

# **PROPOSED ALABAMA RULES OF EVIDENCE**

## **WHAT'S THE SAME; WHAT'S DIFFERENT**

### **I.**

In 1988, the Alabama Supreme Court appointed an Advisory Committee of lawyers and judges to study and revise Alabama's Rules of Evidence. The study began in September of 1988 under the guidance of the Alabama Law Institute. It was decided early to use the Federal Rules of Evidence as a pattern and format. If the law of Alabama and the Federal Rules were substantially similar, the language of the Federal Rule was generally adopted. Over 30 states have promulgated a version of the Federal Rules of Evidence. Alabama will likely adopt a version of her own.

It has been estimated that there are more than One Hundred Thousand decisions making and interpreting Alabama's Evidence Rules.<sup>1</sup> Because Alabama had such a full body of case law, many of the proposed rules reflect the tradition, history, and wisdom previously adhered to by the courts.

Members of the Committee debated, drafted, and redrafted the rules for four years. A final recommendation of the Committee was submitted to the court in April of 1993. By Order on the 27<sup>th</sup> day of the same month, the Court directed that the Bench and Bar be given notice by publishing the proposed Rules in Southern Reporter (2d) advance sheets. Interested persons were requested to file with the Clerk of the Supreme Court any comments regarding the proposed Rules of Evidence.

A hearing on the Rules was held October 7, 1993. At the hearing, several people spoke against various rules. Some of those making argument were present as individuals while other represented such groups as the Attorney General's office, the Alabama District Attorneys Association, the Alabama Criminal Defense Lawyers Association and the Alabama District Judges Association. After all arguments were made as to any series of the proposed rules, some member of the drafting committee would rise to rebut. The Chief Justice gave the Alabama Law Institute, the administratively sponsoring group, until December 1, 1993 to furnish the Court with suggestions as to how the Court should approach its work in considering the proposed rules.

### **II. Purpose**

The Alabama practitioner once knowledgeable of Alabama Law, is often unsettled by the change that occurs when a large body of law undergoes and revolution. The restlessness and apprehension exists even when the change is for the better. In this writer's professional life, the enactment of the Uniform Commercial Code, the demise of

Common Law pleading with the adoption of the Alabama Rules of Civil Procedure, and ----- have all occurred to mention just a few. Most of these revolutionary changes, unlike the so-called tort reform, occurred after much thought and effort by members of the Bench and Bar of Alabama, often working through the Alabama Law Institute. The recommendations of the Committee are the result of such forethought and deliberation.

The purpose of this article is to comfort the practitioner by assurance that most of what is found in these Rules will be familiar either because of the substantial continuation of pre-existing Alabama practice, or the adoption or substantial adoption of the already familiar Federal Rules of Evidence.

The Federal Rules of Evidence served as a model and were adopted except where the Committee felt compelled to follow Alabama law or a variation of the same. The Rules assume that in addition to pre-existing Alabama case law where the applicable, cases construing the Federal Rules of Evidence will complete the authority for future interpretation of the Alabama Rules of Evidence.<sup>2</sup>

The scope of this article is limited to what this practitioner considers major changes in the utility rules of existing Alabama Evidence law. The use of the term utility is meant to designate those rules, which are often used in the trial of a lawsuit. This article in no way attempts to catalog each and every change, whether major or minor. The reader prior to application of information contained in this article, should be satisfied by reading the Rules themselves along with the commentary, in addition to researching original authority.

Alabama Rules of Evidence had been birthed from statutes, cases, and court promulgated rules. The adoption of the proposed Rules of Alabama will result in the entering of the maturation process of Alabama Law of Evidence. Hopefully, this article will be of assistance to the busy practitioner in embarking upon the practical use of these new tools.

### **III. MAJOR CHANGES AND DIFFERENCE FROM FEDERAL RULES**

Of the 168 parts of rules or principals of the proposed rules of Alabama Evidence, many of which are administrative, approximately 124 virtually continue pre-existing Alabama law. In general the proposed rules lean toward admissibility rather than excludability.

The proposed Rules are composed of eleven articles.

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| Article I   | General Provisions;                            |
| Article II  | Judicial Notice;                               |
| Article III | Presumptions in Civil Actions and Proceedings; |
| Article IV  | Relevancy and Its Limits;                      |

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|--------------|--|
| Article V    | Privileges;  |
| Article VI   | Witnesses;   |
| Article VII  | Opinions and Expert Testimony;                     |
| Article VIII | Hearsay;   |
| Article IX   | Authentication and Identification                  |
| Article X    | Contents of Writings, Recordings, and Photographs; |
| Article XI   | Miscellaneous Rules                                |

Rule 301 Presumptions in General in Civil Actions and Proceedings. Although Rule 301 is consistent with pre-existing Alabama law, it deserves comment. The proposed Rule does not adopt Fed. R. Evid. 301. Under the Federal Rule, unless provided otherwise by law, all the presumptions shift the burden of going forward with the evidence on the issue on which the presumption is applied. This type of presumption requires the party against whom the presumption is applied to shoulder the burden of offering evidence to rebut the presumption. This type of presumption is often referred to as the “Busting Bubble” type of presumption.

Alabama recognizes in addition the “Burden Shifting” type of presumption. In that type of presumption, the burden of persuasion or burden of proof is shifted to the opposing party. This Rule does not deal with conclusive presumptions: i.e. those that require the trier of fact by law to find the presumed fact as fact. Section (c), however, recognizes that if a statute creating a presumption provides for the impact of the presumption, then the statute prevails. Otherwise, however, the court is to look at the public policy that the presumption intends to implement in order to determine if the presumption is a “Bursting Bubble” type of presumption or a “Burden Shifting” type of presumption.<sup>3</sup>

Rule 404 Character evidence not admissible to prove conduct; exceptions; other crimes. The Rule adopts the general proposition in the Federal Rules and pre-existing Alabama law that “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion....”<sup>4</sup>

The Rule sets out exceptions for both civil and criminal cases.

404(a)(1) allows evidence of a pertinent trait of character to be offered by an accused, or by the prosecution in rebuttal, but evidence of general reputation as a whole may not be offered by the accused to prove good character although opinion of character for a particular trait may be admitted.<sup>5</sup>

404(b) continues pre-existing Alabama law allowing evidence of collateral conduct in both criminal and civil cases when the purpose of the offer is proper. For example, evidence of other wrongs or acts in civil cases have been allowed to prove fraud<sup>6</sup> or safe or unsafe condition.<sup>7</sup> The Committee Notes for Rule 404(b) include a partial listing of proper purposes such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>8</sup>

It should be noted that in a criminal case if the prosecution intends to use evidence of collateral misconduct, pre-trial notice to the accused is required.<sup>9</sup>

Rule 406 Habit; Routine Practice. This Rule is identical to the Federal Rule 406 and is consistent with pre-existing Alabama law.<sup>10</sup> This Rule however does not require certain condition precedents or corroboration of other evidence before habit evidence can be introduced. Rule 406 applies to the conduct of an organization as well as an individual. At common law, such conduct was often referred to as “Custom”, but under this Rule, it is referred to as “The routine practice of an organization.”<sup>11</sup> Habit under this Rule still requires a regular response to repeated situations.<sup>12</sup>

This does not change Alabama’s pre-existing law, which allows the conduct of a civil party admitted for the relevant purpose of showing plan or design.<sup>13</sup>

Rule 401 Inadmissibility of Plea, Plea Discussions and Related Statements. This Rule expands Alabama law, and is identical with the Federal Rule. Evidence concerning admission of criminal pleas as offers of compromise as well as pleas of no lo contender and any statements made in the course of plea discussions are inadmissible.

Rule 412 Admissibility of Evidence Relating to Past Sexual Behavior of Complaining Witness in Prosecutions for Criminal Sexual Conduct. This provision adopts Alabama’s pre-existing rape shield statute and rejects the rape provisions set forth in Fed. R. Evid. 412.

Article V Privileges. No rules of privilege are found in the Fed. R. Evid. The proposed Alabama Rules of Evidence dealing with privileges reflect pre-existing Alabama privilege statutes and the Uniform Rules of Evidence.

Rule 501 Privileges Recognized Only as Provided. This Rule recognizes the traditional common law that no privilege exists unless previously, legally established. This introductory Rule is consistent with pre-existing Alabama law.

Rule 502 Attorney-Client Privilege. This Rule expands pre-existing Alabama law to include agents of the attorney. It basically incorporates prior Alabama case law and the attorney-client statute. (footnote Ala. Code sec 12-21-161 (1975)). The wording of the rule is based on the Uniform Rules of Evidence. (footnote See Unif. R. Evid. 502) The Rule itself and the Advisory Committee Notes present an excellent discussion of the pre-existing law and the law under the proposed new Rule.

Rule 503 Psychotherapist – Patient Privilege. This Rule is consistent with the pre-existing Alabama statute.

503(a) Client-Counselor Privilege. Two statutory privileges are now merged under this particular Rule. Both counselors and victims’ counselors are governed by this privilege Rule that is substantially based on pre-existing Alabama law.

Rule 504 Husband-Wife Privilege. This privilege is consistent with Pre-existing Alabama law.

Rule 505 Communications to Clergymen. Although the clergymen privilege is continued, under the new Rule the privilege does not belong to the clergymen. It is also expanded to protect any confidential communication in the clergyman's professional capacity, which is broader than the pre-existing privilege. The Common Law Eavesdropper Rule is abandoned, and therefore, the holder of the privilege may prevent others who may have overheard from relating what was said.

Rule 506 Political Vote No change.

Rule 507 Trade Secrets. This rule recognizes Trade Secrets in evidence. They have long been recognized in discovery.

Rule 508 Secrets of State and Other Official Information: Governmental Privileges. No change

Rule 509 Identity of Informer. This rule is similar to pre-existing law but is intended to apply in both civil and criminal cases.

Rule 510 Waiver of Privilege By Voluntary Disclosure. No Change.

Rule 511 Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. This Rule basically states that the privilege is not defeated if there is a disclosure, which was compelled erroneously or made without opportunity to claim the privilege. This is consistent with pre-existing Alabama law, although no case law deals with the issue.

Rule 512 Comment Upon or Inference From Claim of Privilege in Criminal Cases; Instructions. This rule is consistent with pre-existing Alabama law.

Rule 512 A Comment Upon or Inference from Claim of Privilege in Civil Cases. This rule is also consistent with pre-existing Alabama law.

Rule 804. Hearsay Exceptions; Declarant Unavailable. Rule 804(b) lists five exceptions to the Hearsay Rule when the person making the statement is unavailable as a witness. Rule 804(a) includes five situations that define the term "unavailability". The difference between this section and 803 is that the threshold question concerns whether or not the witness is available. The circumstances must meet the definition of unavailable in order to fit in any of the exceptions to the Rule.

Rule 804(a) includes in its definition of unavailable witnesses who do not testify on a court approved assertion of a privilege; those that persist in refusing to testify; those that then possess a lack of memory of the subject matter; those that are unable to be present because of death or illness; and those that are absent from the hearing when the

proponent of the statement has been unable to secure their testimony. A declarant is not unavailable as a witness if the conditions of unavailability have been caused by the wrongdoing of the party desiring the testimony.

Preexisting Alabama law did not clearly recognize a witness's refusal to testify as the basis of unavailability. There was no historical Alabama law, which considered a witness's lack of memory as unavailability. However, preexisting law did consider the declarant's absence upon reasonable efforts to procure the testimony as unavailability. Once the unavailability test is met, then the statement may be introduced if it complies with one of five exceptions.

Rule 804(b)(1). Former testimony. Common law previously recognized the former testimony exception. Under the common law, however, it was necessary that the former testimony occurred in a proceeding where there was an identity of parties or issues. That requirement is abandoned under the proposed rule. The party offering the testimony, however, must show that the party to whom the statement is adverse (or the party's predecessor in interest) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect. "Predecessor in interest" requires that before former testimony can be admitted against a party to a civil action in a subsequent action, that party must have some connection, some privity with the party to the former action who had an opportunity and similar motive to develop the testimony.<sup>14</sup>

Rule 804(b)(2). Statement Under Belief of Impending Death. This Rule incorporates and broadens the traditional dying declaration exception.<sup>15</sup> Under the new rule, declarant does not have to actually die as long as the statement was made under the belief of impending death. The Rule unlike preexisting Alabama law, applies in civil cases and in all criminal cases.

Rule 804(b)(3). Statement Against Interest. Preexisting Alabama law recognized the admissibility of a statement that was against the proprietary or pecuniary interest of the declarant, but this principle is expanded by the proposed Rule.<sup>16</sup> Under this section, a declarant is considered against interest if it may subject the person making the statement to tort liability or weaken that person's tort claim. This exception would also include statements, which might subject the declarant to criminal liability.<sup>17</sup> The federal counterpart to this Rule includes a provision requiring that there be a clear indication of trustworthiness by corroborating circumstances before a statement can be admissible that is offered to excuse the accused or blame the declarant {Not to writer - - I don't know if I made it clear that it is still necessary to determine if the statement was against the interest of the declarant at the time it was made. If that is not clear, make sure I make it clear.}

Rule 804(b)(4). Statement of Personal or Family History. This fourth exception is very similar to preexisting Alabama law. If the declarant is unavailable at the time a statement regarding the declarant's personal or family history is offered, then the statement is exempted from hearsay.<sup>18</sup> This Rule expands the preexisting Alabama law in that the exception also covers statements about personal and family history of one

unrelated to the person making the statement if the declarant is intimately associated with the other's family.

Rule 804(b)(5). Other Exceptions. This provision is identical to the federal counterpart and allows others statements as exceptions if equivalent circumstantial guarantees of trustworthiness exist and if the court determines that the offering is as evidence of a material fact; it is more probative than other evidence which might be secured through reasonable evidence, and the general purposes of the Rules and the interest of justice will be served.

Such a statement may not be admitted, however, unless the proponent makes it known to the adverse party in advance of trial providing the adverse party with opportunity to prepare to meet the statement. This subdivision has the same purpose as Rule 803(24).

Rule 805. Hearsay Within Hearsay. This Rule is consistent with preexisting Alabama law.

Rule 806. Attacking and Supporting Credibility of Declarant. This Rule is consistent with preexisting law allowing the impeachment of an unavailable hearsay declarant just as if the witness had been called to the stand.

Rule 807. Child Hearsay Exception. This Rule is consistent with preexisting statutory Alabama law.<sup>19</sup>

## **ARTICLE XI**

### **AUTHENTICATION AND IDENTIFICATION**

Rule 901. Requirement of Authentication or Identification. This Rule is consistent with preexisting Alabama law in that it requires that evidence that is not testimonial prior to being admitted must be identified or authenticated so as to show it is what it is purported to be. Subdivision (b) of this section by way of illustration only, lists several examples of compliance with the requirements of this Rule.

Rule 902. Self Authentication. Unlike the evidence discussed in Rule 901, some items of evidence need no foundations laid as to identification because they are self-authenticating or self-identifying. Rule 902 lists such items of evidence. The information is fairly consistent with Alabama law, although subdivision 902(3) includes all public documents rather than just public records and subdivision 902(6) expands Alabama law by allowing newspapers and periodicals to be self-authenticated.

While preexisting Alabama law allowed self-authentication of titled documents, which were notarized such as deed, etc., the proposed Rule considers all notarized or properly acknowledged documents as self-authenticating.

As in preexisting law, self-authentication does not prevent the non-offering party to question genuineness. Such is not guaranteed. It should also be remembered that self-authentication or evidence does not necessarily make the item of evidence admissible. Other evidentiary rules such as relevancy, hearsay, and best evidence must be met.<sup>20</sup>

Rule 903. Subscribing Witness' Testimony Unnecessary. This Rule is consistent with preexisting Alabama law and its federal counterpart. Testimony of a subscribing witness for purposes of authentication is unnecessary unless such is required by the laws of the jurisdiction governing the validity of the writing.

## **ARTICLE X**

### **CONTENTS OF WRITING, RECORDING & PHOTOGRAPH**

Rule 1001. Definitions. These provisions deal with what has commonly been referred to as "The Best Evidence Rule". The proposed Rules follow the modern trend of liberalizing and expanding the traditional Best Evidence Rule. The preexisting Alabama law has applied to writings only. The proposed Rule includes photographs and recordings. Data, compilations, computerized records, motion pictures, videotapes, X-ray film would all come under the Best Evidence Rule if proposed Rule 1001 is adopted. This, of course, is an expansion of Alabama law.

Rule 1001(3). Original. This subdivision is consistent with out preexisting duplicate original rule.<sup>21</sup> This Rule expands Alabama law in that it includes the negative of a photograph or print of a computer printout. Under the proposed Rule as under preexisting Alabama law, the duplicate will be admissible without the necessity of accounting or producing the original if it was equally intended to be evidence of the item, event, or transaction.

Rule 1001(4). Duplicate. This subdivision represents a change in that photocopies, recordings or other copies produced by methods which are considered accurate are accepted as the best evidence without accounting for the original. This is distinguished from the "duplicate originals" because these copies may not have been intended to equally evident the transaction.<sup>22</sup>

Rule 1002. Requirement of Original. The original writing, recording, or photograph is required unless otherwise provided by statute or applicable Rules. This is consistent with Alabama's Best Evidence Rule, but also includes recording and photographs as well as writings. This preference for the original complies with preexisting Alabama law.<sup>23</sup> This Rule should not be confused with an offer of the witness' memory which may, in fact, be evidenced by a writing or photograph. If the writing or photograph is offered, the admissibility of the secondary evidence would not be admissible to prove the contents, but to illustrate or confirm the testimony.<sup>24</sup>

If the writing or photograph is offered as real or probative evidence separate and apart from reflecting testimony, then the offerer must account for the unavailability of the original.<sup>25</sup>

Rule 1003. Admissibility of Duplicates. Duplicates that comply with the definition in Rule 1001(4) are admissible and exempt from the Best Evidence Rule unless the authenticity of the original is in question or admitting the duplicate in place of the original would be unfair. Unlike prior Alabama practice, a complying photocopy or recording would be admissible as the original.

Rule 1004. Admissibility of Other Evidence of Contents. Evidence of the contents of a recording, writing or photograph other than the original is admissible if the originals are lost or destroyed, not obtainable, in the possession of the opponent, or on collateral matters. Identical to the Federal Rule and unlike prior Alabama law, the proposed Rule eliminates degree of secondary evidence.<sup>26</sup> Oral testimony of the contents of an original or a copy of the original may be offered if the original is shown to be unavailable. Former Alabama practice required that copies be produced or an accounting of their unavailability be made before oral testimony would be admitted. (Questions to writer – should we expand on the four subdivisions?)

Rule 1005. Public Records. Rule 1005 is consistent with Alabama practice and identical to its Federal counterpart.<sup>27</sup> The contents of an official record if otherwise admissible may be proved by a properly certified copy or by a proper testimony. If the offerer is unable through the exercise of reasonable diligence to obtain a complying copy, then other evidence of the contents may be offered.

Rule 1006. Summaries. An expansion of Alabama law allows the contents of voluminous writings, records, or photographs to be presented in a summary form, including charts or calculations. The duplicates or originals, however, shall be made available, and may be required to be produced in court.

Rule 1007. Testimony or Written Admission of Party. It is not necessary to account for the non production of the original when the contents of the evidence is proved by the testimony of the party against whom it is being offered or by the written admission of that party. If the admission is oral rather than written and is not made during the course of giving testimony, then the original of the writing, recording or photograph must be accounted for.

Rule 1008. Functioning of Court and Jury. The Rule conforms with preexisting Alabama law and is the same as its Federal counterpart. Ordinarily, the court is to determine the preliminary questions if the admissibility depends upon the fulfillment of certain preliminary conditions. If the issue as to whether the evidence ever existed, or if the evidence presented at trial is the original, or whether the offered evidence accurately reflects the contents is raised, then those issues are for the trier of fact.<sup>28</sup>

## **XI. MISCELLANEOUS RULES**

Rule 1101. Rules Applicable. This Rule sets forth when these Rules are applicable or inapplicable. It is based upon the Uniform Rules of Evidence.<sup>29</sup> These Rules apply in

the same proceedings and manner in which Alabama's General Rules of Evidence applied prior to the proposed Rules. It should be noted that the Rules of Evidence are inapplicable to occasions when the judge is deciding preliminary issues of fact dealing with admissibility.

Rule 1102. States that these Rules may be cited as Ala. R. Evid.

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<sup>1</sup> C. Gamble, McElroy's Alabama Evidence Preface to the First Edition (1977).

<sup>2</sup> See Ala. R. Evid. (as proposed) Rule 102 Advisory Committee's Notes (Feb. 1993).

<sup>3</sup> For an excellent discussion see Ala. R. Evid. (as proposed) Rule 301 Advisory Committee Notes (Feb. 1993).

<sup>4</sup> Ala. R. Evid. (as proposed) Rule 404 (Feb. 1993).

<sup>5</sup> Ala. R. Evid. (as proposed) Rule 405(a) (Feb. 1993).

<sup>6</sup> Davis v. Davis, 474 So.2d 654 (Ala. 1985); Actionable Scheme Ex parte Georgia Casualty & Sur. Co., 531 So.2d 838 (Ala. 1988).

<sup>7</sup> Burlington NO. R.R. Co. v. Whitt, 575 So.2d 1011 (Ala. 1990) Evidence of a physical condition that remained unchanged resulting in other incidents before or after the incident in question. Admissible on the question of whether or not the condition was safe.

<sup>8</sup> See Committee Notes, Ala. R. Evid. (as proposed) Rule 404(b) for further discussion of proper purposes and further authorities.

<sup>9</sup> See Fed. R. Evid. 404(b). This portion of the Alabama Rule is patterned upon an amendment to the Federal Rule adopted in 1991.

<sup>10</sup> Dothard V. Cook, 33 So.2d 576 (Ala. 1976); C. Gamble, McElroy's Alabama Evidence, Section 42.01 (4<sup>th</sup> Ed. 1991); J. Colquitt, Alabama Law of Evidence, Section 4.6 (1990). **NOTE TO GSC – try to find the cite of Schroeder, Hoffman & Thigpen, Alabama Evidence, Section \_ \_ \_ \_ (1987).**

<sup>11</sup> Such is consistent with pre-existing Alabama law, Note Ex parte McClarty Const. & Equip. Co. 428 So.2d 269 (Ala. 1983).

<sup>12</sup> Ala. R. Evid. (as proposed) Advisory Committee Notes, Page 59 (1993).

<sup>13</sup> Ala. R. Evid. (as proposed) Advisory Committee Notes to Rule 406, page 60 "Nothing within the present Rule is to be taken as requiring that such conduct must rise to the level of constituting habit as a condition precedent to admissibility." (1993).

<sup>14</sup> See 804(b)(1) Advisory Committee's Notes.

<sup>15</sup> Put cite in all three treatises, Colquitt, Gamble & Schroeder/

<sup>16</sup> See Gamble, McElroy, Alabama Evidence Section 249.01(1)(4<sup>th</sup> Edition 1991) add Schroeder and Colquitt's cities. See also Lavett v. Lavett, 414 So.2d 907 (1982).

<sup>17</sup> See proposed Alabama Rules of Evidence Advisory Committee's Notes to Rule 804(b)(3).

<sup>18</sup> C. Gamble McElroy's Alabama Evidence, Section 250.01 (4<sup>th</sup> Edition 1991); J. Colquitt, Alabama Law of Evidence, Section 8.4(d) (1987). Add the Schroeder cite.

<sup>19</sup> "The Child Sexual Abuse Victim Protection Act of 1989" Alabama Code, Section 15-25-30 (1975).

<sup>20</sup> Atmore Farm & Power Equip. Co. v. Glover, 440 So.2d 1042 (Ala. 1983); Alabama Rules of Evidence 803(a); Alabama Rules of Evidence 1005.

<sup>21</sup> C. Gamble McElroy's Alabama Evidence, Section 225.01(2) (4<sup>th</sup> Edition, 1991); add Colquitt & Schroeder's parallel cites.

<sup>22</sup> See Advisory Committee's Notes.

<sup>23</sup> Advisory Committee's Notes, case and treatise citations.

<sup>24</sup> Advisory Committee's Notes, case citations, treatise citations.

<sup>25</sup> Advisory Committee's Notes, case citations, treatise citations (Gamble is section 123.06).

<sup>26</sup> Advisory Committee's Notes.

<sup>27</sup> Advisory Committee's Notes, case citations, treatise citations.

<sup>28</sup> Advisory Committee's Notes, case citations, treatise citations.

<sup>29</sup> Advisory Committee's Notes.