

COMPREHENSIVE PRINCIPLES GOVERNING THE INTERACTION  
 BETWEEN THE ALABAMA RULES OF EVIDENCE AND  
 ALABAMA STATUTORY RULES OF EVIDENCE: THE NEED FOR  
 JUDICIAL INITIATIVE AND LEGISLATIVE DEFERENCE WHEN  
 BOTH BRANCHES OF GOVERNMENT HOLD CONSTITUTIONAL  
 POWER TO ADOPT RULES OF EVIDENCE

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## I. INTRODUCTION

Perhaps the greatest single contribution wrought by the Alabama Supreme Court's adoption and promulgation of the Alabama Rules of Evidence is the centralization of Alabama's primary evidence law into a single, well-organized volume after its having existed for centuries in scattered decisions left to the organizational skills of treatise authors, digest writers, and encyclopedists. The significance of this development, however, suffers from the fact that it misleads some into thinking that the Alabama Rules of Evidence constitute the sole source of Alabama's evidence law. The single set of rules fosters a failure to fully appreciate either the fact or breadth of the vast body of statutes containing evidentiary principles which hold the possibility to contradict, supplement, or merely confuse the interpretation and application of the Alabama Rules of Evidence. The purpose of this Article is to survey representative examples of these statutes, categorize them and set forth a primer on the principles governing how they are to be interpreted in light of the Alabama Rules of Evidence.

As the drafting of this Article began, the Alabama Supreme Court handed down the landmark decision in *Schoenvogel ex rel. Schoenvogel v. Venator Group Retail, Inc.*<sup>1</sup> Writing for the majority in *Schoenvogel*,<sup>2</sup> Mr. Justice Harwood concluded that Alabama Rule of Evidence 601,<sup>3</sup> through its language that "[e]very person is competent to be a witness,"<sup>4</sup> abrogates Alabama's preexisting Dead Man's Statute which provides that a survivor cannot testify to a communication or transaction with the deceased when testifying against the estate of the deceased or against a party for whom the deceased served as an agent.<sup>5</sup> The specific ruling that Alabama's Dead Man's Statute has been abrogated by the adoption of the Alabama Rules of Evidence is, of course, an important one, and it will be addressed subsequently and more specifically in the present Article. However, the greater significance of this decision lies in the fact that the resolution of the issue

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1. No. 1021932, 2004 WL 1535242 (Ala. July 9, 2004).

2. *Id.* at \*28.

3. ALA. R. EVID. 601.

4. *Id.* ("Every person is competent to be a witness except as otherwise provided in these rules."); see ALA. CODE § 12-21-6 (1975).

5. *Schoenvogel*, 2004 WL 153242, at \*28; ALA. CODE § 12-21-163 (1975); see CHARLES W. GAMBLE, GAMBLE'S ALABAMA RULES OF EVIDENCE: A TRIAL MANUAL FOR MAKING AND ANSWERING OBJECTIONS § 601 (2d ed. 2002) [hereinafter GAMBLE'S]; 1 CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 102.01 (5th ed. 1996) [hereinafter MCELROY'S].

immediately before the court—that is, whether the adoption of Alabama Rule of Evidence 601 abrogated the preexisting and inconsistent Dead Man’s Statute—(1) presents a much broader challenge to the judiciary that goes to the very heart of the whole body of evidence law; and (2) constitutes the most prominent illustration of this challenge to have faced the courts since the Alabama Rules of Evidence went into effect on January 1, 1996. This broader challenge is for the judiciary to develop a jurisprudence which provides a comprehensive explanation of the working interrelationship between the Alabama Rules of Evidence and the vast body of Alabama statutes which contain evidentiary principles. What principles of interpretation apply, for example, when any statute dictates a result concerning admissibility which is inconsistent with that suggested by the express language of the Alabama Rules of Evidence? Which takes precedence when both an Alabama Rule of Evidence and a statute apply to the offered evidence but with some slight variation in potential admissibility? Does an evidentiary provision contained in a statute predating the Alabama Rules of Evidence continue when a later-adopted Alabama Rule of Evidence on the same subject remains silent on that particular evidence principle? Does a preexisting statutory evidence principle continue after the adoption of the Alabama Rules of Evidence when it is not inconsistent with the Alabama Rules of Evidence but could be interpreted as merely supplementary to them?

An attempt will be made to identify major, illustrative statutes. Any announcement of such a purpose, however, must be prefaced with several strong caveats. First, the number of these statutes is too great to collect them all in a single article. Second, the Alabama Legislature is engaged in adding to their number as this Article goes to press. Third, these statutory evidence provisions frequently defy discovery by the most adept researcher because they are buried in the depths of larger code sections whose primary subject may be wholly unrelated to evidence.<sup>6</sup> Once major illustrative evidentiary statutes have been discovered and categorized, the authors will develop a set of comprehensive rules governing how the courts should interpret them in light of the Alabama Rules of Evidence. The vast majority of these statutes were passed prior to the effective date of the Alabama Rules of Evidence on January 1, 1996, and it is these with which the Article primarily deals. Most of the comprehensive rules developed in the Article, however, apply without regard to whether the statute involved was enacted before or after this date. Whenever this is otherwise, it is expressly noted.

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6. With no warning to the reader, the language of the statute often ends with a clause that gratuitously provides, for example, some incidental evidentiary benefit to the proceedings, documents, or writings mentioned in the statute. A statute with innumerable sections setting forth regulations dealing with quality review within a medical facility, for example, may end by providing that any documents or proceedings developed during such a review are privileged. *See, e.g.*, ALA. CODE § 22-21-8(b) (1975) (creating a privilege covering materials developed during quality assurance review of a hospital); ALA. CODE § 34-24-58 (1975) (declaring privileged any decisions, opinions, actions, and proceedings of a committee of physicians or surgeons constituted to evaluate or review performance of medical services).

Although most of the comprehensive rules for dealing with statutes apply without regard to when the statute was enacted, the authors do ultimately focus upon evidence statutes passed after the effective date of the Alabama Rules of Evidence on January 1, 1996. These are used as a basis for illustrating and discussing the relative constitutional rulemaking powers of the two branches of government. It will be acknowledged that the Alabama Rules of Evidence themselves, as well as the Alabama Constitution, envision a concurrent role for the legislature in the enactment of evidentiary rules that will supplement the Alabama Rules of Evidence. However, the problem arises if and when the legislature undertakes to enact evidentiary statutes that change preexisting Alabama Rules of Evidence. It is here that the authors make a plea for the legislative branch to henceforth defer to the judiciary and rarely if ever pass statutes that are inconsistent with the Alabama Rules of Evidence.

## II. INTERACTION BETWEEN THE ALABAMA RULES OF EVIDENCE AND ALABAMA STATUTES CONTAINING PRINCIPLES OF EVIDENCE

### A. *Referenced, Supplementary Statutory Rules*

Statutory rules of evidence, whether containing language dictating admission or exclusion, are supplementary to the Alabama Rules of Evidence if referenced therein. This assumes that some portion of the statute's effectiveness, in terms of admission or exclusion, is referenced in one or more of the Alabama Rules of Evidence. Many of the Alabama Rules of Evidence discussed below serve as gateways to supplementary statutory rules of both admission and exclusion. The ultimate issue for the judiciary, however, is to interpret the legislative intent behind these statutes in terms of how they are to supplement the Alabama Rules of Evidence.

#### 1. *Statutes of Exclusion*

Rule 402 is perhaps the most pivotal principle found in all of the Alabama Rules of Evidence.<sup>7</sup> It provides that even when evidence is relevant under Rule 401 it may yet be excluded because it violates one of the other Alabama Rules of Evidence,<sup>8</sup> a constitutional provision,<sup>9</sup> another rule of

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7. See generally GAMBLE'S, *supra* note 5, § 402; 1 MCELROY'S, *supra* note 5, § 22.01.

8. See, e.g., ALA. R. EVID. 403 (excluding of relevant evidence due to its prejudicial impact); ALA. R. EVID. 404(a) (excluding of character evidence); ALA. R. EVID. 407 (excluding of subsequent remedial safety measures); ALA. R. EVID. 411 (exclusion of insurance coverage); see also 1 MCELROY'S, *supra* note 5, § 22.01 (containing the primary treatment of Alabama Rule of Evidence 402), § 21.01(4) (excluding of material and relevant evidence due to its prejudicial impact), § 127.01(1) (opinion rule); 2 MCELROY'S, *supra* note 5, § 242.01(1) (hearsay), § 319.01(1) (authentication), § 388.01 (attorney-client privilege); Charles W. Gamble & Frank S. James, III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 ALA. L. REV. 95, 119 (1988).

9. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (indicating that the state is without the constitutional power to admit, as relevant to the amount of punitive damages, similar conduct committed

court,<sup>10</sup> or—crucial for purposes of this Article—a statute.<sup>11</sup> Such a statute could be interpreted as an absolute rule of exclusion or, alternatively, it may

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by the defendant in another state where such conduct is lawful); *Ex parte James*, 797 So. 2d 413, 419 (Ala. 2000) (holding that seizure of marijuana cigarettes by police officer searching the pockets of defendant, without any showing that police officer feared for his safety or was conducting a pat-down search for weapons, violates the Fourth Amendment protection against unreasonable search and seizure); *Living v. State*, 796 So. 2d 1121, 1137 (Ala. Crim. App. 2000) (holding that inculpatory statements, obtained after a criminal suspect invokes his right to counsel, are inadmissible unless the suspect voluntarily initiates further communication with the police); *Ex parte Marek*, 556 So. 2d 375, 375 (Ala. 1989) (discussing the constitutional impediments to admitting the silence of the accused, as a tacit admission, after *Miranda* rights have attached); *Lynn v. State*, 477 So. 2d 1365, 1365 (Ala. Crim. App. 1984), *rev'd*, 477 So. 2d 1385 (Ala. 1985) (holding unconstitutional the preclusion against using a juvenile conviction to impeach when applied to disallow the accused to impeach the prosecution's accomplice-witness); 1 MCELROY'S, *supra* note 5, § 22.01; 2 MCELROY'S, *supra* note 5, § 334.01 (exclusion of material and probative evidence which is obtained by unconstitutional search and seizure). *See generally* Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 GA. L. REV. 27, 27 (1979) (tracing the successive constitutional challenges to admissibility of the criminally accused's silence in the face of an accusation).

10. *See, e.g.*, ALA. R. CIV. P. 30(b), 32(a)(3) (establishing requirements that may work to limit the admissibility of depositions); ALA. R. CRIM. P. 15 (restricting the use of depositions in criminal cases, even though relevant); *see also* ALA. R. EVID. 402 advisory committee's note. *But see* Gaylard v. Homemakers, Inc., 675 So. 2d 363, 367 (Ala. 1996) (holding that evidence may not be excluded upon the ground that it was secured in violation of rules of ethics; underlying case was tried before the effective date of the Alabama Rules of Evidence).

11. *Johnson v. State*, 823 So. 2d 1, 32 (Ala. Crim. App. 2001) (holding that the mother of a woman facilitating several "three-way" calls for the defendant, listening with the woman's knowledge, is considered a "party" to the communication and therefore falls under the consent exception to the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (1988), and by handing the phone to her mother to listen, the woman is deemed to have consented to her listening to the conversations placed from the jail); *Mock v. Allen*, 783 So. 2d 828, 834 (Ala. 2000) (finding in the plaintiff's suit against a physician for intentional sexual assault based upon the fondling of the plaintiff's genitals that the trial court properly excluded the defendant physician's five prior acts of fondling patients because this sexual assault action, due to the fact that the fondling of the plaintiff occurred during medical treatment, fell within the Alabama Medical Liability Act, ALA. CODE § 6-5-551 (1975), which provides that the "[p]laintiff shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission"); *Ex parte Toler*, 710 So. 2d 415, 416 (Ala. 1998) (holding that ALA. CODE § 6-5-578(b) (1975) precludes the admission of rules of professional conduct or violations thereof in a liability action against a legal services provider); *Mainor v. Hayneville Tel. Co.*, 715 So. 2d 800, 802 (Ala. Civ. App. 1997) (citing GAMBLES, *supra* note 5, § 402, in recognition that the statute which renders accident reports inadmissible, ALA. CODE § 32-10-11 (1975), continues in force after the adoption of the Alabama Rules of Evidence as envisioned by Rule 402); *Chandler v. State*, 680 So. 2d 1018, 1018 (Ala. Crim. App. 1996) (holding that a cordless telephone conversation, intercepted through a radio scanner, was not rendered inadmissible by a federal statute, state statute, or the constitutional right of privacy), *cert. denied*, No. 1951672 (Ala. 1996); *see* CHARLES W. GAMBLE, CHARACTER EVIDENCE: A COMPREHENSIVE APPROACH § 1.2 (2d ed. 2000) (discussing this statutory exclusion as applied to character evidence); John G. Dana, *Whose Line Is It Anyway: How Far Can the Alabama Legislature Go When Prescribing Rules of Evidence, Practice and Procedure?*, 29 CUMB. L. REV. 427, 429-38 (1998) (written by one of Dean Gamble's former students); Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 5 (1995) [hereinafter Gamble, *Drafting, Adopting*] (discussing the power of the legislature to enact statutes calling for the exclusion of otherwise relevant evidence); *see, e.g.*, 18 U.S.C. § 2515 (1988) (declaring inadmissible, in state and federal courts, information secured through the electronic interception of communications); ALA. CODE § 12-21-203 (1975) (excluding generally the prior sexual behavior of the complaining witness in a sexual misconduct prosecution); ALA. CODE § 32-10-11 (1975) (declaring police accident reports inadmissible); *Ex parte O'Daniel*, 515 So. 2d 1250, 1250 (Ala. 1987) (excluding a recording in a divorce case because it was secured in violation of the federal wiretapping statute); 1 MCELROY'S, *supra* note 5, § 8.01 (noting the legislative authority to change rules of evidence). As the *O'Daniel* decision emphasizes, the reference to "statute" in the Rule 402 language includes federal statutes that apply in state court to exclude otherwise admissible evidence. *Ex parte O'Daniel*, 15 So. 2d at 1250; *see* 26 U.S.C. §§ 6103, 7213 (1986) (prohibiting the disclosure by public

be interpreted as calling for the exclusion of the evidence because its admission would violate traditional evidentiary concerns. The interpretation chosen is a matter of legislative intent decided by the courts.

*a. Statutes of Partial Exclusion*

Statutes often contain blanket provisions declaring certain evidence inadmissible. It is imperative for counsel to note, however, that the judiciary has frequently interpreted such statutes as not constituting rules of *carte blanche* inadmissibility. The statutorily adopted word “inadmissible” cannot be taken literally.<sup>12</sup> One must avoid the temptation to conclude that evidence falling within the purview of the statute is absolutely inadmissible. Rather, the objecting party must inquire as to the evidentiary evil (hearsay, best evidence, authentication, etcetera) that was intended to be addressed by the statutory declaration of inadmissibility. Stated differently, which evidentiary rule of exclusion did the legislature have in mind when it declared the described evidence inadmissible?<sup>13</sup> The identification of such a rule then leads to the issue of whether the offering party may circumvent the apparent exclusionary language of the statute by arguing that the offered evidence satisfies an exception to the specific rule of exclusion upon which the statute is based. One of the best examples of this application is found in those appellate decisions dealing with the admissibility of police accident reports. The beginning point on this subject is the Alabama statute which provides that “[n]o such report shall be used as evidence in any trial, civil or criminal, arising out of an accident.”<sup>14</sup> The foregoing statute provides what, on its face, appears to be blanket inadmissibility. Alabama courts, however, have interpreted it as providing that accident reports are inadmissible only because they are violative of the hearsay rule.<sup>15</sup> Once these reports were de-

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officials or public employees of the contents of income tax returns except under specified conditions); *Pierce County v. Guillen*, 537 U.S. 129, 134-35 (2003) (noting that the Highway Safety Act of 1966, 23 U.S.C. § 409 (2000), provides that states cannot receive federal funds to remedy dangerous sections of roadways without filing investigative safety reports with the federal government; the Act has been amended to provide that any such safety report “shall not be admitted into evidence in Federal or State court”).

12. *Gamble & James*, *supra* note 8, at 95.

13. It is imperative to note that a basic question underlies any resolution of the complimentary role that a statutory evidence provision is to play in relationship to the Alabama Rules of Evidence. This question is what the legislature intended with regard to the statute’s impact upon the law of evidence. This is an inquiry, like all others seeking to discover legislative intent, that is susceptible to the traditional rules of statutory interpretation.

14. ALA. CODE § 32-10-11 (1975).

15. *Stevens ex rel. Suire v. Stanford*, 766 So. 2d 849, 852 (Ala. Civ. App. 1999) (embracing the principle that the statute calling for the exclusion of police accident reports is not a rule of absolute exclusion; rather, that such reports are deemed inadmissible because they are hearsay and can gain admission if they fall within some exception or other theory for circumventing a hearsay objection; holding this particular accident report inadmissible because it was brought within no exception to hearsay; of note is the fact that the author of this opinion dissented from the decision of *Mainor v. Hayneville Tel. Co.*, 715 So. 2d 800, 802 (Ala. Civ. App. 1997), stating the court in *Mainor* held that the police accident report statute, set forth in ALA. CODE § 32-10-11 (1975), dictated absolute or blanket inadmissibility of such reports); *Dennis v. Scarborough*, 360 So. 2d 278, 278 (Ala. 1978); *see* 2 MCELROY’S,

clared by the judiciary as statutorily inadmissible upon this single ground of exclusion, the resulting implication was that such reports would be admissible, and thus avoid the evil in the legislative mind, if the proponent could bring the offered report within some exception to the hearsay rule.<sup>16</sup> A police accident report has been held admissible, for example, under the hearsay exception of past recollection recorded.<sup>17</sup> Thus the door is now open for the same approach to be used in avoiding the plain language of other such statutes which undertake to provide for the inadmissibility of evidence.<sup>18</sup>

*b. Statutes of Complete Exclusion*

As indicated in the preceding subsection, most statutes of exclusion are not interpreted by the courts as providing for complete or absolute exclusion, but rather as providing for exclusion only because of a specific evidentiary evil which, if satisfied, results in admissibility. Occasionally, however, there are instances when the courts interpret the intent of the legislature to have been absolute or complete. Whether a statute provides for absolute inadmissibility is an issue of legislative intent as construed by the judiciary. The more emphasis a court places upon the doctrine of plain meaning in its interpretation of the word "inadmissible," the more likely the statute is to be interpreted as *carte blanche* inadmissible.

The tendency toward placing emphasis upon the plain meaning rule of interpretation, thereby resulting in absolute statutory inadmissibility, can be seen in the interpretative history of the Alabama Medical Liability Act, which provides: "Plaintiff shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission."<sup>19</sup> The first chapter in the story of this statute's judicial application came in the form of cases dealing with discovery. The Alabama Supreme Court, in *Ex parte Golden*,<sup>20</sup> affirmed a trial

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*supra* note 5, § 254.01(10).

16. *Stevens*, 766 So. 2d at 852 (affirming the trial court's exclusion of a police accident report because the report did not fall into any exception to hearsay); *Dennis*, 360 So. 2d at 278.

17. *Newton v. Ryder Transp. Servs., Inc.*, 206 F.3d 772, 774 (8th Cir. 2000) (holding a police accident report admissible under the hearsay exception for recorded recollections); *Worsham v. Fletcher*, 454 So. 2d 946, 946 (Ala. 1984); *Gardner v. Williams*, 390 So. 2d 304, 304 (Ala. Civ. App. 1980) (holding a police report containing the observations of an officer admissible as a past recollection recorded), *cert. denied*, 390 So. 2d 308 (Ala. 1981); see 2 MCELROY'S, *supra* note 5, § 254.01(10).

18. See GAMBLE'S, *supra* note 5, § 402, at 61 (Practice Pointer #2) (discussing the decisions treating the police accident report statute and concluding that "[j]ust because a statute provides that certain evidence is inadmissible does not necessarily make it so").

19. ALA. CODE § 6-6-551 (1975); *Crowne Invs., Inc. v. Reid*, 740 So. 2d 400, 407-08 (Ala. 1999) (holding that ALA. CODE § 6-5-551, calling for the exclusion of prior misconduct or omissions by a defendant health care provider, does not preclude the admission of such proof when the defendant himself opens the door to it by asking a witness what she observed regarding services rendered to other patients).

20. 628 So. 2d 496, 496 (Ala. 1993); see also *Ex parte Anderson*, 789 So. 2d 190, 195 (Ala. 2000) (holding that if all conditions of Section 6-5-551 are met, then any other acts or omissions of the defendant health care provider are exempt from discovery, and the discovering party is prohibited from introducing evidence of them at trial; additionally holding that affording plaintiff discovery of complaints filed against the defendant would be precluded as reflecting "any other act or omission" within the

judge's denial of the plaintiff's requested discovery, in a fraud action, of similar acts of the defendant dentist with other patients. Following *Golden*, the appellate court granted mandamus to quash a trial judge's order permitting the plaintiff administrator's discovery of the defendant nursing home's prior, similar acts of abuse of other patients in *Ex parte Northport Health Service, Inc.*<sup>21</sup> Now the courts have gone beyond applying the statute merely to preclude discovery. The Alabama Supreme Court held that a trial court properly excluded a defendant physician's five prior acts of fondling other patients because the fondling occurred during treatment, thus falling within the Alabama Medical Liability Act in *Mock v. Allen*.<sup>22</sup>

Plaintiffs continue to assert several theories in their attempts to circumvent the exclusionary impact of the Alabama Medical Liability Act. The first of these involves the argument that the particular defendant being sued does not qualify as a "health care provider" such as to authorize the successful assertion of this statutorily mandated exclusionary shield against collateral misconduct.<sup>23</sup> Any defendant who is a medical practitioner, dental practitioner, medical institution, physician, dentist, or hospital is expressly declared by the statute to be a health care provider.<sup>24</sup> All other defendants who would successfully assert the shield must qualify as "other health care providers" under the alternate, statutory definition of "[a]ny professional corporation or any person employed by physicians, dentists, or hospitals who are directly involved in the delivery of health care services."<sup>25</sup> Judicial language indicates that any person who is employed by or has a contractual relationship with one of the specifically named health care providers qualifies as an "other health care provider." A registered nurse providing rehabilitation services under a contract with a physician or hospital, for example, qualifies.<sup>26</sup> No such employment or contractual relationship, however, is a condition precedent to a defendant's assertion of the exclusionary rule.<sup>27</sup> An individual brought in by an orthopedic surgeon to fit a leg brace, apparently without benefit of any contractual arrangement with the physician, has been

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language of the statute).

21. 682 So. 2d 52, 52 (Ala. 1996).

22. 783 So. 2d 828, 834 (Ala. 2000).

23. John S. Thornley, *Diagnosing Section 6-5-551 of the Alabama Medical Liability Act and the Inadmissibility of Collateral Acts and Omissions Against Health Care Providers*, 54 ALA. L. REV. 1441, 1442-46 (2003).

24. ALA. CODE § 6-5-542(1) (1993).

25. ALA. CODE § 6-5-481(8) (1975).

26. *Ex parte Main*, 658 So. 2d 384, 384 (Ala. 1995); see *Wilson v. American Red Cross*, 600 So. 2d 216, 218 (Ala. 1992) (deeming the Red Cross a health care provider because it had a contract to provide blood to a hospital).

27. *Ex parte Rite Aid, Inc.*, 768 So. 2d 960, 962 (Ala. 2000) (holding that a pharmacist or pharmacy, even without the benefit of a contract with or employment by a physician, dentist, or hospital, falls within the statute as one who "is inextricably linked to a physician's treatment of his patients [and his] dispensing of drugs is an integral part of the delivery of health care services to the public"); *Wilson*, 600 So. 2d at 218 (implying that the Red Cross, even if it did not have a contract to provide blood to a hospital, is an "other health care provider" because it is directly involved in the delivery of health care services. and the processing of blood for transfusion is a medical service and, therefore, it should be treated as a professional).



declared a “health care provider[.]”<sup>28</sup> The interpretation adopted by the courts appears to turn primarily upon whether the defendant asserting the statute performs a service or provides a product which is “inextricably linked to a physician’s treatment of his patients.”<sup>29</sup> It should be noted that the courts have refused to include within this definition podiatrists and chiropractors.<sup>30</sup>

There exists a second but more subtle theory for circumventing the statutory exclusion found in the Alabama Medical Liability Act.<sup>31</sup> The express language of the statute prohibits discovery or proof only of those acts or omissions which are not specifically pleaded in a plaintiff’s complaint as an integral part of the theory of liability against the defendant.<sup>32</sup> One may circumvent the statutory exclusion, therefore, if the acts or omissions sought to be discovered or admitted constitute the basis of the plaintiff’s claim.<sup>33</sup> Any act which is not essential to proof of the plaintiff’s claim is designated under the statutory language as “any other act or omission,”<sup>34</sup> thus placing it beyond the scope of discovery or proof. This distinction may be illustrated as follows: Suppose that the plaintiff guardian charges the defendant nursing home with a single act of negligence in the treatment of a relative. Collateral acts of misconduct regarding this or other residents of the facility, offered merely to prove that the sued upon act was part of a pattern or practice, would be shielded because these other acts are not an essential or integral part of the plaintiff’s theory of liability.<sup>35</sup> Suppose, in contrast, that the plaintiff’s theory is not based upon the single act of negligence but upon a theory that the defendant engaged in a systemic failure by negligently hiring, training, or supervising employees. Integral to proof of such a claim would be other acts or omissions that gave the defendant notice or knowledge of the employee’s incompetency; therefore, neither the discovery or proof of such acts or omissions would be precluded by the Alabama Medical Liability Act.<sup>36</sup>

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28. Tuscaloosa Orthopedic Appliance Co. v. Wyatt, 460 So. 2d 156, 161 (Ala. 1984).

29. *Rite Aid*, 768 So. 2d at 962.

30. Sellers v. Picou, 474 So. 2d 667, 667 (Ala. 1985) (podiatrists); Baker v. McCormeck, 511 So. 2d 170, 170 (Ala. 1987) (chiropractors).

31. See Thornley, *supra* note 23, at 1449-50.

32. ALA. CODE § 6-5-551 (1975).

The plaintiff shall include in the complaint filed in the action a detailed specification and factual description of *each act and omission alleged* by plaintiff to render the health care provider liable to plaintiff . . . . The plaintiff shall amend his complaint timely upon ascertainment of *new or different acts or omissions upon which his claim is based* . . . .

*Id.* (emphasis added).

33. *Rite Aid*, 768 So. 2d at 962 (Johnstone, J., dissenting) (recognizing that the statutory exclusion applies to any act or omission “not specifically pleaded in a plaintiff’s complaint as an integral part of the plaintiff’s theory of liability against the defendant”).

34. ALA. CODE § 6-5-551 (1975) (“[A]ny party shall be prohibited from conducting *discovery with regard to any other act or omission* or from *introducing* at trial evidence of *any other act or omission*.”) (emphasis added).

35. *Rite Aid*, 768 So. 2d at 962; *Ex parte* Northport Health Serv., Inc., 682 So. 2d 52, 56 (Ala. 1996).

36. *Ex parte* McCollough, 747 So. 2d 887, 890 (Ala. 1999) (holding that the discovery of other acts was proper because they were not sought as pattern-and-practice evidence but “for the sake of showing

Wiretapping statutes serve as another classic illustration of absolute statutory exclusion. In the classic case of *Ex parte O'Daniel*,<sup>37</sup> the divorce-seeking wife offered a recording of telephone conversations between the husband and his lover taped at the husband's business telephone. After the trial and intermediate appellate courts dealt with admissibility upon a host of erroneous evidentiary grounds, the Alabama Supreme Court recognized the tape's inadmissibility as violative of the federal wiretapping statute.<sup>38</sup> Categorizing such a statute as dictating absolute exclusion holds, of course, only so long as the evidence falls within the exclusionary terms of the statute. One does not violate the wiretapping statute, for example, by tapping that person's own telephone; therefore, evidence such person thereby secures is not statutorily inadmissible.<sup>39</sup>

*c. Hybrid Statutes—Complete and Partial Exclusion*

Perhaps the most significant mutual activity in evidentiary lawmaking by both the judicial and legislative branches of government has been in the area of testimonial privileges. Many of the earliest privileges—including husband-wife and attorney-client—were created by the courts.<sup>40</sup> Eventually, these privileges, along with others, were codified by the legislature but continued to undergo judicial interpretation.<sup>41</sup> The drafters of the Alabama Rules of Evidence, operating under the sponsorship of the Alabama Supreme Court, adopted the language of these statutes as the basis for the privilege section of the Alabama Rules of Evidence.<sup>42</sup> Other statutory privi-

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negligence, wantonness, willfulness, or breach of a contractual duty to provide adequate care . . . in . . . hiring, training, staffing, etc"; court recognizes that this theory is similar to negligent entrustment where the plaintiff's proof of the entrustee's preexisting acts of incompetency, as well as the entrustor's notice of them, is an essential or integral part of the cause of action); see *Rite Aid*, 768 So. 2d at 963 (Johnstone, J., dissenting) (eloquently arguing that this too is a case where, under the *McCullough* precedent, the plaintiff should be allowed to discover other acts because they are an integral part of the theory of negligent hiring, training, or staffing).

37. 515 So. 2d 1250 (Ala. 1987); see *GAMBLE'S*, *supra* note 5, § 402.

38. *Ex parte O'Daniel*, 515 So. 2d at 1253; see *Gamble*, *Drafting, Adopting*, *supra* note 11, at 6.

39. *Stinson v. Larson*, No. 2020918, 2004 WL 541826, at \*3 (Ala. Civ. App. Mar. 19, 2004) (holding a custodial parent's use of her own telephone extension to record a conversation between her child and the noncustodial parent not to be violative of federal and state wiretapping or eavesdropping statutes).

40. ALA. R. EVID. 502 advisory committee's note ("Alabama's preexisting attorney-client privilege is a creature of the common law.") (citing *Ex parte Enzor*, 270 Ala. 254, 117 So. 2d 361 (1960)).

41. See ALA. R. EVID. 502 advisory committee's note ("That common law privilege, however, has been embodied in a statute . . .") (citing *MCELROY'S*, *supra* note 5, § 388.02).

42. See ALA. R. EVID. 504(b) advisory committee's note ("This section perpetuates Alabama's preexisting husband-wife privilege for confidential communications."); ALA. R. EVID. 505 advisory committee's note (Rule 505 tracks, but supersedes, a preexisting statute creating a clergyman privilege in Alabama). Sometimes the Supreme Court Advisory Committee, considering the adoption of the Alabama Rules of Evidence, had before it a statutory privilege in which the legislature had provided little more guidance than that a particular communication was to be placed upon the same footing as the attorney-client communication. When this occurred, the scope of the statutory privilege was expanded consistent with the attorney-client privilege. See ALA. R. EVID. 503 advisory committee's note (providing the physiotherapist-patient privilege in which the drafters recognize that the "legislative act creating the privilege stipulates that it is to be placed upon the same basis as the privilege that arises by law between an attorney and a client; consequently, Rule 503 is modeled after the rule providing for the

leges were left unadopted and thereby unaffected.<sup>43</sup> Additionally, the Alabama Rules of Evidence expressly recognize that the enumerated privileges may be supplemented by future privileges created by the legislature.<sup>44</sup> At almost every session, the Alabama Legislature accepts this invitation and engages in statutory privilege supplementation.<sup>45</sup>

Some statutory privileges contain no exceptions and, therefore, constitute rules of absolute or complete exclusion.<sup>46</sup> The majority of such privileges, however, may be characterized, for various reasons, as rules of partial exclusion. Some, for example, contain express exceptions.<sup>47</sup> Others, by containing language that the privilege is to be placed upon the same footing as

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corresponding attorney-client privilege”).

43. ALA. CODE § 32-7-12 (1975) (motor vehicle accident reports); ALA. CODE § 34-24-59(c) (1975) (hospital disciplinary action reports); *see* ALA. R. EVID. 501 advisory committee’s note (“A number of statutory privileges will continue to exist outside these Rules of Evidence.”).

44. ALA. R. EVID. 501 (“Except as otherwise provided by . . . statute . . . no person has a privilege . . .”) (emphasis added); *see* GAMBLE’S, *supra* note 5, § 501(a). It is important to note that Rule 501 likewise recognizes that privileges may be found in other rules of court. *See, e.g.*, 2 MCELROY’S, *supra* note 5, § 395.01(1) (discussing Alabama Civil Court Mediation Rule 11 which declares privileged and therefore confidential all information disclosed in the course of mediation); 2 MCELROY’S, *supra* note 5, § 395.02 (treating Alabama Rule of Appellate Procedure 55(c) which provides that the content of appellate mediation discussions and proceedings is privileged).

45. *See, e.g.*, ALA. CODE § 15-1-3 (1975) (rendering privileged the relations and communications between a court-appointed interpreter and a defendant, juvenile, or witness who does not understand English); ALA. CODE § 22-13-33(a) (1975) (providing that all information provided to the Alabama Statewide Cancer Registry shall be confidential and privileged); ALA. CODE § 22-21-8 (1975) (providing for a privilege for records concerning accreditation of or quality assurance within a healthcare facility); ALA. CODE § 29-7-6(c)(1) (1975) (rendering privileged any information, conversations, or discussions between the director or any employee of the Alabama Legislative Reference Service and any person legally authorized to request assistance from the agency); ALA. CODE § 32-10-11 (1975) (rendering privileged automobile accident reports filed by persons involved in accidents); ALA. CODE § 34-24-58(a) (1975) (providing for a privilege covering proceedings, opinions, and decisions of medical peer review committee); ALA. CODE § 34-24-59(c) (1975) (granting privileged status to hospital disciplinary reports filed with the State Board of Medical Examiners); ALA. CODE § 34-24-166(h) (1975) (providing that all documents provided to the State Board of Chiropractic Examiners are confidential); ALA. CODE § 36-19-24 (1975) (judicially creating a privilege protecting reports statutorily required to be filed by every fire insurance company with the state fire marshall concerning all fire losses on all property insured by it in the state); ALA. CODE § 38-13-8 (1975) (declaring confidential all reports of criminal history generated on prospective or present employees of public or private schools who will or now have unsupervised access to children in an educational environment); GAMBLE’S, *supra* note 5, § 501(a); 2 MCELROY’S, *supra* note 5, §§ 386.01-421.01.

46. ALA. CODE § 22-11C-7(c) (1975) (providing for the confidentiality of all information reported pursuant to the Alabama Head and Spinal Cord Injury Registry Act).

47. 42 U.S.C. § 290dd-2(a) (2000) (rendering privileged any patient records regarding substance abuse education, prevention, training, treatment, rehabilitation, or research, but only if conducted, regulated, or directly or indirectly assisted by a department or agency of the United States); ALA. CODE § 12-15-100 (1975) (listing exceptions to the statutory privilege for juvenile court records); ALA. CODE § 12-21-3.1(b) (1975) (declaring law enforcement investigative reports and materials to be confidential and going on to provide that such cannot be discovered by a party to a civil or administrative proceeding unless discoverable by a criminal defendant and unless the seeking party is able to show undue hardship and inability to obtain substantially equivalent evidence); ALA. CODE § 30-6-8 (1975) (providing for the privilege covering communications, including written reports, between a domestic violence victim and an advocate, assertable in civil and criminal cases; however, cannot be asserted in a case of child abuse); ALA. CODE § 38-12A-2 (1975) (stipulating that confidential information provided to foster parents, except as may be determined by an internal process designed to promote the health and welfare of the child, shall be kept confidential by the foster parents); ALA. CODE § 40-2A-10 (1975) (prohibiting the disclosure by public officials or public employees of the contents of income tax returns except under specified conditions).

the attorney-client privilege, imply that the privilege carries the same judicially created exceptions as the attorney-client privilege.<sup>48</sup> Still other privileges are qualified in the sense that they can be overcome when the interests of the party seeking the information outweigh the interests of the party seeking to protect the information.<sup>49</sup>

## 2. Statutes of Admission

When faced with statutes declaring evidentiary admissibility, the traditional interpretation by the courts has been that these, like statutes of exclusion, do not generally result in *carte blanche* or absolute admission. The interpretative approach for discovering legislative intent has been to ask what evidentiary objections prompted the legislature to exempt the evidence which is the subject of the statute. Once these are identified, nothing precludes the opponent from raising one or more entirely different objections.<sup>50</sup> Most illustrative of this analysis is the judicial history involving the inter-

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48. ALA. CODE § 34-26-2 (1975) (containing the psychologist-client and psychiatrist-patient privileges which are, at least in part, the predecessors to ALA. R. EVID. 503); *see* ALA. R. EVID. 503 advisory committee's note.

Alabama statutory law has long recognized a psychologist-client privilege . . . . This particular statutory privilege was amended in 1979 to include psychiatrists within its coverage. The legislative act creating the privilege stipulates that it is to be placed upon the same basis as the privilege that arises by law between an attorney and client; consequently Rule 503 is modeled after the rule providing for the corresponding attorney-client privilege.

*Id.*

49. *See, e.g.*, 2003 ALA. H.B. 493 (Westlaw) (providing that records of or records related to the Houston and Henry County pretrial diversion programs shall not be admissible in subsequent criminal or civil proceedings; apparently this privilege is a qualified one in that the communications may be submitted to the court for an *in camera* review if a court determines that there is a compelling public interest); ALA. CODE § 12-21-3.1(b) (1975) (declaring law enforcement investigative reports, records, field notes, witness statements, and other investigative writings to be privileged; going on in subsection (c) to provide that photographs, documents, and tangible evidence may be discovered by a party to a civil or administrative proceeding if discoverable by a criminal defendant and if the seeking party is able to show, by substantial evidence, undue hardship and inability to obtain substantially equivalent evidence); ALA. CODE § 26-14-8(c) (1975) (setting forth a qualified privilege for child abuse, neglect reports, and records held by the Alabama Department of Human Resources); ALA. CODE § 12-21-142 (1975) (containing Alabama's shield law protecting the identity of news sources).

50. One of the most popular rules of statutory interpretation, utilized as a tool for discovering legislative intent, is that the judiciary is to give the words of a statute their plain meaning. The history of evidence law, however, makes it clear that the word "admissible" or "inadmissible" is not always to be given such meaning. If a statute provides for the admissibility of a certified copy of a certain document then the courts traditionally interpret that to mean that the legislative intent was to render the evidence admissible over some evidentiary objections but not all. Since the document was made out of court, it is admissible over a hearsay objection and thus constitutes one of the statutory hearsay exceptions referenced in Alabama Rule of Evidence 802. Use of the word "certified" is code language to indicate that this is one of those documents which is statutorily self-authenticating under Alabama Rule of Evidence 902(10) and, therefore, is to be admitted without a shepherding witness to authenticate it. Finally, use of the word "copy" means that the legislature meant for this document to be statutorily exempted under ALA. R. EVID. 1002 from any best evidence rule requirement of producing the original. Beyond these three dispensations, however, the legislature did not intend to otherwise grant this evidence any immunity from other evidentiary objections. Occasionally, the legislature drafting a statute containing the word "admissible" will insert additional language clarifying that the evidence is not being granted *carte blanche* admissibility. The statute providing for the admission of a certified copy of a hospital record, for example, adds that such is admissible only "[w]hen the original would be admissible." ALA. CODE § 12-21-5 (1975); *see* *Whetstone v. State*, 407 So. 2d 854, 861 (Ala. Crim. App. 1981).

pretation of a statute which provides that a certified copy of a hospital record is admissible in the courts of Alabama.<sup>51</sup> This statute has been interpreted as not providing absolute or *carte blanche* admissibility; rather, it has been construed as intended to exempt such records from objections based upon hearsay, authentication, and best evidence. This then means that other objections may be successfully lodged against such a record's admission. It has been held, for example, that the prosecution's inability to establish a proper chain of custody for blood taken from the accused cannot be overcome by offering a hospital record containing an analysis of the accused's blood-alcohol content.<sup>52</sup> Additionally, a statutory declaration of admissibility in no way renders a hospital record immune from an objection of irrelevancy.<sup>53</sup>

Statutes of admission, like the hospital record law discussed in the preceding paragraph, typically state that a certified copy of the document is admissible in the courts of Alabama. Use of the term "certified" signals that the document is exempt from an authentication objection. The fact that a "copy" is being admitted denotes exemption from an objection under the best evidence rule. Since the document is a statement made outside the present proceeding, usually offered to prove the truth of the matter asserted, then it is generally being exempted from hearsay. The statute typically exempts the evidence from these three evidentiary objections only.

It is important to note that these statutory grounds of admission are generously referenced in the Alabama Rules of Evidence. Alabama Rule of Evidence 802, for example, provides that hearsay is not admissible except as provided in the Rules themselves or in statutes.<sup>54</sup> Statutory grounds of authentication are generously recognized in the Alabama Rules of Evidence. There are two primary ways to authenticate evidence: by laying a foundation to show that the evidence is what the proponent claims it to be under Rule 901(a),<sup>55</sup> or self-authentication under one of the methods specified in Rule 902.<sup>56</sup> Rule 901(b)(10) acknowledges, by way of illustration, that one of the ways to lay a proper foundation for authentication is to satisfy a statu-

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51. ALA. CODE § 12-21-5; *see* 2 MCELROY'S, *supra* note 5, § 254.01(9).

52. *Whetstone*, 407 So. 2d at 861.

53. *Weaver v. State*, 591 So. 2d 535, 540 (Ala. Crim. App. 1991).

54. ALA. R. EVID. 802; *see* ALA. CODE § 5-8A-26 (1975); ALA. CODE § 11-7-8 (1975) (providing a hearsay exception for a survey made by a county surveyor); ALA. CODE § 12-15-65 (1975) (applying the statutory child hearsay exception to dependency proceedings); ALA. CODE § 12-21-30 (1975) (providing for a statutory exception for declarations of a deceased person as to ancient rights); ALA. CODE § 12-21-101 (1975) (providing for the admissibility of church records but superseded in civil cases by ALA. R. CIV. P. 44); ALA. CODE § 15-25-31 (1975) (applying the statutory child hearsay exception to child sexual abuse prosecutions); ALA. CODE § 22-9A-10 (1975) (providing for a statutory exception to the hearsay rule of records dealing with births and deaths); ALA. CODE § 30-3A-316 (1975); ALA. CODE § 35-16-1 (1975) (providing for the admissibility of annuity tables); ALA. CODE § 35-16-4 (1975) (providing for the admission of mortality tables as an exception to hearsay); ALA. R. EVID. 802 advisory committee's note; GAMBLE'S, *supra* note 5, § 802.

55. ALA. R. EVID. 901(a).

56. ALA. R. EVID. 902.

tory method of authentication or identification.<sup>57</sup> Rule 902(10) recognizes self-authentication of any signature, document, or matter declared by statute to be presumptively or prima facie genuine or authentic.<sup>58</sup> Statutory exemption from the best evidence rule is likewise referenced in the Alabama Rules of Evidence. Rule 1002 recognizes that any statute providing admission for the copy of a document constitutes an exception to the general requirement that the original is required to prove the content of a writing.<sup>59</sup>

### 3. *Statutes Dealing with General Evidentiary Procedure*

The formal sources for the procedures governing the testimony of witnesses and the presentation of evidence are generally the Alabama Rules of Evidence, other court rules, common law, and tradition. However, the resolution of the issues that arise during the search for truth ultimately turn upon the common sense and fairness of the trial judge.<sup>60</sup> Consistent with the purpose of this Article, however, it should be acknowledged that some procedural rules of evidence may reside in statutes. Some of these statutes, like that prohibiting a party from leading his own witness unless justice demands it, have been superseded by an identical procedure provided in the Alabama Rules of Evidence.<sup>61</sup>

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57. ALA. CODE § 12-21-5 (1975) (providing that certified hospital records are granted statutory admissibility); ALA. CODE § 26-17-12(b) (using the Uniform Parentage Act to provide the foundation for the admissibility of blood tests conducted to prove paternity); ALA. CODE § 32-5A-194 (1975) (governing the foundation required when blood, urine, breath, or other bodily substances have been tested for presence of alcohol or controlled substance); ALA. R. EVID. 901(b)(10); *see* GAMBLE'S, *supra* note 5, § 901(b)(10).

58. 26 U.S.C.A. § 6062 (West 1993) (providing that the signature of an individual on a corporate tax return was signed with authorization); 26 U.S.C.A. § 6063 (West 1993) (providing that the signature of a partner on a partnership return was signed with authorization); 26 U.S.C.A. § 6064 (West 1993) (providing that the signature of an individual on an individual return was signed with authorization); 28 U.S.C.A. § 1744 (West 1989) (providing for the self-authentication of Patent and Trademark Office records); 47 U.S.C.A. § 412 (West 1981) (providing for the self-authentication of Federal Communications Commission records); 49 U.S.C.A. § 16(13) (West 1990) (providing for the self-authentication of Interstate Commerce Commission records); 49 U.S.C.A. § 1503 (West 1990) (providing for self-authentication of Civil Aeronautics Board records); ALA. CODE § 12-21-90 (1975) (statutorily accepting notice from the armed forces as prima facie evidence of death); ALA. CODE § 12-21-99 (1975) (providing that a properly executed sheriff's deed shall be received in evidence without independent proof); ALA. CODE § 12-21-101 (1975) (providing that registers of marriages, births and deaths, kept in pursuance of the law, may be certified by the custodian and after certification are presumptive evidence of the facts stated); ALA. CODE § 12-21-300(a) (1975) (providing statutory authenticity for certificates of analysis performed in any laboratory operated by the Alabama Department of Forensic Sciences); ALA. CODE § 40-10-30 (1975) (providing that a deed signed by the probate judge in his official capacity and properly acknowledged is prima facie evidence of the regularity of the proceedings); ALA. R. EVID. 902(10); *see* GAMBLE'S, *supra* note 5, § 902(10).

59. ALA. CODE § 35-4-7 (1975) (providing for the admissibility of copies of documents filed in the probate judge's office); ALA. CODE § 41-5-21 (1975) (providing for the admissibility of a certified copy of a public examiner's report); ALA. R. EVID. 1002; *see* GAMBLE'S, *supra* note 5, § 1002.

60. ALA. R. EVID. 611(a) advisory committee's note ("As witnesses testify and evidence is presented, several procedural issues arise. These issues are to be resolved, as under preexisting common law, through the judge's common sense and fairness. The judge has the primary responsibility for the effective working of the adversary system.").

61. ALA. R. EVID. 611(c) advisory committee's note ("This exception from the 'no leading questions' rule retains Alabama's preexisting statutory provision allowing such questions 'when, from the

Other statutory procedures, however, continue in force as supplementary to the Alabama Rules of Evidence. Alabama Rule of Evidence 301, which is the only attempt under the Alabama Rules of Evidence to speak to presumptions, is instructive in this regard. Since Rule 301 deals solely with presumptions in civil cases, then all statutes dealing with presumptions applicable in criminal actions remain viable and supplementary to the body of evidence law.<sup>62</sup> Even in civil actions, statutory presumptions continue to be fully supplementary because the language of Rule 301 does not undertake to name the presumptions and, even as to their procedural nature, it defers to the legislature by stating that the procedural impact provided by Rule 301 will prevail “unless otherwise provided by statute.”<sup>63</sup>

#### 4. *Statutes Providing Evidentiary Rules for Specialized Proceedings*

As a general principle, the Alabama Rules of Evidence govern in all proceedings conducted in the courts of Alabama.<sup>64</sup> Some special proceedings, however, are exempted in whole or in part from the force of the Rules. One of the primary sources of authority for such exemption, as expressly recognized by the Alabama Rules of Evidence, is statutory.<sup>65</sup> This means that the Alabama Rules of Evidence are supplemented by statutes which dictate whether the Rules govern during certain proceedings.<sup>66</sup>

Perhaps the most wide-ranging example of such a statute is the Administrative Procedure Act, which begins by providing that the Rules of Evidence are to be followed in all contested cases before state agencies. This declaration of general applicability, however, is then followed by a provision which expressly exempts from the Rules of Evidence contested cases before any agency whose decisions are subject to approval by the Alabama Supreme Court and the Department of Insurance.<sup>67</sup> Such agencies include, among others, the Alabama Department of Environmental Management,<sup>68</sup> the Alabama Public Service Commission,<sup>69</sup> and counties, municipalities, or any agencies of such local governmental units.<sup>70</sup>

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conduct of the witness or other reason, justice requires it.” ALA. CODE § 12-21-138 (1975) (superseded by adoption of Rule 611(c)).

62. See ALA. R. EVID. 301, 302; GAMBLE’S, *supra* note 5, § 301, at 43 (“Presumptions in criminal litigation continue to be applied under case and statutory law.”); 2 MCELROY’S, *supra* note 5, § 451.01(8).

63. ALA. R. EVID. 301; GAMBLE’S, *supra* note 5, § 301.

64. See GAMBLE’S, *supra* note 5, § 1101(a).

65. ALA. R. EVID. 1101(a) (“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.”) (emphasis added).

66. ALA. R. EVID. 1101(a) advisory committee’s note (“This rule recognizes that specialized proceedings may arise under statute or rule of court in which these Alabama Rules of Evidence, either in whole or in part, are made inapplicable.”).

67. ALA. CODE § 41-22-2(e) (1975).

68. ALA. CODE § 22-22A-7(c)(5) (1975). This section notes that in an enforcement action brought by the Alabama Department of Environmental Management, “[t]he parties shall not be bound by the strict rules of evidence prevailing in the courts.” *Id.*

69. ALA. CODE § 41-22-3(1) (1975); *Ala. Power Co. v. Ala. Pub. Serv. Comm’n*, 179 So. 2d 725,

### B. *Nonreferenced, Consistent, Supplementary Statutory Rules*

Any preexisting statutory evidence principle that is consistent with the Alabama Rules of Evidence, although not referenced therein, should continue as supplementary to them. This form of statutory supplementation most commonly occurs when the drafters of an adopted Alabama Rule of Evidence fail to declare all the law regarding that particular evidentiary principle. This then leaves the remaining body of the preexisting law dealing with that subject, be it decisional or statutory, in full force and effect. Perhaps the most obvious example is Rule 201 dealing with judicial notice. This rule expressly provides that it treats only judicial notice of adjudicative facts.<sup>71</sup> This leaves untouched that body of Alabama law dealing with the judicial notice of legislative facts. A significant portion of this law is found in statutes.

Judicial notice of law likewise falls outside Rule 201. This then serves as a doorway for the effectiveness of statutes which provide for the judiciary's taking judicial notice of the legality of certain actions by public authorities.<sup>72</sup>

### C. *Nonreferenced, Identical, Superseded Statutory Rules*

The beginning policy guiding the drafting of the Alabama Rules of Evidence was that the language of the Federal Rules of Evidence would be adopted unless there was convincing argument put forward as to why preexisting Alabama evidence law should prevail.<sup>73</sup> On innumerable occasions the preexisting Alabama Rule of Evidence and the Federal Rule of Evidence were identical, including even when the Alabama rule was contained in a statute. This then resulted in instances when the resulting Alabama Rule of Evidence was identical to the preexisting statutory rule. Sometimes, although not always, the language used in the statute and the new rule were

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725 (Ala. 1965) (upholding the right of commissioners to hear hearsay evidence, the appellate court observed that members of the Public Service Commission are not required to be knowledgeable in the law of evidence); see 1 MCELROY'S, *supra* note 5, § 6.07(2).

70. ALA. CODE § 41-22-2(e) (1975); *Ex parte* Birmingham, 870 So. 2d 742, 746 (Ala. Civ. App. 2003) (noting that a hearings officer, by the county personnel board's own rules, is not bound by the technical rules of evidence such as that normally excluding the results of polygraph tests).

71. ALA. R. EVID. 201(a) ("This rule governs only judicial notice of adjudicative facts."); ALA. R. EVID. 201(a) advisory committee's note ("No effort is made to set forth rules to govern the process of judicially noticing what authorities in the field have categorized as legislative facts.").

72. *Ewing v. State*, 826 So. 2d 199, 202 (Ala. Crim. App. 2001) (recognizing the statutorily authorized judicial notice, under ALA. CODE § 32-5A-194(a)(1) (1975), of methods approved by the Department of Forensic Sciences for authenticating results from the chemical analysis of blood, urine, breath, or other bodily substances); *Crews v. State*, 797 So. 2d 1123, 1125-26 (Ala. Crim. App. 2000) (finding the certification of a sentencing order and case action summary sheets sufficient despite the fact that the clerk failed to state that he was the lawful custodian of the certified records because the omission could be supplied by judicial notice of the Alabama statutory law which provides that the circuit clerk is the custodian of books and records of the court).

73. See Gamble, *Drafting, Adopting*, *supra* note 11, at 11.



nearly identical.<sup>74</sup> Whenever this overlapping occurred, the preexisting statutory rule was logically superseded by the more general and consistent Alabama Rule of Evidence. Such a consequence is customarily noted in the Advisory Committee's notes to the Alabama Rules of Evidence.

Statutes illustrating this phenomenon abound. One of the most commonly encountered examples is Alabama's preexisting statute which generally precludes one from leading his own witness unless "justice requires it."<sup>75</sup> The subsequently adopted Alabama Rule of Evidence provides that leading questions should not be permitted on direct except "when justice requires that they be allowed."<sup>76</sup> It naturally follows that the Advisory Committee observed that the latter superseded the former.<sup>77</sup>

Statutory evidence rules have been superseded by identical Alabama Rules of Evidence in the area of expert opinions. The admissibility of expert opinions generally have long been sanctioned by statute.<sup>78</sup> The need for such a statute, however, was obviated in 1996 with the adoption of the Alabama Rules of Evidence.<sup>79</sup> A specialty statute, found in the eminent domain code, provides that a witness qualified by knowledge, skill, experience, training, or education may give an opinion as to value of property.<sup>80</sup> The adoption of Alabama Rule of Evidence 702 made this statute unnecessary.

#### *D. Nonreferenced, Inconsistent Statutory Rules*

Any preexisting evidentiary statute that is inconsistent with the Alabama Rules of Evidence and not referenced in them generally stands abrogated by their adoption.<sup>81</sup> This applies to statutes of both admission and exclusion. Any principle of statutory inadmissibility, for example, no longer

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74. This can probably be explained by the fact that many of the statutes were written in the days when legislatures were dominated by lawyers who were codifying the caselaw in an attempt to prevent that caselaw from changing.

75. ALA. CODE § 12-21-138 (1975).

76. ALA. R. EVID. 611(c); *see* 1 MCELROY'S, *supra* note 5, § 121.05(2).

77. ALA. R. EVID. 611(c) advisory committee's note (citing ALA. CODE § 12-21-138 (1975) as "superseded by adoption of Rule 611(c)").

78. ALA. CODE § 12-21-160 (1975).

79. ALA. R. EVID. 702 advisory committee's note (citing ALA. CODE § 12-21-160 (1975) as "superseded by adoption of the present rule"); *see* 1 MCELROY'S, *supra* note 5, § 127.02(4).

80. ALA. CODE § 18-1A-192(a)(1) (1975).

81. Gamble, *Drafting, Adopting, supra* note 11, at 7; Terry A. Moore, *Does the Alabama Supreme Court Have the Power to Make Rules of Evidence?*, 25 CUMB. L. REV. 331, 342 (1994). At least two exceptions should be declared as to this principle. First, an inconsistent statute is not abrogated if a contrary intent was manifested in the advisory notes of the Alabama Rules of Evidence, and the Alabama Supreme Court accepted such persuasive authority. Second, if the Alabama Rule of Evidence merely restates prior law, to which the statutory exception is only inconsistent with part of the rule, then the statute may continue as supplementary on the theory that the Court had no intent, by adopting the rule, of abrogating the statute. *See* ALA. CODE § 34-27A-3 (1975) (making it unlawful for anyone to give an opinion of value without an appraiser's license; calling into question whether this precludes such a person from giving a Rule 702 expert opinion as to land value). If the inconsistent, nonreferenced statute is enacted subsequent to the adoption of the Alabama Rules of Evidence then, as discussed more fully subsequently in this Article, this is within the constitutional power of the legislature unless the statute impedes upon the proper and ordinary functioning of the courts.

applies if the contrary result of admissibility is dictated by an applicable Alabama Rule of Evidence.

Because of the foregoing principle that any preexisting inconsistent statutory rule is abrogated, the declaration in Alabama Rule of Evidence 601—that “[e]very person is competent to be a witness except as otherwise provided in these rules”—serves to wipe out any preexisting statutory ground of witness incompetency.<sup>82</sup> No room is left for witness disqualification except such grounds as might be argued under the Rules themselves. Therefore, the preexisting statute providing that a convicted perjurer is incompetent to be a witness stands abrogated.<sup>83</sup> Equally abolished is the Dead Man’s Statute.<sup>84</sup>

The present principle equally applies to statutory rules of admission. The historic statutory right to impeach a witness with a conviction for a crime involving moral turpitude, for example, has been abrogated.<sup>85</sup> It has been replaced with the alternative standard under Rule 609 that the conviction must either be for a crime that carries punishment of (1) death or more than a year’s imprisonment, or (2) dishonesty or false statement.<sup>86</sup>

### III. JUDICIAL AND LEGISLATIVE CONSTITUTIONAL POWER OVER RULES OF EVIDENCE: MANDATORY JUDICIAL INITIATIVE, JUDICIAL SUPREMACY, AND LEGISLATIVE DEFERENCE

#### A. *The Shift to Judicial Initiative in Rulemaking*

While several primary sources combine to form the whole body of Alabama evidence law,<sup>87</sup> this Article deals with only two of these sources—the Alabama Rules of Evidence, created solely by the judicial branch of government, and statutes. This then sets the stage for the fact that both the judicial and legislative branches of government are and long have been involved

82. See ALA. R. EVID. 601 advisory committee’s note (“No longer, after the adoption of Rule 601, will a witness necessarily be incompetent because the witness is an idiot or a lunatic during lunacy.”) (citing ALA. CODE § 12-21-165(a) (1975)); Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 151 (1995).

83. ALA. R. EVID. 601 advisory committee’s note (“Rule 601 supersedes the historic statutory rule of incompetency applied to any witness who has been convicted of perjury or subordination of perjury.”) (citing ALA. CODE § 12-21-162(a) (1975)); Colquitt & Gamble, *supra* note 82, at 151 (“Adoption of Alabama Rule of Evidence 601 results in the abandonment of any incompetency due to a witness’s conviction, even for perjury.”).

84. Schoenvogel *ex rel.* Schoenvogel v. Venator Group Retail, Inc., No. 1021932, 2004 WL 1535242 (Ala. July 9, 2004); Colquitt & Gamble, *supra* note 82, at 145 (drawing the conclusion, almost a decade before the Schoenvogel decision, that after the adoption of Rule 601, “the dead man’s statute will cease to close the mouth of an interested survivor”).

85. ALA. R. EVID. 609(a) advisory committee’s note (“The preexisting Alabama statutory provision authorizing impeachment by evidence showing conviction for a crime involving moral turpitude, ALA. CODE 1975, § 12-21-162(b), has been superseded by Rule 609.”).

86. ALA. R. EVID. 609(a)(1), 609(a)(2).

87. These primary sources are the Alabama Rules of Evidence, other rules of court, caselaw, constitutional provisions, and statutes. See ALA. R. EVID. 404; GAMBLE’S, *supra* note 5, § 402; 1 McELROY’S, *supra* note 5, § 22.01.

in contributing to the creation and development of evidence law. Any resolution of the issue of how an evidence statute interacts with a court-adopted rule of evidence, when they both apply to the same offered item of evidence, requires an understanding of the relative rulemaking powers of the judicial and legislative branches of government. Does the judiciary, for example, possess the power to hold that the adoption of an Alabama Rule of Evidence abrogates a preexisting, inconsistent evidence statute? If the judiciary holds a preexisting statute abrogated, could the legislature reenact the statute? Could the legislature enact an evidence statute that insures the admissibility of certain evidence without any showing of its being relevant? Could the judiciary declare a statutorily enacted rule of evidence unenforceable because it violates some constitutional guarantee such as separation of powers?

The Alabama Supreme Court has historically possessed the inherent power, under the Alabama Constitution of 1901, to make and promulgate rules of practice and procedure. However, the Court's slowness to engage in modern rulemaking activity would suggest that it did not envision such power to include the taking of the initiative in this area over the legislative branch of government. The Alabama Supreme Court's exercise of the initiative in adopting rules of evidence manifested itself historically in the form of caselaw rather than rules of court. In fact, virtually all the great principles of evidence have found their genesis in decided cases. Whenever the legislative branch has entered the field of evidence, it has commonly been in reaction to preexisting judicial action by the courts. Sometimes such legislative action has been for the purpose of changing preexisting caselaw of evidence while, on other occasions, the purpose has been to codify existing evidence law *en statis* for fear that the judiciary might alter rights long relied upon under preexisting cases.

The constitutional duty to take the initiative shifted to the Alabama Supreme Court in 1973 when Alabama adopted the following constitutional amendment, known as the Judicial Article: "The supreme court shall make and promulgate rules governing . . . practice and procedure in all courts . . . . These rules may be changed by a general act of statewide application."<sup>88</sup> This language constitutionally mandates that the Alabama Supreme Court must take the initiative in the process of making and promulgating all rules of practice and procedure, of which evidence rules are an illustration. It clearly establishes a scheme under which the judicial branch is to act and the legislative branch is to react.<sup>89</sup>

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88. ALA. CONST. amend. 328, § 6.11; see 1 MCELROY'S, *supra* note 5, § 8.01; Gamble, *Drafting, Adopting, supra* note 11, at 1; Moore, *supra* note 81, at 331.

89. Nothing in the exclusive constitutional power of the judiciary to take the initiative in adopting rules of evidence precludes the legislature from exercising its equally exclusive power to enact a statute of substantive law which incidentally impacts upon the admissibility of evidence. ALA. CONST. amend. 328. The argument was made in *Schoenvogel*, although unsuccessfully, that the Alabama Supreme Court's rulemaking power was insufficient to abrogate the Dead Man's Statute because the latter was a substantive rule of law whose abrogation was solely within the power of the legislative branch of gov-

Although the Federal Rules of Evidence began as creatures of the judiciary, having been initially drafted under the auspices of the Supreme Court of the United States, they were ultimately revised and adopted by the United States Congress. In contrast, however, the Alabama Rules of Evidence received no legislative review, and resulted solely from action by the Alabama Supreme Court. Adoption of the Alabama Rules of Evidence, therefore, constitutes the most significant example of the judiciary's exercise of the constitutionally mandated initiative to create evidence principles through its rulemaking power.

Nowhere has there appeared a stronger affirmation of the judiciary's positive constitutional responsibility to take the initiative to make and promulgate rules of evidence, despite the limited power of the legislature to change those rules, than through the language spoken by Justice Harwood in *Schoenvogel*.<sup>90</sup> *Schoenvogel*, perhaps more than any other decision, points out the constitutional separation of powers principles that will come into play when considering inconsistencies between an Alabama Rule of Evidence and an evidence statute. Clearly, for example, the Alabama Supreme Court possesses the constitutional rulemaking authority to adopt an evidence rule which abrogates a preexisting evidence statute. While the Constitution suggests that the legislature can reenact a statute so abrogated, your authors, in the following subsection, will urge that the legislature should defer to the judiciary and not so act.

*B. Beyond Judicial Initiative to Supremacy:  
Separation of Powers and Other Constitutional Violations*

The Alabama Supreme Court possesses the constitutional power to initiate the adoption and promulgation of rules of evidence. This, however, is not the only power that distinguishes the legislative and judicial as not co-equal branches in this particular area of the law. Besides the power to interpret the meaning of statutory rules of evidence and their interaction with the Alabama Rules of Evidence as previously discussed, it is for the courts to decide whether an evidence statute satisfies both the Alabama and United States Constitutions. Important for purposes of this Article, it should be recognized that the Alabama Supreme Court established as early as 1945 that the legislature cannot enact a rule of practice and procedure (and thereby a rule of evidence) which "would hamper the proper functioning of the trial court."<sup>91</sup> This superior constitutional power over evidence rulemaking was noted in the previously discussed *Schoenvogel* decision.<sup>92</sup> It thus is to be recognized that, beyond all other potential constitutional challenges that may be made to a statutory evidence rule, there remains the possibility

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ernment. *Schoenvogel*, 2004 WL 1535242, at \*11.

90. 2004 WL 1535242, at \*28.

91. *Ex parte Foshee*, 21 So. 2d 827, 829 (Ala. 1945).

92. 2004 WL 1535242, at \*8.

that the legislature could enact an evidentiary statute that would be so contrary to customary court practice and procedure as to violate the separation of powers.<sup>93</sup>

A major illustration of such legislative overreaching is the legislature's attempt to change the law as it relates to chain of custody requirements. The legislature accomplished this by enacting a statute in 1995 that changed the rules governing authentication of evidence.<sup>94</sup> This piece of legislation instructs the courts of Alabama to admit evidence automatically, even if the prosecution fails to prove the chain of custody. Specifically, the statute provides:

Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence.<sup>95</sup>

To understand the scope of the statute, it is important to consider the purpose of the authentication requirements. Chattels, a form of demonstrative evidence, are offered as having played a direct role in the incident being litigated.<sup>96</sup> When pieces of fungible evidence are introduced, it is especially important to ensure that the evidence is in substantially the same condition as it was when it was recovered from the scene.<sup>97</sup> In order to show that the chattel is in the same condition, a witness must authenticate the evidence.<sup>98</sup> So, when a chattel is not unique, the admission of such evidence requires a preliminary showing as to the proper chain of custody.<sup>99</sup> The chain of custody has been defined as follows:

The chain of custody is composed of "links." A "link" is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: "(1) [the] receipt of the

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93. There is precedent for a court holding a statute unconstitutional as violating the separation of powers doctrine. *See* *Broadway v. State*, 60 So. 2d 701, 704 (Ala. 1952); *Ex parte Huguley Water Sys.*, 213 So. 2d 799, 805-06 (Ala. 1968).

94. ALA. CODE § 12-21-13 (1975).

95. *Id.*

96. 2 MCELROY'S, *supra* note 5, § 319.01.

97. *Id.*

98. *Id.*

99. *Id.*

item; (2) [the] ultimate disposition of the item, *i.e.*, transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition.”<sup>100</sup>

However, while a missing link can render evidence inadmissible, if circumstantial evidence can be offered to assure the court that the chattel had not been altered or tampered with between the time of collection and the time of trial, then the evidence may gain admissibility.<sup>101</sup> Therefore, prior to this statute’s enactment, prosecutors had to account for demonstrative evidence by showing there was a proper chain of custody. However, if the prosecution could not present circumstantial evidence assuring the court that the evidence had not been tampered with, the evidence could be excluded. At times, prosecutors were frustrated by these requirements because evidence clearly tied to a defendant was nonetheless excluded.<sup>102</sup> Section 12-21-13 alleviated this problem because the plain language of the statute instructs the courts of Alabama to admit evidence automatically, even if the prosecution fails to prove a chain of custody.<sup>103</sup>

As mentioned above, a legislative enactment may not disturb “the functions and orderly processes of courts which derive their existence from the state constitution.”<sup>104</sup> Furthermore, a “legislative enactment may not encroach on the core judicial power.”<sup>105</sup> If a legislative enactment intrudes on court processes, it violates the separation of powers doctrine.<sup>106</sup> So, before one can decide the constitutionality of Section 12-21-13, it is imperative to discern whether the chain of custody statute goes beyond merely promulgating rules to the point that it encroaches on a core judicial power.

Rule 901 of the Alabama Rules of Evidence states, “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”<sup>107</sup> Section 12-21-13 clearly obviates the

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100. *Ex parte Holton*, 590 So. 2d 918, 920 (Ala. 1991) (quoting Edward J. Imwinkelried, *The Identification of Original, Real Evidence*, 61 MIL. L. REV. 159, 159 (1973)).

101. *Id.*

102. This “missing link” rule was interpreted by the courts in a manner which often led to the inadmissibility of demonstrative evidence. *See Van Garrett v. State*, 608 So. 2d 337, 338 (Ala. 1992) (overruled by *Ex parte Slaton*, 680 So. 2d 909 (Ala. 1996)) (holding that because one of the officers who handled the drugs failed to testify, there was a missing link and the trial court erred in admitting the drugs as evidence).

103. Courts have narrowed this broad statute. For example, in *Lee v. State*, 748 So. 2d 904 (Ala. Crim. App. 1999), the court, referring to Alabama Code § 12-21-13, stated that “where a witness can specifically identify the evidence, and its condition is not an issue in the case, then the State is not required to establish a complete chain of custody in order for the evidence to be admitted into evidence.” *Id.* at 912.

104. *Ex parte Huguley Water Sys.*, 213 So. 2d 799, 805 (Ala. 1968).

105. *Schoenvogel*, 2004 WL 1535242, at \*8 (citing *Ex parte Jenkins*, 723 So. 2d 649, 653-56 (Ala. 1998)).

106. *Id.*; *see also Broadway v. State*, 60 So. 2d 701, 704 (Ala. 1952) (holding that a statute which mandated a new trial if the prosecutor referenced the defendant’s failure to testify was unconstitutional for violating the separation of powers doctrine); *Ex parte Jenkins*, 723 So. 2d at 656.

107. ALA. R. EVID. 901; *see also* 7 WIGMORE ON EVIDENCE § 2129, at 709 (1978).

need for this authentication requirement, because it states that evidence collected in connection with a criminal investigation, even if the evidence is unauthenticated, should not be excluded from the jury or court. However, since this statute—which clearly manifests a procedural intent—only has meaning in the context of a court proceeding, one could argue that it encroaches on the court’s ability to properly manage a trial. In fact, the need for authentication has been articulated as “an inherent logical necessity.”<sup>108</sup>

Certainly the courts, in the branch of government most familiar with the facts of a given case, are in a better position to determine whether evidence is properly admissible against a criminal defendant. In fact, courts are the only branch of government that can ensure that the requisite logical relevancy has been established in a particular trial. Because courts are the sole branch that can ensure that only evidence of logical relevancy gains admissibility, a statute which instructs a court to ignore this important element greatly interferes with a court’s ability to function properly.

Section 12-21-13 is analogous to the statute discussed in *Broadway v. State*<sup>109</sup> which mandated a new trial if the prosecutor referenced the defendant’s failure to testify. A plain reading of the statute clearly mandated such a result, even if the comment could be cured by the court and even if the defendant suffered no prejudice.<sup>110</sup> The Supreme Court of Alabama held the statute unconstitutional as violating the separation of powers doctrine.<sup>111</sup> As the court stated, the statute was “so plainly an infringement by legislative power upon judicial power.”<sup>112</sup> Like the statute in *Broadway*, Section 12-21-13 applies only to criminal proceedings and strips the court of the flexibility to decide whether evidence is admissible.<sup>113</sup> Because the courts are in a better position to decide the issue of logical relevancy and because this statute does not allow the court to decide the issue of logical relevancy, this statute could be deemed an encroachment by the legislature on a judicial power.<sup>114</sup>

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*Authentication*, however, presupposes a single object only, and refers to it as associated with a person, a time, a place, or other known conditions. Thus, the object itself, when offered, is not relevant unless it is the object that was in fact thus associated with those conditions. Hence, the evidencing of those conditions is necessary; and the principle of authentication requires that some evidence connecting the object with those conditions be introduced before or at the time of offering the object itself.

*Id.*

108. FED. R. EVID. 901 advisory committee’s note (quoting 7 WIGMORE ON EVIDENCE § 2129, at 564).

109. *Broadway*, 60 So. 2d at 701.

110. *Id.* at 704.

111. *Id.* at 705.

112. *Id.* at 704.

113. See *Ex parte Huguley Water Sys.*, 213 So. 2d 799, 805-06 (Ala. 1968) (holding that the statute in question did not violate the separation of powers doctrine because by its language the statute did not prevent a court from exercising judicial discretion).

114. Even though this statute facially mandates that unauthenticated demonstrative and real evidence be admitted as evidence, courts have been reluctant to rely on Section 12-21-13 as the sole basis for admissibility. See *Smith v. State*, 2004 WL 921748, at \*10 (Ala. Crim. App. Apr. 30, 2004); *Snyder v. State*, 2003 WL 22463403, at \*38 (Ala. Crim. App. Oct. 31, 2003); *Hodges v. State*, 856 So. 2d 875, 918 (Ala. Crim. App. 2001); *Powell v. State*, 796 So. 2d 404, 420 (Ala. Crim. App. 1999). In fact, most courts find from the evidence introduced that the evidence was properly authenticated and—in a

Additionally, it is possible that this statute could be vulnerable to a due process attack. “The identification and authentication requirements [in ARE 901] are an integral part of logical relevancy.”<sup>115</sup> In fact, “[r]ule 901 embraces the historic requirement that the proponent of real or demonstrative evidence . . . lay a threshold foundation, as a prerequisite to admissibility, sufficient to show that the evidence is what it is represented to be.”<sup>116</sup> Clearly, Section 12-21-13 does an end-run around this requirement, for this statute, by its plain language, sets the stage for a prosecutor to admit evidence without satisfying the important authentication predicate. If such admissibility is allowed, it is possible that evidence not tied to the defendant (otherwise known as irrelevant evidence) will be admitted and used by the jury to convict the defendant. If the defendant is convicted by the prosecution’s use of irrelevant evidence, he or she has a legitimate argument that he or she has been deprived procedural due process.<sup>117</sup>

### C. A Call for Legislative Deference

The role of the Alabama Supreme Court in creating evidence rules is primary and constitutionally mandated. Yet, it is not exclusive because the Alabama Constitution places authority in the legislature to enact statutes that change preexisting rules of evidence established by the Alabama Supreme Court.<sup>118</sup> The clear implication of this provision is that the Alabama Supreme Court takes the initiative in creating evidence rules while the legislature acts, if it chooses, only in a reactive role to change them.<sup>119</sup> History makes it clear, however, that even in this reactive role the legislative branch has always acted with deference toward the judiciary. This deferential role

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“kitchen sink” argument—use language like, “[m]oreover [the evidence was] also admissible pursuant to § 12-21-13.” *Melson v. State*, 775 So. 2d 857, 880 (Ala. Crim. App. 1999).

115. ALA. R. EVID. 901 advisory committee’s note.

116. *Id.*

117. 2 MCELROY’S, *supra* note 5, § 320.01.

118. ALA. CONST. amend. 328, § 6.11.

Sec. 6.11. Power to make rules.

The supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party nor affect the jurisdiction of circuit and district courts or venue of actions therein; and provided, further, that the right of trial by jury as at common law and declared by section 11 of the Constitution of Alabama 1901 shall be preserved to the parties inviolate. These rules may be changed by a general act of statewide application.

*Id.*

119. In addition to the legislature’s constitutionally based role for adopting rules of evidence, it should be noted that a number of the Alabama Rules of Evidence contain acknowledgments that their provisions may be supplemented by statutory provisions. *See, e.g.*, ALA. R. EVID. 402 (providing that relevant evidence may be excluded based upon an exclusionary principle found in a statute); ALA. R. EVID. 802 (recognizing the power of the legislature to create statutory exceptions to hearsay which will supplement those found in the Alabama Rules of Evidence); ALA. R. EVID. 901(b)(10) (acknowledging that evidence may be authenticated by methods set out in statutes in addition to the methods found in the Alabama Rules of Evidence); ALA. R. EVID. 902(10) (a document or other item may be granted the status of self-authentication by a statute); ALA. R. EVID. 1002 (authorizing the continued recognition of copies of writings which are statutorily exempted from the best evidence rule).



will be put to its greatest test if and when the legislature is tempted to enact a statute which undertakes to alter one of the Alabama Rules of Evidence or to reenact a statute that has been abrogated by the adoption of the Alabama Rules of Evidence.

The Alabama Supreme Court decided, in *Schoenvogel*,<sup>120</sup> that the adoption of Alabama Rule of Evidence 601 abrogated the preexisting Dead Man's Statute. The question which inevitably comes to mind in light of *Schoenvogel* is whether it would be within the constitutional power of the legislature to reenact the Dead Man's Statute. Suppose, for example, that the following statute was enacted in 2005:

Every person is competent to be a witness except as otherwise provided in these rules [and] *except that no person having a pecuniary interest in the result of the action or proceeding shall be allowed to testify against the party to whom his interest is opposed as to any transaction with, or statement by, the deceased person whose estate is interested in the result of the action or proceeding or when such deceased person at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness or has been taken and is on file in the case. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another.*<sup>121</sup>

Without doubt, it lies within the constitutional power of the Alabama Legislature to change, by statute of statewide application, an evidence rule previously adopted by the Alabama Supreme Court under its rulemaking authority.<sup>122</sup> Therefore, the legislature could reinstate the Dead Man's Statute by codifying the above version of Alabama Rule of Evidence 601. The only limit upon the legislative branch's constitutional power to so act is the prohibition against enacting any evidence statute that "prohibits the due and orderly processes by which [a] court functions, or prevents it from properly functioning."<sup>123</sup> It seems unlikely that the Alabama Supreme Court would classify a recycled and reenacted Dead Man's Statute as such a significant prohibition upon the functioning of trial court processes as to encroach upon the core judicial power, thereby rendering its enactment a separation of

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120. *Schoenvogel ex rel. Schoenvogel v. Venator Group Retail, Inc.*, No. 1021932, 2004 WL 1535242 (Ala. July 9, 2004).

121. ALA. R. EVID. 601. The italicized language used to amend the rule is taken from Alabama's now-abrogated Dead Man's Statute. ALA. CODE § 12-21-163 (1975).

122. ALA. CONST. amend. 328, § 6.11; *see supra* note 118.

123. *Ex parte Foshee*, 21 So. 2d 827, 829 (Ala. 1945); *see Schoenvogel*, 2004 WL 1535242, at \*7.

powers violation.<sup>124</sup> Despite its power to do so, however, the Alabama Legislature should decline to enact this or any other nonreferenced evidence statute that is inconsistent with the Alabama Rules of Evidence. Such deference to the judicial branch is justified for the reasons to follow.

### 1. *Judicial Deference to the Legislature*

Throughout the process of drafting, adopting, and promulgating the Alabama Rules of Evidence, the Alabama Supreme Court acted in deference to the legislature's role in the creation and expansion of the whole body of evidence law. First and most importantly, the Supreme Court Advisory Committee, responsible for drafting the Alabama Rules of Evidence, recognized as a beginning premise that the legislature possesses the threshold power to declare proceedings to which the Alabama Rules of Evidence do not apply.<sup>125</sup> Giving deference to the fact that the body of evidence law, as a matter of historic fact, consists of both judicial and legislatively created rules, language occurs throughout the Alabama Rules of Evidence recognizing statutes as a source of supplementary evidence law. Rule 402, for example, recognizes that an item of evidence may surmount all other evidentiary hurdles asserted against its admissibility under the Alabama Rules of Evidence and yet be excluded because its admission would violate the provisions of a state or federal statute.<sup>126</sup> Even if a statement made outside the present proceeding does not qualify under one of the many exceptions enumerated in Rules 803 and 804, Rule 802 acknowledges the fact that it may yet qualify for admissibility under a statutory hearsay exception existing outside the Alabama Rules of Evidence.<sup>127</sup> Rules 901 and 902, after setting forth methods whereby items of evidence may be authenticated or gain self-authentication, each conclude with a subsection authorizing any supplementary method of authentication found in a statute.<sup>128</sup> The Best Evidence Rule found in Rule 1002 requires that the original be produced to prove a writing unless an exception is provided for by statute.<sup>129</sup>

Perhaps the Alabama Supreme Court was presented with a most interesting opportunity for deciding what measure of deference to afford prior work of the legislature when it approached the issue of whether to adopt rules governing evidentiary privileges. The basic privileges, such as husband-wife and attorney-client, were originally created by the courts through caselaw.<sup>130</sup> Eventually, however, these same privileges were codified by the

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124. *Ex parte Jenkins*, 723 So. 2d 649, 653-56 (Ala. 1998).

125. ALA. R. EVID. 1101(a).

126. ALA. R. EVID. 402.

127. ALA. R. EVID. 802.

128. ALA. R. EVID. 901(b)(10), 902(10).

129. ALA. R. EVID. 1002.

130. ALA. R. EVID. 502 advisory committee's note ("Alabama's preexisting attorney-client privilege is a creature of the common law . . . . That common law privilege, however, has been embodied in a statute."); see 2 MCELROY'S, *supra* note 5, § 388.01.

legislature.<sup>131</sup> It thus appeared that, being their own original creations, the Alabama Supreme Court owed no deference to the prior work of the legislature. Nevertheless, it was ultimately decided that the privilege statutes should be honored since they had been relied upon for so long. Consequently, the approach adopted was to take the statutory language in each statutory privilege and pour it over into the numbered Alabama Rule of Evidence.<sup>132</sup>

The Alabama Constitution grants to the Supreme Court the authority to adopt and promulgate rules of practice and procedure governing the courts of Alabama, including evidence rules.<sup>133</sup> Any rule so adopted abrogates a preexisting, procedural evidence statute that is inconsistent with it. Judicial deference toward the legislature in the process leading to the adoption of the Alabama Rules of Evidence was perhaps best expressed by the Reporter: "Because of the historic and concurrent power exercised by the judicial and legislative branches over the law of evidence, however, the Advisory Committee was very careful to keep to a minimum the instances when the effect of any particular rule would abrogate a preexisting statute."<sup>134</sup>

The Alabama Rules of Evidence have been enforced alongside a vast body of evidence statutes for eight years. During this time, only a single Alabama evidence statute—the Dead Man's Statute—has been held inconsistent with and thereby abrogated by the adoption of the Alabama Rules of Evidence. All other statutes containing evidentiary provisions have been recognized as supplementary to the Alabama Rules of Evidence.

## 2. *General Historical Legislative Deference to the Judiciary in Procedure*

The legislative branch has a long history of deferring to the judicial branch in matters of practice and procedure. When the Alabama Constitu-

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131. *Guterman, Rosenfield & Co. v. Culbreth*, 122 So. 619, 619 (Ala. 1929) (stating that Alabama's attorney-client privilege statute is only a declaration of the law as previously administered by the courts, to which it contributes nothing).

132. ALA. R. EVID. 502 advisory committee's note ("Except as otherwise may be specifically indicated, Rule 502 is intended to embody the same privilege as set out in this former . . . statutory law."); ALA. R. EVID. 503A advisory committee's note ("While the psychotherapist-patient privilege of Rule 503 is based generally upon a preexisting Alabama statute, it nevertheless represents a nationally recognized privilege principle."); ALA. R. EVID. 505 advisory committee's note ("Rule 505 tracks . . . a preexisting statute creating a clergyman privilege in Alabama."); *see also* Gamble, *Drafting, Adopting, supra* note 11, at 9.

Having refused to utilize the rejected Federal Rules of Evidence as a model for its own privilege rules, the Advisory Committee then decided simply to take Alabama's statutory privileges and to use them as models. Consequently, the nucleus of all the proposed privilege rules consist primarily of the principles found in preexisting statutes. These statutory privileges, however, have received relatively little case law interpretation and application. Consequently, the draftsmen were forced to look elsewhere for a model upon which to pattern language for the finer points of each privilege as well as privilege exceptions. The model chosen was the Uniform Rules of Evidence.

*Id.*

133. ALA. CONST. amend. 328, § 6.11; *see supra* note 118.

134. Gamble, *Drafting, Adopting, supra* note 11, at 7.

tion was amended in 1973, with what was commonly referred to as “the new judicial article,” the legislature followed in 1975 with the Judicial Article Implementation Act. The codified version of the act contains several expressions of deference. First, it sets forth an express acknowledgment that the Alabama Supreme Court’s constitutional power to adopt and promulgate rules of practice and procedure is an affirmative duty.<sup>135</sup> Second, this power is primary in that it is the Supreme Court which is to act and the legislature which is to react—that is, the Supreme Court is to adopt rules of practice and procedure which the legislature may change by acts of statewide application.<sup>136</sup> Third, the statute provides that all such court adopted rules of practice and procedure shall be certified by the Secretary of State for publication in the Alabama Code.<sup>137</sup> Fourth, the legislature took the extraordinary step of providing that no rule of practice or procedure previously adopted would be considered superseded or modified by the practice and procedure title of the Code unless there was an express reference to such in the title, there was an irreconcilable conflict with the title, or a later-enacted law so provided.<sup>138</sup>

The Alabama Code is strewn with other examples of legislative deference. The title containing statutes dealing with criminal procedure, for example, is prefaced with a caveat that any provision therein will apply only if not governed by rules of practice and procedure adopted by the Supreme Court of Alabama.<sup>139</sup> Even more dramatically, and in what may well be the ultimate expression of deference, the legislature prefaced the title of its entire civil procedural code with the caveat that any provision therein would apply only if the procedure were not governed by a rule of practice and procedure adopted by the Supreme Court of Alabama.<sup>140</sup>

### 3. *Historic Legislative Deference in Evidence Specifically*

Historic deference has been shown by the legislature toward the judiciary on matters of evidence law and, on this point, examples abound. Statutory privileges have been created without any expressed elements except the provision that they are to be on the same level as the common-law attorney-client privilege.<sup>141</sup> Copies of documents have been declared statutorily ad-

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135. ALA. CODE § 12-2-19(a) (1975) (“Since the Supreme Court now has the initial, primary duty to make and promulgate rules governing practice and procedure in all courts . . .”).

136. *Id.*

137. *Id.* (“The Secretary of State shall cause such rules to be published in the Acts of Alabama and in any code of the laws of Alabama whenever such codes are published or in pocket supplements to codes.”).

138. ALA. CODE § 12-2-19(c) (1975).

139. ALA. CODE § 15-1-1 (1975).

140. ALA. CODE § 12-1-1 (1975) (“Any provisions of this title regulating procedure shall apply only if the procedure is not governed by the Alabama Rules of Civil Procedure, the Alabama Rules of Appellate Procedure or any other rule of practice and procedure as may be adopted by the Supreme Court of Alabama.”).

141. ALA. CODE § 34-26-2 (1975) (granting the statutory psychologist- and psychiatrist-patient privileges, this statute is the predecessor to ALA. R. EVID. 503, which provided that it was to be placed

missible so long as the original would be “otherwise admissible,” meaning admissible under the other (nonstatutory) rules applied by the judiciary.<sup>142</sup>

#### 4. *Legislative-Like Process of Adoption*

The most plausible rationale for proposing a statutorily enacted rule of procedure, as an alternative to a judicially adopted one, would be that the legislative process offers a wider debate than that of a more limited judicial rulemaking committee. This rationale, however, carries less force when applied to the process that resulted in the adoption of the Alabama Rules of Evidence. The committee assigned the task of drafting the Rules of Evidence operated administratively like virtually no other rulemaking body. While appointed by and under the power of the Alabama Supreme Court, the committee worked under the administrative supervision of the Alabama Law Institute, which is an agency of the Alabama Legislature whose officers are composed of the leadership of the legislative branch of state government.<sup>143</sup> At each annual meeting of the Alabama Law Institute held during the life of the project, the Reporter met and briefed the membership on the changes that the rules would bring in preexisting Alabama evidence law. In legislative-like fashion, the Alabama Supreme Court twice published the proposed Alabama Rules of Evidence in the advance sheets of the Southern Reporter for public debate.<sup>144</sup> Objections to the rules were invited and received, and responses were made by the Advisory Committee.<sup>145</sup> All petitions received by the court, along with the Reporter’s response to each objection, were summarized in a chart which was published for statewide circulation.<sup>146</sup> Oral arguments were held before the Alabama Supreme Court

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upon the same basis as the privilege that arises by law between an attorney and a client).

142. ALA. CODE § 12-21-5 (1975); *Whetstone v. State*, 407 So. 2d 854, 861 (Ala. Crim. App. 1981); see 2 MCELROY’S, *supra* note 5, § 254.01(9).

143. See *Gamble, Drafting, Adopting, supra* note 11, at 3 (“The work product of this group, after five years of drafting and debate under the administrative sponsorship of the Alabama Law Institute, was submitted to the Alabama Supreme Court on April 12, 1993.”).

144. Order of Supreme Court of Alabama, Apr. 27, 1993 (615 So. 2d Advance Sheets No. 2 (May 13, 1993)); Order of Supreme Court of Alabama, July 26, 1994 (638 So. 2d Advance Sheets No. 33 (Aug. 18, 1994)); see *Gamble, Drafting, Adopting, supra* note 11, at 3; *Schoenvogel*, 2004 WL 1535242, at \*4. Justice Harwood describes the Supreme Court’s attempts to circulate the proposed rules for comment and discussion as a “lengthy and painstaking vetting process.” *Id.*

145. Adoption of the Rule 505 clergyman privilege illustrates both public feedback concerning the rules and judicial deference to the legislature. The preexisting privilege was statutory and, under it, the privilege belonged to both the parishioner and the priest. This then meant that the parishioner could want the priest to testify to what the parishioner said in confidence but the clergyman could refuse. Historically, privileges belong to the communicating party and not to the party communicated with. The lawyer, for example, possesses no privilege. The privilege belongs to the client. The Advisory Committee originally proposed a version of Rule 505 that would have placed the privilege solely in the hands of the parishioner and, thereby, changed the preexisting statutory privilege. After a strong letter of opposition from the Diocese of Mobile, however, the Alabama Supreme Court directed that the language be revised to conform to the statute such that the clergyman, as well as the parishioner, hold the privilege. See *Gamble, Drafting, Adopting, supra* note 11, at 7 (containing a summary of all arguments lodged with the Alabama Supreme Court against all the proposed Alabama Rules of Evidence and the Supreme Court Advisory Committee’s response to each).

146. *Gamble, Drafting, Adopting, supra* note 11, at 27-71.

on two occasions with interested parties allowed to argue against any proposed rule, followed by a response by an Advisory Committee member.<sup>147</sup>

#### IV. CONCLUSION

While the Alabama Rules of Evidence constitute the primary source of evidence law, they are by no means the exclusive one. Chief among the alternative sources is statutes. The majority of these statutory evidence rules are referenced in the Alabama Rules of Evidence themselves and will continue supplementary to them by constituting additional hearsay exceptions, methods of authentication, best evidence exceptions, privileges, and grounds of irrelevancy. The reference to these statutes is open-ended in terms of including statutes enacted after as well as before the adoption of the Alabama Rules of Evidence. Therefore, ample field of operation is provided for the legislature to participate in the growth of Alabama evidence law. The Alabama Legislature should not, except in rare instances, accept the invitation provided under the constitution to change the Alabama Rules of Evidence or any rule of evidence adopted by the Alabama Supreme Court. Should the legislature take such action, nothing short of politics would preclude the Alabama Supreme Court from subsequently reasserting its own constitutional rulemaking authority to readopt the original rule. This unfortunate and unacceptable cycle, involving lack of deference and comity between the judicial and legislative branches of government, would leave citizens at the mercy of whichever branch acted last. This could lead to a "battle of the branches" in which the procedural law would be adrift and without its most valuable characteristic—predictability.

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147. Order of Supreme Court of Alabama, Apr. 27, 1993 (615 So. 2d Advance Sheets No. 2 (May 13, 1993)) ("It is further ordered that any interested person shall be permitted to file with the clerk of this Court any comments regarding those proposed rules of evidence . . . Any such comments must be filed no later than Aug. 27, 1993."); Order of Supreme Court of Alabama, July 26, 1994 (638 So. 2d Advance Sheets No. 33 (Aug. 18, 1994)) (ordering a second and final hearing on the rule for February 14, 1995).