Alabama Rules of Evidence

Article X. Contents of Writings

Rule 1004.

Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing is admissible, should there be no duplicate readily available to the proponent or witness, if:

(1) ORIGINALS LOST OR DESTROYED. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) ORIGINAL NOT OBTAINABLE. No original can be obtained by any available judicial process or procedure; or

(3) ORIGINAL IN POSSESSION OF OPPONENT. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) COLLATERAL MATTERS. The writing is not closely related to a controlling issue.

Advisory Committee's Notes

Ala.R.Evid. 1002 establishes the requirement that generally one must produce the original when proving the contents of a writing. Rule 1004, as does its counterpart under the Federal Rules of Evidence, sets forth those grounds that, if shown by the offering party, justify the admission of secondary evidence of the contents of the writing. These grounds, which allow the offeror to circumvent the best evidence preference for the original, have long been recognized in Alabama. See generally C. Gamble, McElroy's Alabama Evidence § 212.01 (4th ed. 1991). If the failure to produce the original is satisfactorily explained under one of the paragraphs of this rule, the door is then open to admit secondary proof of the original's contents. Such secondary evidence historically has presented itself in such forms as oral testimony and copies.

While a showing of an original's unavailability opens the door to secondary evidence as to its contents, there is a hierarchy governing the order of offering such secondary evidence. Rule 1004 continues Alabama's historic principle that there are degrees of secondary evidence; specifically, one may not offer oral testimony as to the contents of a writing without first having to produce or account for the nonproduction of a copy that exists. See *Williams v. Lyon*, 181 Ala. 531, 61 So. 299 (1913) (recognizing that one must offer secondary evidence of the "highest grade"). See also C. Gamble, McElroy's Alabama Evidence § 229.02 (4th ed.

1991) (dealing with Alabama's historic position that there are degrees of secondary evidence and that the proponent has the obligation to present the highest form of that evidence). This is a rejection of the corresponding federal rule under which there are no degrees of secondary evidence. See Fed.R.Evid. 1004 advisory committee's note.

Paragraph (1). Originals lost or destroyed. If the originals are shown to be lost or destroyed, the way is then clear for the offeror to present secondary evidence to prove the contents of the originals. The plural term "originals" is used to carry through the idea that if there were duplicate originals, see Rule 1001(2) and advisory committee's notes, then it would be necessary to show that all originals were lost or destroyed as a condition precedent to the admissibility of secondary evidence. The original may have been lost or destroyed by the party who now offers the secondary evidence, so long as the loss or destruction was not accomplished in bad faith.

This principle continues former Alabama practice. Loss of the original historically has excused nonproduction of the original. See *Bradley v. Nall*, 505 So.2d 1062 (Ala.1987). See also C. Gamble, McElroy's Alabama Evidence § 214.01 (4th ed. 1991). Paragraph (1) is not intended to alter preexisting Alabama law requiring that a search have been conducted before loss of the original can justify admission of secondary evidence as to the original's contents.

Traditional Alabama practice likewise recognizes destruction of the original as an excuse for its nonproduction and thus as permitting the receipt of secondary evidence. See *Howton v. State*, 391 So.2d 147 (Ala.Crim.App.1980). See also C. Gamble, McElroy's Alabama Evidence § 215.01 (4th ed. 1991). Such destruction may have been at the hands of the party seeking to avoid the best evidence preference for the original, so long as the destruction was not accomplished for the purpose of preventing the original's use as evidence. See *J.R. Watkins Co. v. Goggans*, 242 Ala. 222, 5 So.2d 472 (1941); *May Hosiery Mills v. Munford Cotton Mills*, 207 Ala. 27, 87 So. 674 (1920).

Paragraph (2). Original not obtainable. If the original is in the hands of a third person (not the opponent), and it cannot be obtained by any judicial process or procedure, then other evidence is admissible to prove its contents. See Fed.R.Evid. 1004(2) advisory committee's note. Compare Ala.R.Evid. 804(a)(5) (defining "unavailability" as including an inability to procure a hearsay declarant's attendance or testimony by "process or other reasonable means").

Under prior Alabama law, detention of the original by a third person has constituted unavailability, for the purpose of determining whether one could offer secondary evidence. See *Brooks v. State*, 462 So.2d 758 (Ala.Crim.App.1984). See also C. Gamble, McElroy's Alabama Evidence § 217.01 (4th ed. 1991). Preexisting Alabama law does not require an offeror relying upon this ground of unavailability to show an effort to have the third person produce the original, if the third person is located outside Alabama. See *Richardson v. State*, 437 So.2d 645 (Ala.Crim.App.1983); *Waters v. Mines*, 260 Ala. 652, 72 So.2d 69 (1954). If the third person in possession of the original is in Alabama, then secondary evidence of the original's contents will not be admitted "unless a subpoena duces tecum has been issued to such third person and has failed of success." C. Gamble, McElroy's Alabama Evidence § 217.01(2) (4th ed. 1991). See *Bogan v. McCutchen*, 48 Ala. 493 (1872); *Smith v. Armistead*, 7 Ala. 698 (1845).

Paragraph (3). Original in possession of opponent. If a party opponent is in control of the original, at a time when that party is placed on notice that proof of its contents will be offered at the hearing, that party's failure to produce the original at the hearing sufficiently establishes the unavailability of the original to justify admission of secondary evidence as to its contents. The prerequisite notice may be accomplished by pleadings or otherwise. Such notice is required, rather than to compel production as by use of a subpoena duces tecum, merely to afford the party opponent an opportunity to "ward off secondary evidence by offering the original." Fed.R.Evid. 1004(3) advisory committee's note.

As applied in civil cases, the notice requirement of Rule 1004(3) is substantially the same as that imposed under preexisting Alabama law. See *Jones v. State*, 473 So.2d 1197 (Ala.Crim.App.1985); C. Gamble, McElroy's Alabama Evidence § 216.01 (4th ed. 1991). Like preexisting Alabama evidence law, Rule 1004(3) does not require that the prerequisite notice be made in writing; however, notice ordinarily ought to be made in written form. See *Allen v. Southern Coal & Coke Co*., 205 Ala. 363, 87 So. 562 (1921). Rule 1004(3) changes the Alabama authority suggesting that such notice generally may not be given at the hearing itself unless the original is in court. See *Stremming Veneer Co. v. Jacksonville Blow Pipe Co*., 263 Ala. 491, 83 So.2d 224 (1955). Even under prior Alabama law, of course, one could give notice at trial if there was no opportunity to do so before the trial. See *Northern Alabama Ry. v. Key*, 150 Ala. 641, 43 So. 794 (1907). See also C. Gamble, McElroy's Alabama Evidence § 216.04(2) (4th ed. 1991) (absence of opportunity to give notice before trial).

The pivotal issues, under Rule 1004(3), are whether reasonable notice has been given and whether the opponent is in control of the original when the notice is given. The principles governing these issues are left to be evolved under prior and future Alabama case law.

Paragraph (3) applies to both civil and criminal cases. However, it makes no provision for the continuation of pre-rules Alabama authority for the proposition that the criminal prosecution may offer secondary evidence of an original that is in the possession of the accused or in the possession of an accomplice of the accused without having furnished notice to produce. This preexisting Alabama position has been based upon the recognition that both the accused and the accomplice have a constitutional right not to produce any evidence that would be self-incriminating. See *Howton v. State*, 391 So.2d 147 (Ala.Crim.App.1985); *Dean v. State*, 240 Ala. 8, 197 So. 53 (1940).

Paragraph (4). Collateral matters. The preference for originals is inapplicable if the writing is collateral to the primary or controlling issues in the case. Some originals simply are not important enough, as judged by the primary issues in the case, to require production or proof of unavailability before a party can present secondary evidence as to their contents. This paragraph conforms to preexisting Alabama law. See *Schreiber v. Equico Lessors*, 428 So.2d 69 (Ala.Civ.App.1983); *Associates Capital Corp. v. Bank of Huntsville*, 49 Ala.App. 523, 274 So.2d 80 (1973). See also C. Gamble, McElroy's Alabama Evidence § 226.01(2) (4th ed. 1991).