Alabama Rules of Evidence

Article VIII. Hearsay

Rule 806.

Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant must have been confronted with the circumstances of the statement or afforded an opportunity to admit or deny the statement. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Advisory Committee's Notes

Some hearsay statements are admitted even if the declarant is unavailable. See Ala.R.Evid. 803. Indeed, some hearsay exceptions require such unavailability. See Ala.R.Evid. 804(b). Even the definition of hearsay, expanded under these Rules of Evidence, categorizes some out-of-court statements as nonhearsay despite the fact that the person who made the statement may not testify. See, e.g., Ala.R.Evid. 801(d)(2)(C), (D), and (E). When such statements of unavailable or nontestifying declarants are admitted, the declarant is just as much a witness against the objecting party as if the declarant were orally testifying. Rule 806 recognizes that unavailable or nontestifying declarants are subject to all the methods of impeachment to which a witness testifying in the courtroom would be subject. See, e.g., Ala.R.Evid. 608(a) (reputation and opinion), Ala.R.Evid. 609 (conviction), Ala.R.Evid. 613 (inconsistent statement), Ala.R.Evid. 616 (bias). The credibility of such hearsay declarants likewise may be supported through the same forms of rehabilitation evidence that could have been used if the declarant had testified as a witness. See Ala.R.Evid. 608(a).

Some forms of impeachment carry threshold requirements that are impossible to satisfy when the declarant is unavailable or never testifies. Impeachment by extrinsic evidence of an inconsistent statement in writing, for example, carries the requirement that the declarant be confronted with the circumstances of the statement and be afforded an opportunity to admit or deny the statement. See Ala.R.Evid. 613(b). Such an opportunity could hardly be extended, for example, to a now unavailable declarant who had made a statement under belief of impending death. Ala.R.Evid. 804(b)(2). Rule 806 stands for the proposition that effective testing of credibility in these instances can be accomplished only if the impeaching party is exempted from the necessity of satisfying such threshold requirements.

Out-of-court statements are admissible under some hearsay exceptions even if the declarant is available but not called by the party who offers the statement. See Ala.R.Evid. 803. After the admission of such a statement, the opposing party may call the declarant as a

witness. In such instances, the calling party's questioning of the witness may be conducted as if on cross-examination.

Alabama case law has long embraced the Rule 806 concept that one may impeach an unavailable hearsay declarant as if that declarant had appeared as a witness in the present trial. *Massey v. Reynolds*, 213 Ala. 178, 104 So. 494 (1925). See C. Gamble, McElroy's Alabama Evidence §§ 165.01(4) (stating the general principle), 248.01(12) (dealing with impeachment of a dying declarant) (4th ed. 1991).