

Alabama Rules of Evidence

Article X. Contents of Writings

Rule 1008.

Functions of court and jury.

When the admissibility of other evidence of contents of writings under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Advisory Committee's Notes

Throughout the best evidence provisions, preliminary conditions of fact are specified as precedent to the admission of any secondary evidence showing the contents of an original writing. Rule 1004(1), for example, allows secondary evidence as to the contents of an original that is shown to be lost. The sufficiency of a factual showing that the original has been lost is a preliminary question for the court. The court's determination, as to that sufficiency, is made in conformance with the provisions found in Ala.R.Evid. 104.

Even after a party has made a factual showing that an item has been lost, or has made a factual showing regarding some other justification for admitting secondary evidence, and the court, acting in accordance with Rule 104, has held that factual showing to be sufficient, so that the secondary evidence of the original's content is admissible, other factual issues may yet be raised which are to be determined by the trier of fact. Whether the asserted writing ever existed, for example, is such an issue. Additionally, the trier of fact is to make the ultimate finding of fact as to whether another offered writing is the original or whether other evidence of contents correctly reflects the true contents. These determinations by the trier of fact are to be made in the same manner as other determinations of fact are made.

Rule 1008 is consistent with preexisting Alabama evidence law. The sufficiency of proof as to the original's being lost, for example, historically has been committed to the discretion of the trial judge. *Bradley v. Nall*, 505 So.2d 1062 (Ala.1987); *Powell v. Hopkins*, 288 Ala. 466, 262 So.2d 289 (1972). See C. Gamble, *McElroy's Alabama Evidence* § 214.01 (4th ed. 1991). Rule 1008 is likewise consistent with Alabama's preexisting principle that preliminary issues of fact are generally for the trial judge while questions regarding the ultimate weight are for the trier of fact. *Bennett v. State*, 46 Ala.App. 535, 245 So.2d 570 (1971); *Burton v. State*, 107 Ala. 108, 18 So. 284 (1895), overruled by *Martin v. Martin*, 123 Ala.191, 26 So. 525 (1899). See C. Gamble, *McElroy's Alabama Evidence* § 464.01 (4th ed. 1991).