



MONTGOMERY
VOLUNTEER
LAWYERS
PROGRAM

EASY EVIDENCE

**FOR DISTRICT AND
CIRCUIT COURT
VOLUNTEER
ATTORNEYS**

"[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Justice Hugo L. Black

Griffin v. Illinois, 351 U.S. 12
(1956)





The Alabama Pro Bono Alliance

Member Organizations:



MONTGOMERY VOLUNTEER LAWYERS PROGRAM

Easy Evidence is a practice tool produced by the Montgomery Volunteer Lawyers Program (MVLP), in an effort to support and simplify our volunteer attorneys' work in court. MVLP was created by the Montgomery County Bar Foundation (MCBF), the charitable arm of the Montgomery County Bar Association, and officially began operation in April 2013, with the goal of providing pro bono civil legal service to low-income residents of Montgomery County. This objective is being achieved through offering community advice and counsel legal clinics at various locations, by referral of cases from Legal Services Alabama, and by direct intake in Montgomery County's District and Circuit Court dockets.

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PRETRIAL MOTIONS

COMMON PRETRIAL MOTIONS

- Leave to amend complaint (filed at any time with good cause). (ARCP 15)
- For continuance before trial based on showing of good cause.
- Recusal.
- Challenging expert testimony (ARE 104(a), 702)

MOTION TO DISMISS STANDARD OF REVIEW

- “To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.” See Ala. R. Civ. P. Form 26 - Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under rule 12(b).
- “At the motion-to-dismiss stage, however, a court’s ability to pick and choose which allegations of the complaint to accept as true is constrained by Alabama’s broad and well settled standard for the dismissal of claims under Rule 12(b)(6). ... [O]ur standard of review does not permit this Court to consider the plausibility of the allegations. Rather, in considering whether a complaint is sufficient to withstand a motion to dismiss, we must take the allegations of the complaint as true, *Ussery v. Terry*, 201 So. 3d 544, 546 (Ala. 2016); we do not consider “whether the pleader will ultimately prevail but whether the pleader may possibly prevail,” *Daniel v. Moyer*, 224 So. 3d 115, 127 (Ala. 2016) (quoting *Newman v. Savas*, 878 So. 2d 1147, 1149 (Ala. 2003) (emphasis added)); and ‘[w]e construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff.’ *Daniel*, 224 So. 3d at 127.” Ms. *6, quoting *Ex parte Austal USA, LLC*, [Ms. 1151138, March 3, 2017] __ So. 3d __, __ (Ala. 2017).

SUMMARY JUDGMENT STANDARD OF REVIEW

- This Court may grant Summary Judgment to either party upon a motion showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ala. R. Civ. P. 56. The Court must review the record in the light most favorable to the non-movant and must resolve all reasonable doubts against the movant. *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994).

SUMMARY JUDGMENT EVIDENCE

- Court may consider only evidence admissible at trial.
- Supporting materials may be by affidavit or from depositions, interrogatory answers, or admissions.
- Other exhibits must be identified by affidavit or otherwise made admissible.
- Affidavits must be on personal knowledge, setting forth admissible evidence, showing that the affiant is competent to testify to the matters stated. (ARCP 56(e))

PLANNING FOR EVIDENTIARY ISSUES AT TRIAL

PRETRIAL

Prior to trial, ensure you have done the following:

- All expert disclosures provided and supplemented as required by ARCP 26.
- All interrogatory answers and requests for production properly replied to and supplemented.
- All requests for admission timely replied to. (PRACTICE TIP: If no timely response, may be deemed admitted.)
- All exhibit lists timely filed.
- All witness lists timely filed.
- All depositions to be used at trial filed, or available for filing, as required. (PRACTICE TIP: Redact as required in the jurisdiction.)
- Subpoenas prepared and served.
- List of opposing counsel's exhibits prepared, and objections to exhibits prepared in writing.
- Witnesses notified of the trial date and scheduled tentatively.

DURING TRIAL

- Tell clients not to discuss the case with anyone but you or your office.
- Tell clients and witnesses how to dress for trial.
- Have witnesses queued up to testify.

TRIAL NOTEBOOK (CIRCUIT COURT)

- Contact information. (Clients, witnesses, experts, and others who may need to be reached)
- Witness schedule. (Tentative schedule of witnesses' testimony with copies of subpoenas served)
- Tab for each witness with examination summary, exhibits to be used, points to be proven.
- Plaintiff's filed witness list.
- Defendant's filed witness list.
- Tab for each defense witness to be called with list of points to be raised and documents to be used for impeachment.
- Pretrial orders entered by the court.
- Plaintiff's exhibit list.
- List of Plaintiff's documents produced.
- Defendant's exhibit list.
- List of defendant's documents produced.
- Undisputed exhibit list. (Exhibits that will not be subject to pattern by either party.)
- Admissions or stipulations (if any).

EVIDENTIARY FOUNDATIONS

GENERAL

- Exhibits must have a proper foundation.
- Foundation includes a witness's competence to testify, and exhibit's relevance, identification, and trustworthiness or authentication.
- Exhibit must comply with hearsay and original documents rules.

FOUNDATION FOR BUSINESS RECORD

- I am handing you a document marked Exhibit A.
- Can you identify this document?
- Is it the regular practice of your business to create and maintain documents of this type?
- Are these documents created routinely by people with knowledge of the recorded event at or near the time the event occurs?
- What is the purpose of this document?
- Does your company rely on this type of document during its day-to-day operations?
- Where was this document stored after being created by your business?
- Was this document under your custody or control until the time it was retrieved?
- Was it found at the location where such documents are stored by your business when you went to retrieve it for this hearing?

FOUNDATION FOR PHOTOGRAPH

- I am handing you a photograph marked as Exhibit 2.
- Have you seen this picture before?
- Are you familiar with this photograph?
- Are you familiar with the NAME OF SUBJECT this photograph depicts?
- Have you personally viewed that NAME OF SUBJECT?
- How many times?
- Does this photograph fairly and accurately depict the intersection?

FOUNDATION FOR A DIAGRAM

- I am handing you a diagram marked Exhibit 3. Can you identify it?
- What does it show?
- Are you familiar with the [SUBJECT DEPICTED] depicted in this diagram?
- What is the name of the [SUBJECT DEPICTED]?
- How many years have you (worked there, lived there, owned that, etc.)?
- Does this diagram appear to be of the proper scale for the actual dimensions?
- Does this diagram fairly and accurately depict the [SUBJECT DEPICTED]?

EVIDENTIARY FOUNDATIONS

AUTHENTICATING A SIGNATURE

- I am handing you a document marked Exhibit 4. Have you seen it before?
- Are you personally familiar with how Mr. Smith signs his name?
- Have you seen other letters or documents signed by Mr. Smith in the past?
- Have you personally seen Mr. Smith sign letters or documents in the past?
- Looking at this signature at the bottom of Exhibit 4, is that Mr. Smith's signature?

AUTHENTICATING THE VOICE ON A TAPE RECORDING

- Do you know Mr. Smith?
- Have you talked to Mr. Smith in the past? How often?
- Are you familiar with Mr. Smith's voice?
- Have you in the past had an opportunity to listen to the tape recording marked as exhibit 5?
- Can you identify the voice on this tape recording?
- Who is speaking on the recording?

PAST RECOLLECTION REFRESHED/RECORDED

- Do you recall the date Joe Smith completed his loan application in your office?
- Since you cannot remember the date, I ask if it was routine and customary for you to prepare a loan application cover sheet for each loan application you accepted from office visits at the end of each business day before sending the applications to central office?
- I am handing you a copy of a loan cover sheet that was provided to me by ABC's counsel, and which I have now provided to opposing counsel, and ask if you prepared that document?
- Was the information on the document accurate at the time it was written?
- Is that your signature?
- Does the document now refresh your memory as to the correct date?
- What date do you now recall as the date Joe Smith completed his loan application in your office?

EVIDENTIARY MOTIONS

MOTIONS

- Declare witness hostile (to allow leading questions). (ARE 611(c))
- Exclude nonparty witnesses from courtroom during trial. (ARE 615) (PRACTICE TIP: Say, “Your honor, I request that The Rule be invoked.”)
- Permit cross-examination into previously excluded area of inquiry where opposing counsel “opened the door.”

OBJECTIONS BASED ON ALABAMA RULES OF EVIDENCE

GENERAL PROVISIONS (ARE 101-106)

- Intrudes on a privileged communication. (ARE 104, 501)
- Improperly asks if another witness is lying. (ARE 104, 403, 611)
- The writing, recording, or photograph is incomplete. (ARE 106)

JUDICIAL NOTICE (ARE 201)

- Information necessary for judicial notice not provided by party requesting notice be taken. (ARE 201)
- The accuracy of the sources from which the court is requested to take judicial notice is subject to reasonable dispute. (ARE 201)

RELEVANCE (ARE 401-415)

- Evidence not relevant. (ARE 402)
- Admission of evidence would confuse issues or would cause undue delay. (ARE 403)
- Question is confusing, ambiguous, misleading, or unduly prejudicial. (ARE 403, 611)
- Witness harassment. (ARE 403, 611)
- Asked and answered (duplicative testimony). (ARE 403, 611)
- Proposed evidence is unfairly prejudicial. (ARE 403)
- Photographs are resized, reshaped or have misleading lighting. (ARE 403)
- Undue emphasis on text not emphasized in the original. (ARE 403)
- Assumes facts not in evidence. (ARE 403, 611)
- Attempts to show conformity by character. (ARE 404)
- Inquires into offers of compromise. (ARE 408)
- Refers to insurance. (ARE 411)

PRIVILEGES (ARE 501-502)

- Inquiry seeks privileged testimony. (ARE 104, 501, 502)
- Document is inadmissible as privileged. (ARE 502)

OBJECTIONS BASED ON ALABAMA RULES OF EVIDENCE

- Types of Privileges that may apply:
 - Attorney-Client
 - Attorney Work-Product
 - Domestic Violence Victim-Counselor
 - Sexual Assault Counselor-Victim
 - Patient-Medical Care Provider
 - Psychotherapist-Patient
 - Spousal Testimony
 - Clergy-Penitent
 - Counselor/Social Worker-Client
 - Reporter-Informant (may be limited)
 - Executive Privilege
 - Testimonial Privilege
 - Fifth Amendment Privilege Against Self-Incrimination
 - Trade Secret
 - Sign Language Interpreter-Client
 - Interpreter-Client

WITNESSES (ARE 601-615)

- Witness incompetent to testify. (ARE 601)
- Inquiry violates dead man's statute. (ARE 601)(Ala. Code 1975 § 12-21-163)
- Witness lacks personal knowledge. (ARE 602)
- Witness failed to take oath or affirmation. (ARE 603)
- Interpreter failed to take oath or affirmation. (ARE 604)
- Question is argumentative. (ARE 611(a))
- Assumes facts outside the record. (ARE 611)
- Question misquotes the record. (ARE 611)
- Inquiry calls for narrative answer. (ARE 611)
- Violates parole evidence rule. (ARE 104, 611)
- Seeks answer violating statute of frauds. (ARE 104, 611)
- Calls for speculation. (ARE 611)
- Seeks testimony contrary to binding admission. (ARE 611)
- Misstates the law. (ARE 611)
- States inadmissible conjecture as fact. (ARE 611)
- Question beyond scope of direct exam. (ARE 611)
- Question constitutes redirect beyond scope of cross-examination. (ARE 611)
- Rebuttal witness's testimony outside the scope of case presented by defendant. (ARE 611)
- Leading question on direct examination. (ARE 611)
- Opposing counsel did not provide document being used to refresh memory. (ARE 612)
- Improper use of a writing to refresh recollection. (ARE 612)
- Prior statement not inconsistent with in court testimony to allow hearsay exception. (ARE 811(d)(1))
- Court improperly interrogating witness. (ARE 614)
- Excluded witness is in the courtroom. (ARE 615)

OBJECTIONS BASED ON ALABAMA RULES OF EVIDENCE

OPINIONS AND EXPERT TESTIMONY (ARE 701-706)

- Expert not qualified. (ARE 701)
- Inadequate foundation laid for expert's exhibit to be considered. (ARE 702)
- Hypothetical assumes facts not in evidence or not reasonably relied on by expert. (ARE 703)
- Expert is disclosing inadmissible facts barred by ARE 703, 403.

HEARSAY (ARE 801-806)

- Question calls for hearsay not meeting exception. (ARE 801-804)
- Prior statement not inconsistent with in-court testimony and is hearsay. (ARE 801(d)(1))
- Admission neither party's statement nor adopted by party and is hearsay. (ARE 801(d)(2)(A)-(B))
- Statement not made by person authorized to speak on subject matter. (ARE 801(d)(2)(C))
- Purported business record lacks trustworthiness. (ARE 803(6))
- Witness has not proven unavailable to use prior deposition. (ARE 803, 804)
- No similar motive and opportunity to cross examine witness existed at the time of prior deposition. (ARE 803, 804)
- No showing witness believed death was imminent for dying declaration. (ARE 801, 804(2))
- Evidence is hearsay within hearsay not meeting exception. (ARE 805)

AUTHENTICATION AND IDENTIFICATION (ARE 901-903)

- Authenticity of writing or recording not proven. (ARE 901)
- No advance notice or use ARE 902(11) or (12) to prove authentication.
- Ancient document's condition creates suspicion of genuineness.

CONTENTS OF WRITINGS, RECORDINGS, & PHOTOGRAPHS (ARE 1001-1008)

- Best evidence rule violated. (ARE 1002)
- Records offered are not originals. (ARE 1002)
- Duplicate offered is questionable. (ARE 1003)
- Party offering copy lost the original. (ARE 1004)
- Summary chart documents not previously provided, charts not based on admissible evidence, or arranged with prejudicial headings. (ARE 1006)

APPEALS FROM DISTRICT COURT TO CIRCUIT COURT

GENERAL PROVISIONS

- Any party may appeal from a final judgment of the district court in a civil case by filing notice of appeal in the district court, within 14 days from the date of the judgment. (Ala. Code 12-12-70(a))
- Exception: Unlawful Detainer appeals must be made within 7 days from the entry of an eviction judgment. (Ala. Code § 35-9A-461(d))
- Except as provided in Section 12-12-72 and in subsection (e) of Ala. Code 12-15-120, all appeals from final judgments of the district court shall be to the circuit court for trial de novo. (Ala. Code § 12-12-71)
- An appellant shall not be entitled to a jury trial in circuit court unless it is demanded in the notice of appeal, and an appellee shall have no right to a jury trial unless written demand is filed in circuit court within 14 days of service upon him of notice of appeal. (Ala. Code § 12-12-71)

SUPERSEDEAS BOND

- A supersedeas bond in twice the amount of the judgment shall be required of the appellant in any civil appeal to the circuit court. (Ala. Code § 12-12-73)
- Upon the filing of such supersedeas bond and the timely filing of a notice of appeal, execution of the judgment shall be stayed pending final judgment on appeal. (Ala. Code § 12-12-73)
- If you are unable to pay the required bond or filing fee, you may complete an Affidavit of Substantial Hardship (Form C-10-Civil found at <https://eforms.alacourt.gov/civil-forms/civil-forms/>). File the Affidavit along with a Motion to Waive the Supersedeas Bond.

TRIAL DE NOVO STANDARD

- Trial de novo is a new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance.
- (PRACTICE TIP: Note that in some situations both law and fact findings from an administrative proceeding can be reviewed de novo. Volunteers often see this with Unemployment Compensation Appeals.)

➤ DISTRICT COURT TRIAL AND EVIDENCE PRACTICE POINTERS

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