**Alabama Rules of Evidence**

Article VIII. Hearsay

**Rule 801.**

**Definitions.**

The following definitions apply under this article:

(a) *Statement.* A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A “declarant” is a person who makes a statement.

(c) *Hearsay.* “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements that are not hearsay.* A statement is not hearsay if --

(1) PRIOR STATEMENT BY WITNESS. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person.

(2) ADMISSION BY PARTY OPPONENT. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subsection (C), the agency or employment relationship and scope thereof under subsection (D), or the

existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subsection (E).

[Amended 8-15-2013, eff. 10-1-2013.]

**Advisory Committee's Notes**

**Section (a). Statement.** The hearsay evidence objection applies only to offered evidence that constitutes a statement. Such a statement is normally in the form of a verbal assertion and may be oral or written. This definition is consistent with pre-existing Alabama practice. See, e.g., *McDuffie v. First Nat'l Bank of Tuskaloosa*, 450 So.2d 451 (Ala.1984) (handwritten memos attacked as hearsay); *Atmore Farm & Power Equip. Co. v. Glover*, 440 So.2d 1042 (Ala.1983) (photocopy of a shipping document subject to hearsay objection). It is the assertive nature of the statement that gives rise to the hearsay concern posed by admission of a statement by an out-of-court declarant.

No definitional problem arises with regard to whether assertions in words fall within the ban on hearsay. The difficulty lies in the treatment of conduct. Some conduct – such as pointing in response to a question – is so synonymous with a statement that it clearly constitutes an assertion for purposes of the hearsay rule of exclusion. Other acts, despite their assertive impact in the litigation, are not so easily identified as statements. Rule 801(a) excludes from the operation of the hearsay rule all evidence of conduct that is not intended as an assertion. Such an express "intent to assert" requirement, as a prerequisite for applying the hearsay rule to acts, would appear to go beyond that which is required by preexisting Alabama law. See C. Gamble, McElroy's Alabama Evidence § 241.01(2) (4th ed. 1991). Under Rule 801, whenever evidence of an act is offered, it will be for the trial court to determine whether it was intended by the actor as an assertion. The burden of proving such an intention is on the party claiming the intention. See Fed.R.Evid. 801(a) advisory committee's note.

**Section (c). Hearsay.** This section embraces the historic, definitional nucleus of hearsay – the principle that the statement is hearsay only if it is offered to prove the truth of the matter asserted therein. See *Meriweather v. Crown Inv. Corp*., 289 Ala. 504, 268 So.2d 780 (1972); 1 Alabama Pattern Jury Instructions: Civil § 15.10 (2d ed. 1993). See also C. Gamble & R. Sandidge, *Around and Through the Thicket of Hearsay: Dispelling Myths, Exposing Imposters and Moving Toward the Federal Rules of Evidence*, 42 Ala.L.Rev. 5, 13 (1990). This rationale has given rise to a host of "other purposes" for which such a statement may be admitted as exempt from the hearsay exclusion. See, e.g., *Ex parte Brown*, 499 So.2d 787 (Ala.1986); *Piper Aircraft Corp. v. Evans*, 424 So.2d 586 (Ala.1982); *Tierce v. State*, 396 So.2d 1090 (Ala.Crim.App.1981). See also C. Gamble, McElroy's Alabama Evidence §§ 207.01, 263.01, 273.02, 274.01, 274.02, and 159.02(2) (4th ed. 1991).

**Section (d). Statements that are not hearsay.** The first subsection lists several types of statements that traditionally would have fallen within the definition of hearsay. These statements, however, are declared arbitrarily not to be hearsay. The second subsection results in the transfer of admissions from their historic designation as constituting an exception to the hearsay rule to reclassification as nonhearsay.

**Subsection (d)(1). Prior statement by witness.** This provision recognizes the admissibility, over a hearsay objection, of two types of statements made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement. The indicia of reliability possessed by such statements – the presence of the witness, the ability to cross-examine the witness, and the nature of the statement – are deemed strong enough to overcome the traditional hearsay dangers.

**Subdivision (d)(1)(A). Inconsistent statement.** If a witness testifies, and is subject to cross-examination, then that witness's prior inconsistent statement is exempted from the hearsay definition, but only if it was made under oath, subject to the penalty of perjury, and made at a trial, hearing, or other proceeding, or in a deposition. This rule is consistent with preexisting Alabama practice. See *Hooper v. State*, 585 So.2d 137 (Ala.1990); *Randolph v. State*, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (1977). See also C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1987*, 40 Ala.L.Rev. 95, 116 (1988). Compare Ala.R.Civ.P. 32(a)(1) (containing a broad rule with regard to the admissibility of prior inconsistent statements found in a party witness's deposition). Inconsistent statements generally, offered to impeach a witness, will continue to be admissible upon the theory that such statements are not offered to prove the truth of the matter asserted but, rather, to show that the witness says one thing in court today but said something different in the past. Ala.R.Evid. 801(c); *Redus v. State*, 243 Ala. 320, 9 So.2d 914 (1942), cert. denied, 318 U.S. 774 (1943). See C. Gamble, McElroy's Alabama Evidence § 159.02(1) (4th ed. 1991); C. Gamble, C. Howard, & J. McElroy, *The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement*, 34 Ala.L.Rev. 1 (1983). Common law would not admit such statements as substantive evidence of the truth of the assertion unless the inconsistent statement was made by a party opponent. See *Bailey v. State*, 41 Ala.App. 39, 123 So.2d 304 (1960). In contrast, Rule 801(d)(1)(A) will work to admit all inconsistent statements, meeting its requirements, as substantive evidence of the truth of the matter asserted in them.

**Subdivision 801(d)(1)(B). Consistent statement.** An impeached witness generally may not be rehabilitated by proof of prior consistent statements. Such rehabilitation evidence may be offered, however, if the cross-examiner suggests that the witness has recently fabricated the story, has been subjected to improper influence, or has an improper motive. See *McDonald v. State*, 448 So.2d 460 (Ala.Crim.App.1984). See also C. Gamble, McElroy's Alabama Evidence § 177.01 (4th ed. 1991). Even if such consistent statements are admitted, however, traditional case law admits them only for the nonsubstantive purpose of bolstering the credibility of the witness. E. Cleary, McCormick on Evidence § 251 (3d ed. 1984). The present rule, however, admits such statements as substantive evidence of the truth of the matters contained therein. The committee considers this departure from the classic hearsay principle appropriate, because the witness is on the stand and is subject to cross-examination concerning the statements.

**Subdivision 801(d)(1)(C). Identification statement.** This subdivision, found in the corresponding federal rule, has been omitted. This omission constitutes a rejection of the federal principle that a prior identification statement, of a witness who is now testifying and subject to cross-examination, is definitionally nonhearsay and therefore admissible substantively to prove the truth of the matter asserted. See Fed.R.Evid. 801(d)(1)(C). Compare Me.R.Evid. 801(d)(1). Alabama law will continue its refusal to recognize any such arbitrary

exemption from the definition of hearsay. See *Thomas v. State*, 461 So.2d 15 (Ala.Crim.App.), aff'd, 461 So.2d 16 (Ala.1984). See also C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution*, *1977-1987*, 40 Ala.L.Rev. 95, 113 (1988).

An identification statement may be admissible, over a hearsay objection, but this must be accomplished under some other theory. Alabama has long admitted identifications, for example, when offered to prove the act of identification rather than the truth of the matter asserted. See, e.g., *Baker v. State*, 555 So.2d 273 (Ala.Crim.App.1989); *Bui v. State*, 551 So.2d 1094 (Ala.Crim.App.1988), aff'd, 551 So.2d 1125 (Ala.1989), vacated, 499 U.S. 971 (1991). See also C. Gamble, McElroy's Alabama Evidence § 273.01 (4th ed. 1991). An identification statement could be admissible to show lack of credibility if an in-court identification is inconsistent with an out-of-court one. Ala.R.Evid. 801(c). See *Whitmore v. Burge*, 512 So.2d 1320 (Ala.1987). See also C. Gamble, McElroy's Alabama Evidence § 242.01 (4th ed. 1991). If the prior identification was made under oath at a trial-like proceeding or in a deposition, and the identifying witness presently testifies and is subject to cross-examination, then nothing precludes the identification from being offered, under Rule 801(d)(1)(A), to prove the substantive truth of the matter asserted, if it is inconsistent with the witness's present testimony. See *Randolph v. State*, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (Ala.1977).

**Subsection 801(d)(2). Admission by party opponent.** Admissions of a party, as a matter of traditional evidence law, have been classified as an exception to the hearsay rule. This exception is based upon the indicia of reliability and trustworthiness – i.e., one would normally not make a statement against interest unless it was true. In contrast, however, Rule 801(d)(2) declares such admissions to be definitionally nonhearsay. This realignment results in a more generous treatment for such statements as regards their admissibility. Henceforth, any statement of a party, offered against that party, constitutes an admission, without regard to whether it was against that party's interest at the time the statement was made. Greater admissibility is based upon the concept that the adversary system, rather than any "against interest" circumstance, satisfies the concerns underlying the hearsay rule. Much of the more modern Alabama precedent contains similar language, which places less emphasis upon the "against interest" aspect of the admission and greater emphasis upon whether it is offered against a party and is a statement that is inconsistent with that party's position at trial. See *Woods v. Perryman*, 514 So.2d 995 (Ala.1987); *Mobile County v. Brantley*, 507 So.2d 483 (Ala.1987). Rule 801(d)(2) is consistent with preexisting Alabama law, which exempts admissions from the opinion and firsthand knowledge requirements. See *Malone v. Hanna*, 275 Ala. 534, 156 So.2d 626 (1963) (opinion); *Bains Motor Co. v. Le Croy*, 209 Ala. 345, 96 So. 483 (1923) (firsthand knowledge). See also C. Gamble, McElroy's Alabama Evidence § 180.01(2), (5) (4th ed. 1991).

**Subdivision 801(d)(2)(A). The party's own statement.** The classic category of admissions is that including a party's own statement. Such a statement is not subject to a hearsay objection, even if the party makes the statement in a representative capacity. As long as the statement is relevant to the party's dealings or activities as a representative, and is offered against the party in that representative capacity, no further inquiry is necessary regarding whether the party was acting in the representative capacity in making the statement.

**Subdivision 801(d)(2)(B). Adopted admissions.** The principle stated in this subdivision, unchanged from the common law, works to admit any statement of which a party

has manifested an adoption. If the adoption is express, then it is admissible just as any other admission is. Ala.R.Evid. 801(d)(2)(A). Adoption, however, may be manifested in any appropriate manner, including conduct. Whether any given conduct rises to the level of constituting adoption depends upon the prevailing circumstances. A historic form of adoptive conduct has been silence. Silence, in response to an accusation, has been held to constitute a tacit admission as to the truth of the accusation. See C. Gamble, McElroy's Alabama Evidence § 193.02 (4th ed. 1991) (silence as an adopted admission in civil cases); J. Colquitt, Alabama Law of Evidence § 8.3(g) (1990). Rule 801(d)(2)(B) should have no impact upon Alabama's abrogation of the tacit admission rule in criminal cases. See *Ex parte Marek*, 556 So.2d 375 (Ala.1989). See also C. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment*, 14 Ga.L.Rev. 27 (1979).

**Subdivisions 801(d)(2)(C) and (D). Vicarious admissions.** These two subdivisions deal with the issue of when an agent's statement constitutes an admission against the principal. If the agent is expressly authorized to make a statement, then, according to subdivision (C), the expression clearly constitutes an admission of the party granting the authority to speak. See E. Cleary, McCormick on Evidence § 267 (3d ed. 1984). The more difficult issue, and that addressed by subdivision (D), concerns whether an agent's statement constitutes an admission of the principal when the agent has no express authority to speak. Preexisting Alabama law has dealt with this issue through application of the corresponding principle governing whether the principal is legally responsible for the acts of the agent – i.e., whether the act was committed (or the statement was made) within the line and scope of the agent's authority. Because many agents do not have the authority to speak, such statements often are not admissible. See C. Gamble, McElroy's Alabama Evidence § 195.01 (4th ed. 1991). Rule 801(d)(2)(D) embraces a more liberal test for the admissibility of such vicarious admissions. If the statement is related to a matter that is within the scope of the agency or employment of the declarant, then it is admissible against the principal. See *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 8-3(d) (1987).

**Subdivision 801(d)(2)(E). Coconspirator admissions.** This subdivision continues the historic coconspirator rule, admitting against one conspirator the statements of another if made "during the course and in furtherance of the conspiracy." See *Lundy v. State*, 539 So.2d 324 (Ala.Crim.App.1988); *Stokley v. State*, 254 Ala. 534, 49 So.2d 284 (1950); C. Gamble, McElroy's Alabama Evidence § 195.03 (4th ed. 1991). As recognized by both state and federal authority, admissibility is denied to statements made after the objectives of the conspiracy have either failed or been achieved. See *Wong Sun v. United States*, 371 U.S. 471, 490 (1963); *Eaton v. State*, 280 Ala. 659, 197 So.2d 761 (1967).

**Advisory Committee's Notes to Amendment to Rule 801(d) Effective October 1, 2013**

Rule 801(d)(1) has been amended to add subsection (C). This reverses Alabama's original rejection of the principle that a prior identification statement of a witness who is now testifying and subject to cross-examination is definitionally nonhearsay. Under this revised rule, the prior identification is admissible only when the person who made it testifies at trial and is subject to cross-examination. This ensures that if any discrepancy occurs between the witness's in-court and out-of-court testimony, the opportunity is available to probe, with the

witness under oath, the reasons for the discrepancy so that the trier of fact might determine which statement is to be believed. In criminal cases, the prior identification must meet constitutional and due-process requirements against unnecessarily suggestive identifications.

Rule 801(d)(2) has been amended to respond to issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987), and the resulting 1997 amendment to Federal Rule of Evidence 801(d)(2). This amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary matters to be established by a preponderance of the evidence.

This amendment extends the reasoning of *Bourjaily* to statements offered under subsections (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subsection (C) and the existence of agency or employment relationship and the scope thereof under subsection (D).

This amendment is in accordance with existing Alabama practice. The principal justification in *Bourjaily* for allowing "bootstrapping" was Federal Rule of Evidence 104(a), which allows the trial judge to consider the bootstrapping statement permitted under Rule 801(d)(2) in determining the existence of a conspiracy. Alabama's Rule of Evidence 104(a) is identical to Federal Rule of Evidence 104(a) and would also allow the trial judge to consider the alleged conspirator's statement in proving the existence of a conspiracy. Additionally, regarding questions of agency, Alabama courts have traditionally allowed the trial judge to consider the statement itself along with other direct and circumstantial evidence. In *New Plan Realty Trust v. Morgan*, 792 So. 2d 351, 361 (Ala. 2000), the Alabama Supreme Court reviewed the issue of proving agency and, citing several cases that predate the adoption of the Alabama Rules of Evidence, held:

> """[A]cts and declarations of one whose agency is the subject of inquiry, though incompetent when there is no other evidence of agency or of ratification, become competent for consideration in determining both the fact of agency and the scope of authority originally given, when shown in connection with other evidence of agency.'"
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> *"Warren Webster & Co. v. Zac Smith Stationery Co.*, 222 Ala. 41, 44, 130 So. 545, 547 (1930) (quoting *Birmingham Mineral R.R. v. Tennessee Coal, Iron & R.R. Co.*, 127 Ala. 137, 145, 28 So. 679, 681 (1900) ...)."

**Note from reporter of decisions:** The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.