ALABAMA RULES OF EVIDENCE – BACK TO THE BASICS

The scope of the Alabama Rules of Evidence is stated in Rule 101:

Rule 101.
Scope.

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

So it makes some sense to go straight to Rule 1101, even though it is almost the *last* rule, to get an understanding of when the Rules apply and when they don't:

Rule 1101.
Rules applicable.

(a) *General applicability.* Except as otherwise provided by constitutional provision, statute, this rule, or other rules of the Supreme Court of Alabama, these rules of evidence apply in all proceedings in the courts of Alabama, including proceedings before referees and masters.

(b) *Rules inapplicable.* These rules, other than those with respect to privileges, do not apply in the following situations:

(1) PRELIMINARY QUESTIONS OF FACT. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) GRAND JURY. Proceedings before grand juries.

(3) MISCELLANEOUS PROCEEDINGS. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) CONTEMPT PROCEEDINGS. Contempt proceedings in which the court may act summarily.

So we start with the proposition that the rules relating to privileges will *always* apply. We'll have a more in-depth discussion of privileges. But *other than the rules regarding privileges,* the rules don't apply in the following situations:

1) PRELIMINARY QUESTIONS OF FACT.

Rule 104 addresses "preliminary questions":

Rule 104.
Preliminary questions.

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

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

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

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

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

What are preliminary issues that the Court must decide?

- Questions concerning qualification of a person to be a witness (e.g. competency; expert qualifications; availability).
- Privilege
- Admissibility of evidence (e.g. suppression issues, expert testimony)

So the rules of evidence are not going to apply when the Court is determining witness qualifications and admissibility of evidence issues, but the rules establishing privileges *will* apply.

Rule 1101(b)(2) provides that the Rules don't apply to grand jury proceedings.

Rule 1101(b)(3) specifies that the Rules won't apply to the following specific proceedings:

- Extradition hearings
- Preliminary hearings in criminal cases
- Sentencing hearings
- Probation revocation hearings
- Hearings on motions to set/reduce bond
- Issuance of search or arrest warrants

ARTICLE II - JUDICIAL NOTICE

Rule 201.
Judicial notice of adjudicative facts.

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

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

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

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

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

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

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

- NEVER EVER EVER ask us to take judicial notice of Wikipedia, WebMD, or anything from the Internet that you don't have a witness to authenticate.
- Note also APJI 15.15:

"The rules of evidence permit me to accept facts that I find cannot reasonably be disputed. This is called judicial notice. I take judicial notice of (state the facts)). Even though no evidence has been introduced to prove this fact, you must conclusively accept this fact as proved."

ARTICLE IV - RELEVANCY AND ITS LIMITS

The primary issue we see under this Article arises under Rule 404(b)

Rule 404.
Character evidence not admissible to prove conduct; exceptions; other crimes, wrongs, or acts.

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

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

(2) CHARACTER OF VICTIM.

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

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

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

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[Amended 8-15-2013, eff. 10-1-2013.]

Remember the exceptions.

- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of mistake or accident

The Rule requires the State in a criminal case to give reasonable notice of the general nature of any such evidence it intends to introduce at trial. In that regard, please take note of our STANDING ORDER RE: RULE 404(b) AND RULE 609, ALABAMA RULES OF EVIDENCE, a copy of which is attached.

Also be mindful of APJI 15.08, "Limited Purpose Evidence," which provides:

> Some of the evidence in this case is admitted for a limited purpose. The evidence (describe the evidence) is admitted only for (describe the purpose). You cannot consider it (describe what it cannot be used for.)
>
> You will consider this evidence with the reset of the evidence, but only for the purpose it was admitted.

ARTICLE V- PRIVILEGES

Rule 501.
Privileges recognized only as provided.

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

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Note that Rule 501 basically says there is no privilege unless given by constitution, statute, or rule promulgated by the Supreme Court of Alabama. No person can 1) refuse to be a witness; 2) refuse to disclose any matter 3) refuse to produce any object or writing; or 4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Here are the privileges that are recognized in the Rules of Evidence:

- Rule 502 -Attorney-client privilege (most notable exceptions - *furtherance of crime or fraud * breach of duty by an attorney or client
- Rule 504 – Husband/wife privilege
- Rule 505 – Communications to clergymen
- Rule 506 – Political Vote
- Rule 507 – Trade secrets
- Rule 508 – Government secrets
- Rule 509 – Identity of informants

The privileges we seem to spend the most time on are the following:

Rule 503.
Psychotherapist-patient privilege.

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

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

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

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the

diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

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

(d) *Exceptions.*

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

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

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

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

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

Rule 503A.
Counselor-client privilege.

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

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

(2) A “licensed professional counselor” is any person who holds himself or herself out to the public by any title or description of services incorporating the words “licensed professional counselor” or “licensed counselor”; who offers to render professional counseling services to individuals, groups, organizations, corporations, institutions, government agencies, or the general public, implying that the person is licensed and trained, experienced or expert in counseling; and who holds a current, valid license to engage in the private practice of counseling.

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

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

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

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

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

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

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

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

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

(F) Victim counseling. The providing of counseling to victims for any emotional or psychological impact resulting from a sexual assault or family violence.

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

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

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

(A) Attempting to cause or causing physical harm.

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

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

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

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

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

(d) *Exceptions.*

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

(2) EXAMINATION BY ORDER OF COURT. If the court orders an examination of the mental or emotional condition of a client, whether a party or a witness, communications made in the course thereof are not privileged under this rule

with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.

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

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

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

If you have a situation involving mental health or counseling issues, first consult Rule 503 to see whether your "professional" is covered. The first thing to determine is which Rule applies, i.e. is the professional rendering services a psychotherapist? A psychologist? A licensed counselor?

The "general rule of privilege" is the same in both Rules:

> Regarding psychotherapists and psychologists, here's the general rule of privilege:
>
> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcohol or drug addiction, among the

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

The counseling privilege has the same basic rule:

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

This confidentiality issue comes up in civil cases; in criminal cases; and a lot in domestic relations cases, and the treatment of the issue can be a little different in each.

CIVIL CASES. The psychotherapist/psychologist/counseling privilege most often comes up when a plaintiff in a personal injury case claims mental anguish/emotional distress as a result of the incident they are suing about—a traffic accident, a fall, etc. The defense attorney will typically issue interrogatories asking the plaintiff to identify all health service providers they have seen over the last 10 years, and will specifically ask whether the plaintiff has ever before suffered the type injury/damage they now claim. Rule 503 and 503A don't protect the *fact* that the plaintiff has seen these providers before – but does protect communications between

them, and therefore the provider's records are protected. The defense attorney can subpoena the records if he/she chooses, but unless the patient waives the privilege, they are not going to be produced. The argument of course is that it's not fair to the defendant to allow the plaintiff to claim injury *now* with no discovery of what his condition was *before.* Without the records, the argument goes, a defendant is robbed of his ability to disprove causation. Such argument always falls on deaf ears and the records are *never* discoverable. See *Ex parte Pepper, 794 So.2d 340 (Ala. 2001); Ex parte United Serv. Stations, Inc., 628 So.2d 501(Ala. 1993).*

CRIMINAL CASES. Rule 503(d)(3) provides that accused in a criminal case cannot assert the psychotherapist/psychologist privilege if he raises the defense of insanity. Rule 503A makes no reference to a criminal proceedings but does provide, in 503A((d)(3), that the "counselor" privilege does not apply when the client relies upon the condition as a element of his defense.

<u>DOMESTIC RELATIONS CASES.</u> Rule 503(d)(5) specifically provides that there is no psychotherapis/psychologist privilege "in a child custody case in

which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure." Interestingly, there is no counterpart to this exception in 503A for communications with a counselor.

By far the most troublesome issue raised by Rules 503 and 503A arises in both criminal and domestic cases when the communications sought to be discovered are by a MINOR to a psychologist, psychotherapist, or counselor. Case law makes clear that a minor's communications enjoy the same protection as those of an adult. The real issue becomes the capacity of the minor to either claim or waive the privilege. Both 503 and 503A provide that the privilege may CLAIMED by the patient/client, or the patient/client's guardian or conservator. In cases in which communications between a minor and a psychotherapist/psychologist or counselor may be an issue, the best practice seems to be appointment of a *guardian ad litem* for the minor. That is routinely done in custody cases, and is authorized in criminal cases in which the victim is a minor.

Parties in custody proceedings frequently urge release of their minor child's privileged communications by stating that both parents consent to the release. That is an insufficient basis, as the privilege belongs to the

minor, not the parents. Others argue that the communications of a minor are discoverable pursuant to the "child custody" exception in Rule 503(d)(5). That argument was rejected by the Alabama Court of Civil Appeals in *Ex Parte Dr. Barbara Johnson,* a decision released on September 9, 2016. In *Johnson,* the father in a custody proceeding served a subpoena upon Dr. Johnson, a psychotherapist, seeking production of records regarding her diagnosis and treatment of the parties' minor. Dr. Johnson asserted the privilege on behalf of the child and filed a motion to quash the subpoena directed to her. The trial court denied the motion to quash and ordered her to produce the records. Dr. Johnson filed a petition for mandamus to the Alabama Court of Civil Appeals, which was granted. The Court basically said that 1) a minor child is not a party to a custody determination, 2) the privilege belongs to the minor, and 3) only the minor can waive it. Thus, while it is clear that a *guardian ad litem* for a minor can claim the privilege, it is not at all clear that a *guardian ad litem* can waive it. Given the disabilities traditionally associated with minority, one wonders how a minor could ever waive the privilege.

The *Johnson* court noted in a footnote that the parties did not raise concerns "separate and apart" from the exception in Rule 503, and

specifically mentioned "constitutional concerns." Thus the door would seem to be at least open for the argument – particularly in a criminal case – that the right to a fair trial outweighs the minor's privilege of confidentiality.

The remaining question is this – what recourse is available to a party denied access to the psychotherapist/psychologist/counselor records of a witness? Look at Rule 512 and 512A.

Rule 512.
Comment upon or inference from claim of privilege in criminal cases; instruction.

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

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

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

Rule 512A.
Comment upon or inference from claim of privilege in civil cases.

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

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

If the records are those of an accused in a criminal case or a non-party witness, the answer is : NOTHING. If the communications are those of a party in a civil case, however, Rule 512A allows the lawyer who wants the records but can't have them to in essence "call out" the party claiming the privilege. Rule 512A says "an appropriate inference" may be drawn from the claim of privilege, and APJI 15.17 advises the jury that they may, but are not required to, consider the claim of privilege against the party claiming it.

ARTICLE VI – WITNESSES

The highlights:

Rule 607.
Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

RULE 609 – Impeachment by prior conviction of crime

Rule 609.
Impeachment by evidence of conviction of crime.

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

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

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

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

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction, more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

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

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

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

The rule differentiates between an accused, and a witness who is <u>not</u> an accused. Before you attempt impeachment, re-read the rule and make sure the conviction you are about to offer is admissible. And above all, remember that <u>AN ARREST IS NOT A CONVICTION.</u>

RULE 611 - This rule has three important sections:

Rule 611.
Mode and order of interrogation and presentation.

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

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

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

RULE 612 - Writing used to refresh memory:

Rule 612.
Writing used to refresh memory.

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

(b) *Production of writing used to refresh memory.* If while testifying a witness uses a writing to refresh his or her memory, then an adverse party is entitled, upon request, to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions of it relating to the witness's testimony. If it is claimed, in opposition to such a request, that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not delivered pursuant to order under this rule, the court shall make any order justice requires,

> except that in a criminal case if the prosecution does not comply, the order shall be one striking the testimony of the witness whose memory was refreshed or, if the court in its discretion determines that the interests of justice so require, the order shall be one dismissing the indictment or other charging instrument or declaring a mistrial.

A writing may be used to refresh the memory of a witness under two circumstances: *present recollection revived* and *past recollection recorded.* In the first instance, it is not necessary for it to be shown that the witness needs his recollection revived. It must be shown that the witness possesses a personal knowledge of the matter recorded in the writing. It is not necessary that the witness wrote the document or even knew of its existence. If the writing refreshes the recollection of the witness, the document itself may not be introduced into evidence, unless introduction is made by the adverse party.

If the memory of the witness cannot be refreshed by reviewing the document, the situation becomes one of *past recollection recorded* and is essentially governed by the requirements of Rule 803. The document may be read into evidence but not itself admitted unless offered by the adverse party.

RULE 613: PRIOR STATEMENTS OF WITNESSES

Rule 613.
Prior statements of witnesses.

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

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

Remember: before you can impeach with a prior statement, the testimony of the witness on the stand MUST BE DIFFERENT from what he/she said in the statement you want to use. To effectively use the prior statement to impeach, a predicate must be laid. Be prepared to question the witness about the content of the statement, the place and time it was made, and the person to whom it was made.

RULE 615 –

Rule 615.
Exclusion of witnesses.

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

This is sometimes known as The Rule Regarding Sequestration of Witnesses, or simply "THE RULE." Note that it is discretionary, not mandatory, with the Court. It applies only to in-court testimony – not depositions. It is up to the judge to determine whether, in a particular case, invocation of the Rule means witnesses cannot talk to each other outside the courtroom.

ARTICLE VIII – HEARSAY

The "hearsay" topic is too broad to cover in an hour; it could well be the topic of a full 8 hour seminar. The issue that we want to address today is the "business records" exception found in Rule 803(6):

Rule 803.
Hearsay exceptions; availability of declarant immaterial.

. . .

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

Frequently, "business records" are "certified" pursuant to Rule 902(11) and are admitted. Be careful about assuming that the admission of those records carries the day. That is not ALWAYS the case. This issue comes up frequently in personal injury cases in which a plaintiff claims damages for medical expenses. Certified copies of hospital and medical bills and records are frequently offered. Remember that to recover medical expenses, the plaintiff must prove that the expenses were 1) reasonable in amount and 2) necessary as a result of the incident made the basis of the case. We sometimes hear the argument that because the hospital/medical records are "business records," the plaintiff has carried his burden. Not so. The certification provides no proof from an expert that the bills were reasonable/necessary. Without that expert testimony, those bills are not admissible, *even though* they are "business records."

Also be aware of the "hearsay within hearsay" issue. The "business record" exception only guarantees admission of statements by persons *whose business duty it was* to make the statement. If the statement in the record was made by someone else, there has to be *another* hearsay exception to make the statement admissible.