; *Townsend v. General Motors Corp.*, 642 So.2d 411 (Ala. 1994). It is usually adequate to show that the witness has some specialized skill or knowledge, acquired through experience or education and that the witness is able to apply that skill or knowledge in a manner that is relevant to the issues of the case. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990).

Under the Alabama Rule 702, the term "qualification" should be defined broadly so that one may gain expertise through practical experience as well as through formal training or education. *Internat'l Telecommunications Sys. v. State,* 359 So.2d 364 (Ala. 1978). Other areas of basic qualification include specialized training, continuing education courses, teaching and lecturing positions, licenses and certifications, publications, consulting experience, professional memberships, awards, and other professional honors. *Internat'l Telecommunications Sys.,* 359 So.2d at 364.

The test to determine whether a witness has the necessary expertise to be qualified to render an expert opinion is whether the testimony would aid the trier of fact. *Price v. Jacobs*, 387 So.2d

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172 (Ala. 1980). A witness will not be allowed to offer an opinion outside of the witness' field of expertise. *Cook v. Cook*, 396 So.2d 1037 (Ala. 1981); *Basin Coal Co. v. Gulledge*, 470 So.2d 1258 (Ala. Civ. App. 1985). The qualification of an witness is a threshold question for the judge, who must determine whether the witness is qualified before allowing the testimony. *Griffin v. Gregory*, 355 So.2d 691 (Ala. 1978). The trial judge's determination regarding the qualification of an expert will not be disturbed except for abuse. *McKelvy v. Darnell*, 587 So.2d 980 (Ala. 1991); *Rannells v. Graham*, 439 So.2d 12 (Ala. 1983).

C. Objections During Examination of the Expert Witness

Most objections during the examination of an expert witness relate to the content of the witness' testimony or opinion. Once qualified, an expert witness may testify only as to matters which relate to the expert's training and experience. It is error for a trial court to allow expert witness to testify to matter outside witness's expertise. *Levesque v. Regional Medical Center Bd.*, 612 So.2d 445 (Ala. 1993). An expert witness may not testify based upon the opinions of others unless those opinions are in evidence and are of the type customarily relied upon by expert in the practice of his profession. *Morris v. Young*, 585 So.2d 1374 (Ala. 1991).

While an expert may base testimony upon facts related outside the trial or hearing, the Alabama Rules of Evidence preclude an expert from basing an opinion upon facts or data that have not been admitted into evidence. *Madison v. State*, 620 So.2d 62, 68 (Ala. Crim. App. 1993); *Marley Erectors, Inc. v. Rice*, 620 So.2d 31 (Ala. Civ. App. 1993). This is a rejection of the Federal Rules allowance of expert testimony based upon inadmissible facts or data, including hearsay, so long as they are of the type reasonably relied upon by experts in the same field of expertise. Fed. R. Evid. 703. For example, a physician is precluded from basing an opinion upon charts, records or hearsay

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statements by other health care professionals. *Chinevere v. Cullman County*, 503 So.2841 (Ala. 1987); *Salotti v. Seaboard Coast Line R.R.*, 299 So.2d 695 (Ala. 1975). Note, however, that experts are allowed to give opinions as to value based in part on hearsay evidence. For example, the judiciary has approved the use of a toxicologist's autopsy report as a basis for a coroner's expert testimony. *See Jackson v. State*, 412 So.2d 302 (Ala. Crim. App. 1982).

Expert testimony in the form of an opinion or inference, which otherwise is admissible, is properly excludable if it embraces an ultimate issue to be decided by the trier of fact. Ala. R. Evid. Rule 704; *McLeod v. Cannon Oil Corp.*, 603 So.2d 889 (Ala. 1992). The basis for this exclusion is the fear that the admission of such an opinion will preempt the role and function of the fact finder. However, in cases where the expert's opinion as to the ultimate opinion in the case will greatly facilitate the trier of fact, courts have been willing to expand the ultimate issue to rule to allow such testimony. *See Harrison v. Wientjes*, 466 So.2d 125, 127 (Ala. 1985); *Alabama Power Co. v. Liberty Nat'l Life Ins. Co.*, 395 So.2d 34 (Ala. 1981). *Crawford Coal Co. v. Stephens*, 382 So.2d 536 (Ala. 1980). Even if such testimony is admissible over the ultimate issue objection, the opinion may still be excludable as failing to satisfy the requirement that the testimony assist the trier of fact. Ala. R. Evid. 702.

Opinions that will assist the trier of fact are admissible even if they are on subjects no beyond the understanding of the average juror. Ala. R. Evid. 702. However, exclusion may be proper when the admission of testimony is so open and within the understanding of the juror that it will not assist the trier of fact. *Kingsberry Homes Corp. v. Ralston*, 235 So.2d 371 (Ala. 1970); *Roberts Ala. Great Southern R.R. v. Bishop*, 89 So.2d 738 (Ala. 1956). Such admission may also be excluded if it is a waste of time. Ala. R. Evid. 403.

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Where an expert witness bases his opinion on a mere guess or speculation, such testimony is excludable where no reasonable inference based upon a premise of fact exists. *Alabama Power Co. v. Robinson*, 447 So.2d 148 (Ala. 1983).

Objection to expert testimony on ground of inadequacy of facts goes to weight of evidence, rather than its admissibility. *Alabama Power Co. v. Courtney*, 539 So.2d 170 (Ala. 1988). Because an expert opinion, or expert testimony is admitted to assist the trier of fact, the weight given to testimony is for the trier of fact. Ala. R. Evid. 104(e); *Shelby County v. Baker*, 110 So.2d 896 (Ala. 1959). As a general rule, the jury is not bound by the expert testimony, however, such testimony is disregarded when called into question by other evidence in the case or through cross-examination which lessens the weight and credibility of the testimony. *Ellis v. State*, 570 So.2d 24 (Ala. 1990). Expert testimony may be binding upon the jury when testimony is both uncontradicted and concerns a subject exclusively within the knowledge of experts. *King v. W.A. Brown & Sons, Inc.*, 585 So.2d 10 (Ala. 1991); *Jefferson County v. Sulzby*, 468 So.2d 112 (Ala. 1985); *Dyer v. Traeger*, 357 So.2d 328 (Ala. 1978).

It must be kept in mind that the trial judge has substantial discretion in the questions a party is allowed to ask of expert witnesses. *Ayers v. Lakeshore Community Hosp.*, 689 So.2d 39 (Ala. 1997). However, once an expert witness is allowed to testify as an expert, proper questions should not be excluded. *Riley v. City of Huntsville*, 379 So.2d 557 (Ala. 1980). The broad discretion given to the judge concerning the qualification of a witness is applicable to the scope of the expert's testimony. *C.S. v. T.W.*, 585 So.2d 26 (Ala. 1991); *Ellingwood v. Stevens*, 564 So.2d 932 (Ala. 1990).

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V. HEARSAY

A. What Determines Hearsay vs. Non-Hearsay.

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Edward W. Cleary, McCormick on Evidence 584 (3d ed. 1984).

Hearsay includes all out-of-court statements offered to prove the truth of the matter asserted. Simply because the declarant is in court and available for confrontation and cross-examination does not by itself render the out-of-court statement as non-hearsay. Ex parte Snell, 565 So.2d 271 (Ala. 1990). A hearsay objection remains appropriate even if a declarant is called upon to relate the declarant's own out-of-court statement. Kilcrease v. Harris, 259 So.2d 297 (Ala. 1972). *See* McElroy § 242.01(1)(a); Charles W. Gamble and Russell L. Sandidge, Around and Through the Thicket of Hearsay: Dispelling Myths, Exposing Imposters and Moving Toward the Federal Rules of Evidence, 42 Ala.L.Rev. 5, 22 (1990). Nor is the hearsay rule inapplicable because a party was present when a statement was made. Robinson v. Morrison, 133 So.2d 230 (Ala. 1961).

A "statement" is an oral or written assertion or a non-verbal conduct of a person, if it is intended by the person as an assertion. Ala.R.Evid. 801(a). Clearly, an oral or written assertion, if offered to prove the truth of the matter asserted, is hearsay. Acts, on the other hand, qualify as hearsay whenever they are intended by the actor as assertions. Therefore, evidence of an act may be objected to as hearsay only if it meets this "intent to assert" requirement. *See* Ala.R.Evid. 801(a) Advisory Committee's Notes. Whether the actor intended an assertion is a preliminary question for the trial judge, and the burden of proving such intent is on the party making the hearsay objection. Ala.R.Evid. 801(a) Advisory Committee's Notes.

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A "declarant", as it relates to the hearsay rule, is a person who makes a statement. Ala.R.Evid. 801(b). Generally, the hearsay rule precludes the admission of any statement made outside the present trial or hearing but is offered to prove the truth of the matter asserted within the statement. Hearsay objections are usually made when a witness on the stand is asked to relate a statement that was made outside the present trial by some declarant meaning that a witness is precluded from relating the witness' own prior statement made outside the present trial. Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931). *See also* Charles W. Gamble and Russell L. Sandidge, Around and Through the Thicket of Hearsay: Dispelling Myths, Exposing Imposters and Moving Toward the Federal Rules of Evidence, 42 Ala.L.Rev. 5, 22 (1990). A witness can, however, relate that witness' own statement if the statement satisfies one of the hearsay exceptions or if the statement is not being offered to prove the truth of the matter asserted.

The Rule states two specific instances where statements are not hearsay. Ala.R.Evid. 801(b)(1)-(2).The Rule is stated as follows:

> Rule 801(d)(1)
> (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 purgery 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 declaration of recent fabrication or improper influence or motive.

First, any witness may be impeached by proof of a prior statement inconsistent with the witness' testimony. Rothchild v. State, 558 So.2d 981 (Ala.Crim.App. 1989). A prior inconsistent

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statement by a witness is not hearsay because the statement is being offered only to show the inconsistency rather than to prove the truth of the matter asserted therein. Ala.R.Evid. 801(c).

However, the Alabama Rules of Evidence contain two provisions where a witness' prior statement may gain substantive admissibility when the witness testifies and is subject to cross-examination concerning this statement. First, a prior inconsistent statement of a witness who takes the stand and is available for cross-examination concerning this statement, may be used as substantive evidence if the statement was given under oath subject to the penalty of purgery at a trial, hearing, or other proceeding, or in a deposition. Ala.R.Evid. 801(d)(1)(A); Reese v. State, No. CR-94-896, 1995 WL 444767 at *1 (Ala.Crim.App. July 28, 1995). Next, a prior consistent statement constitutes substantive evidence of the matter asserted when it is offered to rehabilitate a witness who has been charged impliedly or expressly with recent fabrication or improper influence or motive. Ala.R.Evid. 801(d)(1)(B).

B. Blocking Unreliable Hearsay

The hearsay rule prohibits the admission into evidence statements falling within the definition under Rule 801. Generally the hearsay rule prohibits the admission of out of court statements offered to prove the matter that it asserts. In order to block or object successfully to unreliable hearsay, it is necessary for the practitioner to be intimately familiar with not only the definitions of hearsay versus non-hearsay evidence, but a;sp all of the exceptions to the hearsay rule. Only then can a meaningful analysis be made of the evidence being offered and a valid objection be made. The analysis of the proffered evidenced can be broken down into several subparts which will help the practitioner determine if, (1) the offered evidence is hearsay or (2) if it fits within some exception to hearsay. The analysis may be made as follows:

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1. Is the witness testifying to an out of court "statement" for the purposes of the hearsay rule. (Remember that out of court statements include verbal and non-verbal assertions therefore, if assertive conduct is part of the testimony, be alert for the possibility of a hearsay objection).

2. If so, is the out of court statement being offered to prove the truth of the matter asserted or offered only to prove that the statement was made. For example, assuming a witness testifies that the declarant, a testator in a will contest, said "I am Napoleon Bonaparte." This would not be hearsay if offered to prove that the testator was not in a proper frame of mind to make a will or that the testator spoke English.

3. That the statement, if offered to prove the truth of the statement, is it exempted under Rule 801 as a prior statement of witness or a statement of a party opponent? If the statement is not exempted under Rule 801, is it subject to an exception under Rule 803? Remember the availability of the declarant is not a material requisite to 803 exceptions.

4. Is the declarant unavailable as defined by Rule 804 and, if so, does the statement fit within one of those exceptions. Remember each of these exceptions has the prerequisite the unavailability of a declarant.

5. Is the statement permissible pursuant to a statute or a rule of procedure. For example, in Alabama, pursuant to statute, certain hospital records are exempt from the hearsay exclusion; in the worker's compensation context, certain doctors' records are exempt from the hearsay exclusions and the admission of declarations by deceased persons as to ancient rights, Alabama Code § 12-21-30.

Tactically, therefore, you must try to determine the purpose of your opponent's question. If the interrogation aims to elicit facts that are at issue, then the response is likely to contain hearsay

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and an appropriate objection will be necessary. Once you object, your opponent must prove that the response is either not hearsay or falls within one of the exceptions to the hearsay rule. If your opponent is successful in characterizing testimony as an exception to the hearsay rule and the judge overrules your objection, do not give up your argument. At that point, even though it may be an exception to the hearsay rule, the testimony may none the less be irrelevant, unreliable, or subject to some other objection and thus should still be excluded.

C. Exceptions

As is often the case with rules of evidence, there are numerous exceptions to the applicability of the general rule which would allow evidence into a case which would otherwise be excluded. In fact, the definition of hearsay, Rule 801(c) Alabama Rules of Evidence, contains only 29 words. The rules contain 27 exceptions to that definition. Rule 803, Alabama Rules of Evidence, sets out the 23 recognized exceptions to the hearsay rule when the availability of the declarant is immaterial and Rule 804 sets out the exceptions to the hearsay rule when the declarant is unavailable. While the practitioner must be conversant with each of these exceptions to the hearsay rule in order to avoid a hearsay objection or to effectively make a hearsay objection, the purpose of this section will be to address those exceptions to the hearsay rule which are most frequently utilized.

Rule 803(1) **present sense impression,** is practically identical to the corresponding federal rule. Most of the statements that would be admissible under 803(1) would have been admissible under the prior rule of law in Alabama, the *res gestae* rule. In order for an out of court statement of the declarant to be admissible as a present sense impression, the statement must be made while the declarant is perceiving the facts in question or immediately thereafter. Thus, the foundation requirements for the application of this exception require (1) establishing that the declarant had first

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hand knowledge of the event being perceived, (2) that the statement made by the declarant described the event or condition and (3) it must be established that the statement was made contemporaneously with the event or immediately thereafter.

Rule 803(2) **excited utterance** is identical to the federal rule. The distinction between the excited utterance exception and the present sense impression exception is that the excited utterance is made in response to a startling event during the trauma or stress of the event. Present sense impression does not require the element of "a startling event." The foundation for this type of evidence includes (1) the existence of the event creating the trauma or stress, (2) that the declarant had personal knowledge of that event and, (3) as a subjective condition, the declarant was under extreme stress when the statement was made.

Rule 803(3), **a then existing mental emotional or physical condition** is an exception to the hearsay rule. 803(3) is identical to the corresponding federal rule and is consistent with prior common law authority in Alabama. This exception provides for the admissibility of statements made by the declarant concerning his state of mind, emotions, sensations, or physical condition. The key to admissibility of these statements is that they must refer to then existing subjective qualities of the declarant. Examples of out of court statements which would generally satisfy the rule are: "I am ill;" "I have a pain in my chest;" "I do not plan to sell my house;" "I plan to go to Tahiti this year."

Rule 803(4) **statements for the purpose of medical diagnosis or treatment** are exceptions to the hearsay rule. Historically, the limitation of this exception is that the declarant must have been the physician's patient. However, this is no longer a requirement. Statements made to non-physicians qualify under the present exception so long as the person to whom the statement is made serves an integral role in the diagnosis and treatment. For example, such persons may include

hospital attendants, ambulance drivers, or even members of the family. It reaches all statements by a patient regarding the history of the patient's case if they are pertinent to the diagnosis or treatment. This would include statements of how a patient was injured if it can be reasonably associated with diagnosis or treatment.

Rule 803(6) **records of conducted activity** (business records) is consistent with the pre-existing common law and various statutory provisions of Alabama law. Any writing or record made in the ordinary course of business, when it is the regular course of business to make such a record, qualifies for admissibility via the business records exception. The foundation for the admission of a business record must be laid through a witness qualified to testify: (1) that the document is a record of the business; (2) that the witness knows the method used in the business for making such records; (3) that it was the regular practice of the business to make such a record; (4) that the record was made in the regular course of business at the time of the event recorded or within a reasonable time thereafter.

It is important for the practitioner to recognize that business records often contain statements of persons who are not employees of the business and which do not have a duty to report accurately to that business. These third-party statements are not exceptions to the hearsay rule and would only be admissible if they satisfy the multiple hearsay requirements of Rule 805.

Rule 803(18), **the learned treatises** exception is important for the practitioner in the area of expert witnesses. Statements and public treatises, periodicals, or like documents on the subjects of history, medicine or other science and art, are admissible as exceptions to the hearsay rule. The admission of such statements requires a foundation that the publication is not only authoritative but also reliable. The foundational showing can be made either through expert testimony or through

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judicial notice. Interestingly, Rule 803(18) allows the statements to be read into evidence but the treatises may not be received as exhibits under this exception.

Pursuant to Rule 804, there are four exceptions to the hearsay rule when the declarant is not available. Importantly, the practitioner must be familiar with the definition of "unavailability" within the meaning of Rule 804. There are a number of situations which will make the witness "unavailable" other than just not be physically present in the courtroom. Those grounds are set out in their entirety in Rule 804(a). Interestingly, unavailability becomes an issue of proof just as any other issue in the case and the trial judge may admit evidence concerning it. Once the "unavailability" of a witness has been determined, then the exceptions to hearsay apply, the four exceptions are (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; and (4) statement of personal or family history.

Probably the two most utilized of these exceptions is that of former testimony and statement against interest. Rule 804(b)(1) reflects pre-existing and Alabama common law and rejects the federal rule regarding the "former testimony" exception to the hearsay rule. Such testimony is admissible only if it was given in a deposition or hearing under oath; before a tribunal or officer vested with the legal authority to take sworn testimony with allowance for cross examination; in a setting where the party against whom it is offered or his predecessor in interest in a civil case had an opportunity to test the declarant's credibility; and in litigation in which the issues and parties were substantially similar.

Rule 804(b)(3) provides that a statement is admissible over a hearsay objection if it is a statement against interest. This is the codification of the historical exception to the hearsay rule under Alabama law. In order to establish a foundation for such a statement under Rule 804(b)(3)

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the practitioner must prove the following: (1) the declarant must be unavailable as defines in Rule 804(a); (2) the declarant must have first hand knowledge as contemplated by Rule 602; (3) the nature of the statement must be such that a reasonable person would not have made it unless he or she believed it to be true; and (4) the statement must be contrary to a pecuniary or proprietary interest at the time of its utterance.

The practitioner should be careful not to confuse this exception with that of an admission of a party opponent. While it frequently occurs that an admission will be contrary to some interest of a party to the litigation, none of the foundational requirements of 804(b)(3) are required to be satisfied prior to the introduction of admissions. The confusion historically has resulted from the unfortunate designation of the admission of a party opponent as an "admission against interest." However, the practitioner must realize that any statement of a party opponent qualifies as an admission with no requirement that it had been made against the declarant's interest at the time the statement was made.

As can be seen from these examples of the exceptions to the hearsay rule, the practitioner must be completely conversant with all of the exceptions to the hearsay rules as well as the foundational requirements in order to effectively utilize and/or combat objections to hearsay testimony.

VI. OBJECTIONS AT TRIAL RELATING TO:

A. Attorney-Client Privilege - Pre-trial Discovery

The Alabama Rules of Civil Procedure limit the scope of discovery to any relevant matter

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which is not privileged. Ala. R. Civ. P. 26 (b) (1). Privileges assertable in discovery are either absolute or qualified and even as they are enforceable in discovery, they may likewise be waived.

Purpose and History

The purpose of the attorney-client privilege is to protect confidential communications between a client or prospective client and an attorney or his agents for the purpose of obtaining legal services or advice from that attorney. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed. 584 (1981). As distinguished from the work product doctrine, the attorney-client privilege belongs to the client and the privilege survives the termination of the relationship. Ala. R. Evid. 502(b); *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977). The language in Rule 502 of the Alabama Rules of Evidence is primarily derived from the Uniform Rules of Evidence, but includes the principles set forth in 12-21-161 of the Alabama Code and existing case law. Ala. R. Evid. 502 advisory committee's notes.

The general rule of the attorney-client privilege is that an attorney cannot disclose the advice he gave to his client about matters concerning which he was consulted professionally, nor can the client be required to divulge the advice the his attorney gave him. *Sawyer v. Stanley*, 1 So.2d 21 (Ala. 1941).

Requirements

The basic elements of the attorney-client privilege are summed up as follows:

1. The privilege arises only when legal advice is sought by the client. Ala. R. Evid. 502(b); *Hunt v. State*, 642 So.2d 999 (Ala. Crim. App. 1993). As noted above, the privilege belongs to the client. Ala. R. Evid. 502(c); *Mallory v. State*, 219 So.2d 888 (Ala. Crim. App. 1969). It may be an institution, corporation, public entity, organization or individual. Ala. R. Evid. 502(a)(1); *Ex parte*

Alfa Mut. Ins. Co., 631 So.2d 858 (Ala. 1993). The privilege arises only when the client's purpose for consulting the attorney is to obtain professional legal services. Ala. R. Evid. 502(a)(1). It is not necessary however, that the client actually hire the lawyer and communications after the attorney has rejected employment are not protected. Ala. R. Evid. 502(a)(1) advisory committee's notes; *State v. Tally*, 15 So. 722 (Ala. 1893).

2. Communications are protected only when made to facilitate the rendition of professional legal services from an attorney. Ala. R. Evid. 502(b). An attorney is defined as one who is authorized to practice law in any state or nation. Ala. R. Evid. 502(a)(3). The privilege attaches even if the consultation occurs in a jurisdiction other than that in which the attorney is authorized to practice law. Ala. R. Evid. 502(a)(3) advisory committee's notes. The privilege extends to representatives of both the attorney and the client. Ala. R. Evid. 502(b)(1-5). A representative consists of anyone employed by the attorney to assist in rendering professional legal services. Ala. R. Evid. 502(a)(4). This may include accountants, investigators, and consulting experts. *See United States v. Schwimmer*, 892F.2d 237 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991); *Grimsley v. State*, 632 So.2d 547 (Ala. Crim. App. 1993); *Miller v. District Ct.*, 737 P.2d (Colo. 1989). Nothing, requires that the representative be on the attorney's payroll, however, it is a requirement that the person must have been employed by the attorney. Ala. R. Evid.502(a)(4) advisory committee's notes; *United States v. White*, 617 F.2d 1131 (5th Cir. 1980).

3. The attorney-client privilege shields confidential communications. Ala. R. Evid. 502(b). Alabama has taken an expansive view of the meaning of communication. *Cooper v. Mann*, 143 So.2d 637 (Ala. 1990). The term communication includes not only words uttered, but information conveyed by any other means. *Cooper*, 143 So.2d at 639. The term communication includes any

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knowledge that the attorney acquired from the client and any advice or counsel given to the client. A. R. Evid. 502(b); *Richards v. Lennox Indus.*, 574 So.2d 736 (Ala. 1990); Ala. Code, 1975 § 12-21-161. Letters from the client to the attorney seeking the latter's legal advice, as well as letters legal advice from the attorney to the client, are covered by the attorney-client privilege. Ala. R. Evid. 502(b); *Birmingham Ry & E. Co. v. Wildman*, 24 So. 548 (Ala. 1898).

4. A primary requirement of the attorney-client privilege, as with other privileges, is that the communicating party intend confidentiality. Ala. R. Evid. 502(a)(5). If the communication is made under circumstances suggesting no such intent that the communication not be disclosed to an unnecessary third party, then the privilege fails. *Id.* The known presence of an unnecessary third party or an understanding that the information will be communicated to such a person negates the prerequisite confidentiality. *Id.*; *Crenshaw v. Crenshaw*, 646 So.2d 661, 662 (Ala. 1994). Disclosure to a necessary party to whom a confidential communication is made is proper if the disclosure is made in furtherance of the rendition of legal services to the client. Ala. R. Evid. 502(a)(5).

5. The communication must be made by the client or on the client's behalf. Ala. R. Evid. 502(c). The attorney or the attorney's representative may assert the privilege on the client's behalf or representative of the client. Ala. R. Evid. 502(c). In fact, the attorney has an ethical obligation to assert the privilege on behalf of the client. *See* Alabama Rules of Professional Conduct, Rule 1.6. Representatives of the client include persons having either the authority to obtain professional legal services in behalf of the client or the authority to act upon legal advice rendered on the client's behalf. Ala. R. Evid. 502(a)(2)(i). The attorney-client privilege also survives the death of the client. Ala. R. Evid. 502(c).

In regards to corporate representatives, Alabama follows the Supreme Court decision in

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Upjohn v. United States, 449 U.S. 383, 390, 101 S.Ct. 677, 683, 66 L.Ed.2d 584, 591 (1981) which extends the privilege beyond the scope of the "control group" (or one in a position to control or even to take a substantial party in a decision about any action which the corporation may take upon the advice of the attorney) to include middle-level and even lower-level employees. Ala. R. Evid. 502(a)(2) advisory committee's notes. The determination of whether the employee constitutes a corporate representative is left to a case by case determination by the courts. *Upjohn v. United States*, 449 U.S. 383, 394, 101 S.Ct. 677, 685, 66 L.Ed.2d 584, 594 (1981). It must be emphasized however, that the communication must concern matters within the scope of the employee's corporate duties and for the purpose of effectuating legal representation for the corporation. Ala. R. Evid. 502(a)(2); *Matthews v. Time Ins. Co.*, 646 So.2d 583 (Ala. 1994).

Exceptions

No privilege attaches when services are sought or obtained for the purpose of promoting anyone's commission of what the client knows or reasonably believes to be a crime or fraud. A. R. Evid. 502(d)(1); *Hunt v. State*, 642 So.2d 999, 1034 (Ala. Crim. App. 1993); *Ex parte Griffith*, 178 So.2d 169 (1965) *cert. denied*, 382 U.S. 988 (1966). This exception applies even is the consultation is aimed toward aiding in the criminal or fraudulent conduct of someone other than the client. Ala. R. Evid. 502(d)(1); *Ex parte Enzor*, 117 So.2d 361 (Ala. 1960).

No privilege may be raised as to communications between that client and the client's attorney when the respective claims of all of the parties to the litigation arise through the same deceased client. Ala. R. Evid. 502(d)(2). This exception is common in cases where the parties claim under the same will or in intestate succession. Ala. R. Evid. 502(d)(2) advisory committee's notes.

The attorney-client privilege is also inapplicable when litigation develops between the

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attorney and the client with either charging a breach of duty by the other. Ala. R. Evid. 502(d)(3).

Finally, when an attorney serves as an attesting witness on a document, no attorney-client privilege may be raised to preclude the attorney from being required to testify as to either the execution of the document, including the attorney's attestation, or the intent or competency of he client who executed the document. Ala. R. Evid. 502(d)(4); *Vaughn v. Vaughn*, 116 So.2d 427 (Ala.1928).

Waiver

The attorney-client privileged may be waived either directly or constructively by the client. *Swain v. Terry*, 454 So.2d 948, 954 (Ala. 1984). It is noted however, that one who has the client's consent may waive the privilege on the client's behalf. Waiver may occur through voluntary disclosure of any significant part of the privileged matter. Ala. R. Evid. 510; *Louisville & Nashville R.R. v. Hill*, 22 So.63 (1897). Disclosure may occur through the failure of the attorney to object when a witness is questioned about a privileged matter or when the client divulges the confidential communication to an unnecessary third party outside of court. The material must constitute a significant part of the privileged matter. Ala. R. Evid. 510.

The attorney-client privilege may also be waived if the party asserting the privilege has injected the privileged material into the case. *See* Ala. R. Evid. 510 advisory committee's notes; *Ex parte Malone Freight Lines, Inc.*, 492 so.2d 1301 (Ala. 1986). Once the privileged material is injected into the case as a relevant matter, the party opposing party may probe into the circumstances surrounding the creation of the material. *Ex parte Malone Freight Lines*, 492 So.2d at 1303.

It is important to emphasize the requirement that the waiver be voluntary. Inadvertent disclosure are generally not considered to be voluntarily waived by the client. In making a

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determination on the waiver of an inadvertent disclosure, the court will look at the following factors:

1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;

2. The number of inadvertent disclosures;

3. The extent of the disclosure;

4. Any delay and measures taken to rectify the disclosures;

5. Whether the overriding interests of justice would or would not be served by relieving a party of its error.

Ala. R. Evid. 510 advisory committee's notes.

Objections

The burden of establishing the privilege rests upon the client or other party objecting to disclosure. *Hunt v. State*, 642 So.2d 999 (Ala. Crim. App. 1993). It is an issue of the trial judge as to whether the objecting party has offered proof sufficient to satisfy the element of the privilege. The trial judge is not bound by the rules of evidence except for privileges. Ala. R. Evid. 104(a); *Richards v. Lennox Indus.*, 574 So.2d 736 (Ala. 1990).

B. Attorney Work Product Immunity - Pre-trial Discovery

Purpose and History

The work product doctrine is distinguished form the attorney-client privilege in that the latter applies only to communications between client and counsel. The work product doctrine is broader in that it affords protection to all documents and intangible items prepared by or for the attorney of the party from whom discovery is sought "as long as they were prepared in anticipation of litigation

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or preparation for trial." C. Lyons, Alabama Rules of Civil Procedure Annotated, § 26.6 (2d ed. 1986).

The work product doctrine protects the adversary system and acts to safeguard the judicial process by limiting the scope of discovery of trial preparation material. *See Great Am. Surplus Lines Ins. Co. v. St. Paul Fire & Marine Ins. Co*, 540 So.2d 1357 (Ala. 1989). Our judicial system, being adversarial in nature, must allow each side to be free to investigate and prepare a case without fear that the opponent will discover and utilize unfavorable material. The attorney work product doctrine was first established in the landmark case of *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Hickman involved a tug accident in which several crew members were killed. The tug owners hired a law firm to defend them against potential litigation. *Hickman*, 392 U.S. at 498. An attorney for the tug owners procured statements from survivors and witnesses and took notes in connection with the interviews. *Id.* After suit was filed, the plaintiff attempted to obtain copies of this information. *Id.* at 499. The United States Supreme Court held that written material and mental impressions prepared or formed by an attorney in the course of performing legal duties for a client were protected from disclosure as the attorney's work product, absent undue prejudice or hardship to the party seeking discovery. *Id.* at 495. The court admitted that the materials were not protected by the attorney client privilege, but nevertheless reasoned that an attorney must a have a degree of privacy to prepare adequately the client's case and that unwarranted inquiries into an attorney's files and mental impressions were not justified. *Id.* at 504. Justice Jackson stated in his concurrence that "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516.

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The *Hickman* Court also made it clear that the discovery protection created by the work product doctrine was not an absolute, but a qualified privilege. *Id.* at 511. Information in an attorney's files may be so essential to the adverse party's case preparation that discovery of the material containing the work product may be ordered. *Id.* The party seeking discovery of that work product, however, must show adequate reasons to justify removing the protection. *Id.* at 512. Such work product material is discoverable only on a substantial showing of "necessity or justification."

The *Hickman* decision established a two-tier system of protection for an attorney's trial preparation materials. The first level protects ordinary work product material, such as factual information gathered by an attorney in anticipation of litigation. An attorney's opinions or mental impressions about a case, are accorded a heightened level of protection. This type of work product includes the attorney's legal strategy, the intended lines of proof, the evaluation of the strengths and weaknesses of the case, and the inferences drawn from interviews of witnesses. Therefore, a stronger showing than mere necessity and inability to obtain this type of information without undue hardship must be demonstrated before an attorney will be compelled to disclose his opinions or mental impressions.

Because the work product doctrine established by *Hickman v. Taylor* was interpreted and applied inconsistently by lower courts, the Supreme Court adopted Rule 26(b)(3) as an amendment to the Federal Rules of Civil Procedure in 1970. Rule 26(b)(3) codified the work product doctrine and delineated the materials which constitute work product. This attorney work product doctrine was recognized and applied by Alabama in *Ex parte Alabama Power Co.*, 196 So.2d 702 (Ala. 1967) and adopted by the Alabama Rules of Civil Procedure. Ala. R. Civ. P. 26(b)(3); *Ex parte Garrick*, 642 So.2d 951 (Ala. 1994); *Southern Haulers, Inc. v. Martin*, 382 So.2d 491 (Ala. 1990).

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Requirements

Rule 26(b)(3) protects from discovery materials meeting three basic requirements:

1. The protection extends only to "documents and tangible things." Ala. R. Civ. P. 26(b)(3); *LaMonte v. Personnel Bd. of Jefferson County*, 581 So.2d 866 (Ala. Civ. App. 1991). In practice, this means that work documents are generally protected under the rule, but to the extent case facts contained in those documents, such facts may be discoverable. The work product doctrine is broader than the attorney client privilege in that the work product doctrine applies to all documents and tangible items prepared by or for the attorney of the party from whom discovery is sought. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 393, n. 4 (1994).Therefore, mental impressions, personal beliefs of the attorney and oral statement made by the attorney are excluded from the scope of the protection of the privilege. *Ex parte Stephens,* 676 So.2d 1307, 1313 (Ala. 1996). Likewise, because pre-trial interviews of witnesses play an integral role in the lawyer's formulation of the strategy for the case, such inquiries are protected by the privilege. *Ex parte Stephens*, 676 So.2d at 1312; citing *International Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975). However, the work product privilege is inapplicable when the statements are made by the witness, regardless of whether they were drafted by the attorney and adopted by the witness or prepared by the witness and later delivered to the attorney, because the mental impressions and observations are those of the witness and not the attorney. *Assured Investors Life Ins. Co. v. Nat'l Union Associates, Inc.*, 362 So.2d 228 (Ala. 1978); citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

2. A document must have been "prepared in anticipation of litigation or for trial" in order to qualify for the work product privilege. Ala. R. Civ. P. 26(b)(3); *Sims v. Knollwood Park Hosp.*, 511

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So.2d 154 (Ala. 1987) . When documents are prepared after a potential cause of action arises, even if actual litigation has not yet begun, those documents are considered work product. On the other hand, documents prepared in the regular course of business, rather than for litigation purposes, are not protected.

The Alabama Supreme Court has ruled that the mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege. *Sims*, 511 So.2d at 157. The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Id.* at 157-8; citing 8 Wright & Miller [Federal Practice & Procedure, Civil, Section 2024]. *Id.* at 158; quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982). The mere contingency that litigation may result is not determinative. If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigative report is produce able in civil pre-trial discovery. *Id.* While litigation need not be imminent, the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation. *Id.* The party seeking to assert the privilege has the burden of proving that at the very least, some articulable claim, likely to lead to litigation has arisen. *Id.*

3. The work product protection extends only to materials prepared "by or for another party or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent)." Ala. R. Civ. P. 26(b)(3); *LaMonte v. Personnel Bd. of Jefferson County*, 581 So.2d 866 (Ala. Civ. App. 1991). While this extends the scope of the protection, a party may not hide behind the privilege by asserting the advice of counsel defense. *See Ex parte Proactive Ins.*

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Corp., 668 So.2d 508 (Ala. 1995).

Exceptions

A party may still obtain discovery of material meeting the threshold requirements by showing a either a "substantial need" of the documents or that they are "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Ala. R. Civ. P. 26(b)(3); Wright & Miller, Federal Practice & Procedure, Civil, § 2023 (1970). For a party arguing that it has substantial need of the materials, it must show that the documents are necessary for preparing a case. Ala. R. Civ P. 26(b)(3) committee comments.

Waiver

An attorney may waive the privilege of the work product doctrine. A waiver is a voluntary relinquishment of a right or such conduct as a warrants an inference of the relinquishment of such right. Black's Law Dictionary 1580 (6th ed. 1990). Individuals with a common interest in litigation may exchange work product to prepare a common defense. *United States v. American Tel & Tel. Co.*, 642 F.2d 1285, 1300 (D.C.Cir. 1980). Therefore, attorneys facing a common opponent do not waive the rule's protection by sharing work product. The work product privilege was originally limited only to cases with actual co-defendants, but the protection has been extended to work product exchanged between parties to potential litigation as well. As long as the parties anticipate litigation against a common defendant, they may share their materials in preparation for litigation. Ala. R. Civ. P. 26(b)(3).

Disclosure to an expert witness does not constitute a waiver of the privilege because they are presumed to have a common interest in the litigation. However, Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing reports. The report is to disclose the data

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and other information considered by the expert. Litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions whether or not ultimately relied upon by the expert are privileged or protected from disclosure when such persons are testifying or being deposed. *See* Ala. R. Civ. P. 26(b)(4) committee comments.

As with the attorney-client privilege, waiver of the attorney work product doctrine occurs when the work product that is prepared is in furtherance of a crime or fraud, the privileged material is inadvertently produced to the opposing counsel, or when a party places at issue facts which are contained in the work product documents. If the content of the privileged materials relate directly to an issue in the case, then the party asserting a privilege cannot rely on the protection of the work product doctrine. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977).

Objections

The party objecting to discovery under Rule 26(b)(3) carries the burden of proving that the materials sought were protected by the privilege. *Ex parte Fuller*, 600 So.2d 214 (Ala. 1992); *Sims v. Knollwood Park Hosp.*, 511 So.2d 154 (Ala. 1987). The Alabama Supreme Court has held that the party objecting to discovery based on the work product privilege must show that the discovery was prepared in anticipation of litigation; however, this showing is required only if the party requesting the discovery first argues that the discovery was not prepared in anticipation of litigation. *Fomby v. Popwell*, 695 So.2d 628 (Ala. 1996); quoting, *Ex parte Garrick*, 642 So.2d 951, 953 (Ala. 1994).

Because the attorney work product doctrine is a qualified privilege, the trial court has broad discretion to rule on the discovery material and the decision will not be disturbed unless there is abuse of discretion. Ala. R. Civ. P. 26(c). Mandamus is the appropriate method for testing the

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correctness of the trial judge's order governing discovery. *Ex parte Alabama Power Co.*, 196 So.2d 702 (Ala. 1967).

D. Refuting Hearsay Objections

Generally, Courts exclude hearsay statements as unreliable because they cannot be tested by cross-examination and the finder of fact has no opportunity to guage the declarant's sincerity, perception, memory, nor do they have the opportunity to resolve ambiguities in the declarant's statement. Thus, for the practitioner to overcome a hearsay objection, one must be prepared to prove to the court that either the statement is not hearsay, or that it falls within some exception to the hearsay rule. Using the same analysis as identified previously in this paper on Blocking Unreliable Hearsay, the converse will assist the practitioner in answering objections to relevant evidence.

As mentioned above, there are numerous exceptions to the hearsay rule. Obviously, the best way to refute a hearsay objection is to prove to the court that the evidence being offered is not hearsay. Admissions are not considered hearsay. The rationale is that an individual will take responsibility for his own statements in our adversary system of justice. Because the declarant is a party, he has a full opportunity to explain why he made the statement and to place it in its proper context. In addition, the rule does not limit admissions to statements made by the individual party but extends to adopted statements made by others, statements made by authorized persons, statements by agents, and statements by co-conspirators. Practically speaking, in order for you to admit a statement which is not made directly by the party but is a vicarious admission, you must be prepared to show that the agent's statement is concerning a matter within the scope of his agency and be prepared to lay the proper foundation on the existence and scope of that agency. Similarly, if the admission is adoptive (one person writes a report and the party signs it), be prepared to meet

arguments that the party did not read or understand the report. Remember that the party need not have first hand knowledge of the matter contained in the admission. Also, it is important that the practitioner remember that the definition of hearsay is a statement "offered to prove the matter that it asserts." Thus, any statement offered for another reason such as showing motive, plan, or design is not hearsay. If it is not offered for the truth of the matter it contains, it is not hearsay.

Without burdening the reader with a recitation of all of the exceptions to the hearsay rule, needless to say it is imperative that the practitioner be prepared to lay the proper foundation to respond to any hearsay objections when offering testimony as an exception to a hearsay rule. The practitioner must also be prepared to argue in the alternative various exceptions to the hearsay rule. For example, do not let an objection based on hearsay and the lack of proof of a traumatic or startling event prevent you from introducing the evidence on an alternative theory from excited utterance. Recall from our previous discussions on the exceptions to the hearsay rule that a present sense impression does not require a startling event to make the statement admissible. Conversely, an excited utterance differs from the present sense impression in that the excited utterance only need to relate to the startling event while a present sense impression must describe or explain the event. An excited utterance does not necessarily occur immediately after the event and the practitioner must be prepared to show that the declarant was still under the influence of the startling event at the time that the comment was made.

One of the most often heard objections to documentary evidence is that the document contains inadmissible hearsay and does not qualify under a business record exception. One must be prepared to refute that exception by laying the proper foundation as outlined. Once you have established the proper foundation for a business record exception, you may expect another objection

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based on Rule 805, hearsay within hearsay. You must be prepared to refute this objection by having prepared an analysis of each statement within the records showing that either the (1) statement within the records is not hearsay or (2) that the statements fall within some other recognized exception to the hearsay rule. Then and only then will the document be admitted into evidence.

Finally, and probably just as importantly, the opportunity to argue the admissibility of the evidence can serve a useful purpose. If, for instance, your opponent objects with the general objection that we hear in court all the time: "Objection, hearsay," it is your opportunity at that time to argue to the judge, in front of the jury, why this is not objectionable, why its not hearsay and why it should come into evidence. Tactically, that can be a very good for credibility on your side and an opportunity to paint the opposing party in a very bad light. On the other hand, if you are not sure that you will win the argument, it would be better to argue the objection fully at side bar. This tactical maneuver can only be utilized successfully in a courtroom in which you as the practitioner are comfortable and in a courtroom where you know the judge will not condemn you or your practice in the front of the jury. Ultimately, however, no evidence, whether it is an exception to the hearsay rule or simply not hearsay, will be admitted unless it is reliable, material, and relevant. You must be prepared to overcome those subsequent objections when you are preparing to offer statements, documents, or tangible items into evidence.

VI. OBJECTIONS AT TRIAL RELATING TO :

C. ATTORNEY OR JUDICIAL MISCONDUCT

1. Attorney Misconduct

The main concern with attorney or judicial misconduct during a jury trial is the prejudice that the comments or behavior creates. Therefore, when an attorney is faced with prejudicial misconduct

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of an opposing counsel, it is important to interrupt the behavior and raise an objection immediately to preserve the behavior for appeal and ask that the jury be instructed to disregard the comments. Otherwise, you run the risk of waiving the error unless, of course, the misconduct is so aggravated that it could not be cured by any instruction.

In a situation where the misconduct of opposing counsel is so grave that the prejudice can not be cured by a timely admonition to the jury, a motion for mistrial should be considered. A mistrial for prejudicial misconduct is discretionary with the court, but when the misconduct is shown to have caused irreparable prejudice that could not be cured by a timely admonition to the jury, the court may order a mistrial. Generally, when the improper conduct of an attorney is promptly objected to and the jury is properly instructed, and the parties receive a fair trial, a motion for a mistrial will likely not be granted. Where the court has sustained objections to allegedly improper conduct or argument and excluded it from the jury's consideration, a mistrial should not be granted "unless it clearly appears that the defendant's rights have been so clearly prejudiced as to render a fair trial a matter of grave doubt,"that its influence was not or could not have been eradicated. McArthur v. State, 591 So.2d 135, 138 (Ala.Cr.App. 1991) (quoting Watson v. State, 266 Ala. 41, 44, 93 So.2d 750, 752 (1957)).

The types of behavior that give rise to attorney misconduct include making improper arguments in a jury's presence where inadmissible matters are brought before the jury; arguing the merits of a case in the jury's presence on the pretense of stating an objection to the evidence; making self-serving remarks under the guise of an evidentiary objection ; improper communication with jurors; improper eavesdropping on confidential attorney-client communications; willfully concealing evidence that an attorney has an obligation to reveal or produce; and improper opening statement or

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closing summations (discussed next in this paper). Additionally, an attorney cannot abuse, belittle, or embarrass his adversary before a jury to an extent that his opposing counsel's respectful consideration by the jury is destroyed or seriously jeopardized.

2. Judicial Misconduct

The Alabama Supreme Court wrote regarding the judicial misconduct that occurred in Ex Part James:

> The courts must maintain public confidence in the judicial system. The moral authority of courts is an essential part of the foundation upon which the American legal system operates. Courts do not enact laws; they do not command a police force. A court's word, without accompanying coercion or force, must command obedience by legal, moral, and logical suasion, or it loses its authority. The judicial misconduct and abuse of authority that have taken place in this case undermine public confidence in the judicial system. 713 So.2d 869, 922 (Ala. 1997).

While sitting on the bench in Ex Parte Reese, a case about Alabama's educational system, Judge Reese was running for the Supreme Court and the Alabama Judicial Inquiry Commission determined that his use of the case [Ex Parte Reese] in a television campaign advertisement created an appearance of a conflict of interest. *Id.* at 920.

Case law in Alabama has clearly laid out the duty of a trial judge "to be thorough, courteous, patient, punctual, just and impartial. Yet, [a judge] is not required to be a "Great Stone Face" which shows no reaction to anything that happens in his courtroom." M.T.v. State, 677 So.2d 1223 (Ala.Cr.App. 1995). The Court of Criminal Appeals held that a trial judge's behavior did not rise to the level of misconduct when he told the defense lawyer to "shut up now" in front of the jury and promptly instructed the jury, himself, to disregard any comments he makes to the lawyers during trial. M.T.v. State at 1228-1229. The Court ruled that a trial judge has a vast array of

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responsibilities, including that of protecting witnesses "from improper questions and from harsh or insulting demeanor." *Id.* at 1229. Further, the Court stated that "in discharging his [the judge's] responsibilities , the trial judge may properly caution, correct, advise, admonish, and to a certain extent, criticize counsel during the case, provided it is done in such a manner as not to subject counsel to contempt or ridicule, or to prejudice the accused in the minds of the jurors." *Id.* at 1229.

Of course, a judge can recuse himself from hearing a case upon a showing of preexisting bias or prejudice resulting from close relationships to the parties or counsel; financial interest in the litigation; or personal knowledge of disputed facts. But, if these grounds are not discovered before trial, then a challenge at the time of trial would be appropriate.

D. OPENING STATEMENTS AND CLOSING SUMMATIONS

Miscellaneous Issues before an Opening Statement

1. Under Alabama practice, on the judge's own motion or on the motion of a party, witnesses may be excluded from the courtroom pursuant to Ala.R.Evid. 615. This practice is referred to as both "sequestration of witnesses" and as "putting witnesses under the rule." *See,* e.g., Chatman v. State, 380 So.2d 351 (Ala.Cr.App. 1980); C. Gamble, McElroy's Alabama Evidence §286.01 (4th ed. 1991). An important distinction between the Alabama and Federal rule of evidence 615 exists within the use of the word "may" in the Alabama rules contrasted to the word "shall" in the Federal rule. In Alabama, Rule 615 continues to be a discretionary sequestration and a mandatory sequestration in the Federal system.

2. It is possible to challenge the entire jury selection process under the Jury Selection Act. However, this objection must be made "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds

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therefor, whichever is earlier." 28 U.S.C. § 1867 (a). The timeliness requirement is 'to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act.' Therefore, once voir dire begins, Jury Selection Act challenges are barred, even where the grounds for the challenges are discovered only later." U.S. v. Paradies, 98 F.3d 1266, 1277-78 (11th Cir. 1996).

3. The Equal Protection clause forbids a lawyer from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the lawyer's case. Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1986). Batson continues to recognize that a lawyer is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case the lawyer is trying. *Id.* at 1719.

The Court in Batson laid out the following elements of a prima facie Batson claim:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the [opposing counsel] has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the [opposing counsel] used that practice to exclude the venirement from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723 (citations omitted).

The following are a few examples of "reasons" to disqualify a juror:

1. Inability to follow questions. U.S. v. Williams, 936 F.2d 1243 (11th Cir. 1991)

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2. Rubbing and rolling of the eyes. U.S. v. Hendrieth, 922 F.2d 748 (11th Cir. 1991).

3. Hostile facial expressions and body language. Barfield v. Orange County, 911 F.2d 644 *rehearing denied* 920 F.2d 13 (11th Cir.), *dert. denied* 111 S.Ct. 2263 (1990).

1. Opening Statement

Opening Statements are your first opportunity to tell the jury what your case is about, but you are limited to only demonstrating your facts and themes of the case. Basically, an opening statement can be nothing more than a story--a story about your client and what happened to bring them to court. It is improper to comment on inadmissible evidence or make inflammatory or prejudicial remarks during opening statements. The general rule is that no statement may be made in opening that counsel does not intend to prove or cannot prove.

Making objections during opening statements is a strategic devise inasmuch as it is anything else. As a general rule, many lawyers simply do not make objections during opening statements. However, a lawyer does not want to prejudice their client's case by letting opposing counsel's abuse continue without an objection. The following are possible grounds for objections to make during an opening statement:

- *Arguing the law or the instructions*

  Opening statements permit the lawyers to tell the jury what they anticipate the evidence at trial will be. Accordingly, it is usually objectionable to review or discuss in detail the law or instructions applicable to the case. Courts, however, differ on how strictly they require counsel to adhere to this rule.

- *Argumentative*

  The opening statement should tell the jury the anticipated facts that will be presented during the trial. Accordingly, it is improper to make the opening statement argumentative, such as arguing the credibility of witnesses and other evidence the jury will hear, or arguing inferences and deductions from the evidence. These are

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appropriate only during closing arguments.

- *Mentioning inadmissible evidence*

  It is always improper to bring before the jury during opening statements or at any time, evidence that is inadmissible. Common forms of inadmissible evidence are:

  1. Evidence that has been suppressed by pretrial motions or motions in limine.

  2. Privileged matters, such as attorney/client or husband/wife conversations, inadmissible under FRE 501.

  3. Evidence of settlement negotiations in civil cases.

  4. Subsequent repairs, made after an event, inadmissible to prove negligence in connection with that event under FRE 407.

  5. Evidence of payment of, or promise to pay, medical and related expenses resulting from injury, inadmissible to prove liability under FRE 409.

- *Mentioning unprovable evidence*

  It is improper to mention evidence that, although true, is incapable of being proved at trial. Where a witness has died or cannot be found for trial, it is improper to state what that witness' testimony would be. Where exhibits have been lost or destroyed, it is improper to tell the jury what such exhibits contain. The test here is good faith. A lawyer can include in his opening statements only evidence that he in good faith believes is both available and admissible at trial.

- *Giving personal opinions*

  It is improper to tell the jury your personal opinion on any evidentiary matter. Such personal opinions are not proper because they directly inject the credibility of the trial lawyer into the trial. Accordingly, phrases such as "I think" or "I believe" are best left out of your trial vocabulary.

- *Discussing the other side's evidence*

  It is improper to tell the jury during opening statements what you expect the other side to present as evidence during the trial, since the other side is not obligated to present evidence and can elect to present whatever it chooses. This is a problem usually limited to criminal cases where it is highly prejudicial for the prosecutor to suggest what the defense will prove, since the defendant is never required to prove

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anything.

2. **Closing Arguments**

Closing arguments are the last opportunity a lawyer has to communicate directly with the jury. It is proper for counsel to state or comment on any aspect of the evidence and on all proper inferences from the evidence and suggest conclusions from the evidence based on counsel's own reasoning. During closing, counsel may even argue law to the jury and discuss the legal principles applicable to different phases of the testimony. But closing arguments are not the place to argue facts which are not in evidence, relate personal experiences, refer to the wealth or poverty of the parties, or express personal opinions on the evidence or on the merits of the case.

Whether to object to an improper argument made by opposing counsel during their closing argument is often a close call. An objection is generally necessary to avoid waiver and may have the beneficial effect of throwing your opposing counsel "off stride" and disrupting the flow and impact of their argument. On the other hand, your objection will probably focus the jury's attention on whatever your opposing counsel has just stated. Objections during closing argument are usually considered "bad form" and may invite retaliation from the opposing counsel and possibly alienate the jury. However, if your opposing counsel's closing argument rises to the level of egregious, the following objections may be made:

- *Misstating evidence*

  It is improper to misstate evidence or misquote testimony admitted during the trial. However, it is proper to argue reasonable inferences and deductions from such evidence. Trial judges are usually reluctant to sustain such objections absent a clear violation, since what the evidence actually admitted at trial was involves memory and recollection, which can and do often differ. Accordingly, judges often overrule such objections but remind the jurors that they heard the evidence and should rely on their recollections in determining whether counsel's statement of the evidence are

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accurate. This objection is probably best saved for obvious gross misrepresentations and misstatements.

- *Misstating law and quoting instructions*

  It is improper in some jurisdictions to read the court's instructions verbatim to the jury during closing arguments. However, it is usually permissible in those jurisdictions to refer to the instructions the court will actually give and paraphrase their contents to the jury. When this is done, the paraphrasing or other reference to the instructions must be fair and accurate.

- *Giving personal opinions*

  It is improper for counsel to inject his or her personal opinions, beliefs, and attitudes into the case at any time. Therefore, such comments as "I think" and "I believe," unless clearly and directly linked to the evidence, are improper. Since these phrases often draw objections when used, they are best excised from your trial vocabulary.

- *Appealing to jury's bias, prejudice, and pecuniary interest*

  Our jury trial system requires the jury to reach a verdict without resorting to bias or prejudice. That verdict should be based solely on the evidence admitted during the trial and the court's instructions on the applicable law. Accordingly, suggestions to the jury that they may be personally affected by a given verdict is improper, even if done indirectly.

- *Personal attacks on parties and counsel*

  It is always improper to engage in personal attacks on opposing counsel or the other parties in the trial. This should never be done for both legal and persuasive reasons. Nothing can diminish your credibility before the jury faster than resorting to this type of argument. Never let things get personal, either at this or any other stage of the trial. Commenting on the party's race, religion, national origin, political affiliations, or other personal characteristics is in most instances highly improper.

- *Prejudicial arguments*

  A large number of arguments are improper because they are prejudicial comments having little or nothing to do with the evidence. It is improper to ask the jury to put itself in the shoes of any of the parties, since this is a direct appeal to the juror's emotions and violates what is commonly called the "Golden Rule" (e.g., you cannot argue, "if someone came to you and said, 'I'll give you $1 million but you'll have to spend the rest of your life lying on your back,' would you take it?").

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