IN THE SUPREME COURT OF ALABAMA
January 30, 2020

ORDER

IT IS ORDERED that the Advisory Committee's Notes to Rule 503A, subsection (3) of the paragraph entitled "Section (d). Exceptions," the Advisory Committee's Notes to Rule 803, paragraph (7) and paragraph (8), and Rule 803(16), Alabama Rules of Evidence, be amended to read in accordance with Appendices A, C, and E, respectively, to this order;

IT IS FURTHER ORDERED that the Advisory Committee's Notes to Amendment to Advisory Committee's Notes to Rule 503A(d)(3); the Advisory Committee's Notes to Amendment to Advisory Committee's Notes to Rule 803; the Advisory Committee's Notes to Amendment to Rule 803(16); Rule 902(13) and Rule 902(14), Alabama Rules of Evidence; and the Advisory Committee's Notes to Adoption of Rule 902(13) and Rule 902(14), be adopted to read in accordance with Appendices B, D, F, G, H, and I, respectively, to this order;

IT IS FURTHER ORDERED that the amendment of the Advisory Committee's Notes to Rule 503A(d)(3), the amendment of the Advisory Committee's Notes to Rule 803, the amendment of Rule 803(16), and the adoption of the Advisory Committee's Notes to those amendments, and the adoption of Rule 902(13) and Rule 902(14) and the Advisory Committee's Notes to those rules are effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to the follow Rule 503A, Rule 803, and Rule 902:

> "Note from the reporter of decisions: The order amending the Advisory Committee's Notes to Rule 503A and Rule 803 and amending Rule 803(16), and adopting Advisory Committee's Notes to those amendments, and adopting Rule 902(13) and Rule 902(14) and Advisory Committee's Notes to those rules, effective January 30, 2020, are published in that volume of Alabama Reporter that contains Alabama cases from __ So. 3d."

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Witness my hand this 30th day of January, 2020.

Clerk, Supreme Court of Alabama

FILED
January 30, 2020
12:50 pm
Clerk
Supreme Court of Alabama

APPENDIX A

Advisory Committee's Notes to Rule 503A(d)(3)

Subsection (3). When the Client's Condition Is an Element of a Claim or a Defense. In any proceeding in which the client relies upon his or her mental or emotional condition, as an element of either a claim or a defense, the privilege does not protect communications that are relevant to that condition. See Harbin v. Harbin, 495 So. 2d 72 (Ala.Civ.App. 1986) (holding that the psychologist-patient privilege is not applicable to protect communications that are relevant to show a party's mental state in a custody case).

APPENDIX B

Advisory Committee’s Notes to Amendment to Advisory Committee's Notes to Rule 503A(d)(3)
Effective January 30, 2020

The second and third sentences of the original Advisory Committee’s Notes to Rule 503A(d)(3), upon the adoption of Rule 503A in 1996, read: "This exception is identical to an exception to the psychotherapist-patient privilege. See Ala. R. Evid. § 503(d)(3)." Those two sentences have been deleted from the Advisory Committee’s Notes because those sentences should not have been published with the final version of Rule 503A that became effective on January 1, 1996. That reference was to an earlier draft of Rule 503; the final version of Rule 503 (effective on January 1, 1996) does not contain the provision that was numbered as 503(d)(3) in earlier drafts of Rule 503. Those sentences have been deleted from the Notes in order to prevent confusion.

APPENDIX C

Advisory Committee's Notes to Rule 803,
paragraph (7) and paragraph (8)

Paragraph (7). Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). This paragraph is identical to the corresponding federal provision, except for the addition of a comma after the word "memoranda." Rule 803(6) governs the admissibility of business records, with the term "business" broadly defined. A search for a business record, however, may be undertaken without success. In that event, Rule 803(7) provides that evidence that a particular matter is not included in business records where it logically would have been expected is admissible to prove the nonoccurrence or nonexistence of the matter, if the matter searched for was of a kind regularly made and preserved in the business records made admissible by Rule 803(6). The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. In re Japanese Electronic Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), reversed, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Some common-law authority stands for the proposition that evidence of an absence of a regular entry is nonhearsay. Yet other decisions, however, have treated such evidence as hearsay and as not within any exception to the hearsay rule. Rule 803(7) lays this issue to rest, in favor of admissibility. See E. Cleary, McCormick on Evidence § 250 (3d ed. 1984).

Alabama authority, predating Rule 803(7), recognized an "absence of entry" exception. See, e.g., Jenkins v. Avery, 257 Ala. 387, 59 So. 2d 671 (1952) (school records); Reichert v. Jerome H. Sheip, Inc., 212 Ala. 300, 102 So. 440 (1924) (church records). See also C. Gamble, McElroy's Alabama Evidence § 220.02 (4th ed. 1991).

The committee intends that this rule have no impact upon that line of Alabama decisions regarding the admission of a futile search as evidence of the unavailability or nonexistence of a certain person. See Seibold v. Rogers, 40 Ala. 438, 18 So. 312 (1895). See also C. Gamble, McElroy's Alabama Evidence §§ 257.02, 257.07(9), 233.01(15) (4th ed. 1991).

Paragraph (8). Public Records and Reports. Like business records, public records have attained common-law recognition as an exception to the hearsay rule. This treatment is based upon both reliability and necessity. Reliability is based upon the assumption that a public official will carry out the duty to record properly. See E. Cleary, McCormick on Evidence § 315, at 888 (3d ed. 1984). Necessity is furnished by the inconvenience of requiring public officials to appear in court to testify.

Subdivision (A). This subdivision recognizes the admissibility of records, reports, statements, or data compilations setting forth the "activities of the office or agency." Such admissibility has long been recognized at common law. See Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123 (1919); Ballew v. United States, 160 U.S. 187 (1895).

Subdivision (B). Matters observed by a public official, set forth in a public record or report, are admissible if the official was under a duty to report such matters. Rule 803(8)(B) contains an additional requirement that the official must have observed the recorded matters pursuant to a duty imposed by law. Recognizing a potential conflict with a criminal defendant's right to confront witnesses, this subdivision provides that matters observed by police officers and other law-enforcement personnel are not admissible under this rule when offered in criminal cases against the accused. Numerous decisions at common law have sustained the admission of records of matters observed. See, e.g., T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957); Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945).

Subdivision (C). At common law a split of authority existed regarding the admissibility of the "evaluative report." Rule 803(8)(C), as does its counterpart under the Federal Rules of Evidence, adopts that line of cases calling for admissibility. See Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950) (Bureau of Mines report regarding cause of gas-tank explosion); United States v. Dumas, 149 U.S. 278 (1893). Such admissibility, because of the possible conflict with the constitutional right to confront witnesses, does not apply as to the defendant in a criminal case. Factual findings are admissible only if made pursuant to authority granted by law. The party objecting to the

admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. In re Japanese Electronic Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), reversed, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Consistent with the general rule of interpretation that a state's adoption of a rule based upon a federal model renders as persuasive authority the federal decisions applying the rule, Rule 803(8)(C) is intended to incorporate the interpretation set out in Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). Regarding a split in authority over the question of whether "factual findings" includes "opinions" or "conclusions," the Supreme Court in that case adopted a broad, liberal view of Federal Rule 803(8)(C), in light of the "liberal thrust" of the Rules--as illustrated, e.g., in Rules 701-705, dealing with admission of expert testimony. The Supreme Court held that "portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." 488 U.S. at 170.

Rule 803(8)(C) is likewise intended to carry the Eleventh Circuit's interpretation of Beech Aircraft Corp. v. Rainey. Footnote 13 of the Rainey opinion observes that the case presented no question of whether the Rule distinguishes between opinions regarding "fact" and opinions regarding "law"--i.e., whether "legal conclusions" contained in official reports are admissible. In Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989), the court decided that "legal conclusions" are not made admissible through Federal Rule 803(8)(C). The Hines opinion offers some guidance for distinguishing "factual" conclusions from "legal" conclusions: "Another way of looking at this inquiry is: Would the conclusion, if made by the district court, be subject to the clearly erroneous standard of review on appeal? If so, then the conclusion is factual; if not, then the conclusion is legal." 886 F.2d at 303.

By way of illustration, nothing in Rule 803(8)(C) is intended to guarantee the carte blanche or presumptive admissibility of police accident reports as public records. Such records may be excluded because the attendant

circumstances indicate a lack of trustworthiness. If a police officer has little training or experience, for example, then the officer's expertise may not be sufficient to authorize admission of an expert opinion or conclusion. See Ala. R. Evid. 702. No matter what the level of expertise possessed by the investigating officer, a naked legal conclusion found in a police accident report could be excluded if it would not be helpful, as required by Ala. R. Evid. 701(b), or would not assist the trier of fact, as required under Ala. R. Evid. 702.

Some evaluative reports continue to be admissible under federal statutes. See, e.g., 7 U.S.C. § 78 (1994) (findings of Secretary of Agriculture as to grade of grain); 7 U.S.C. § 210(f) (1994) (Secretary of Agriculture's findings in damages action against stockyard owner); 7 U.S.C. § 292 (1994); 7 U.S.C. § 1622(h) (1994); 8 U.S.C. § 1440(c) (1994); 18 U.S.C. § 4245 (1988); 42 U.S.C. § 269(b) (1988); 46 U.S.C § 679 (1988).

Traditional Alabama common law recognizes the admissibility of public records. See Zinn v. State, 527 So. 2d 148 (Ala. 1988); Vizzina v. City of Birmingham, 533 So. 2d 652 (Ala. Crim. App. 1987), aff'd, 533 So. 2d 658 (Ala. 1988); C. Gamble, McElroy's Alabama Evidence § 218.01 (4th ed. 1991). In addition to caselaw, a general statute and a rule of court recognize the exception. See Ala. Code 1975, § 12-21-35; Ala. R. Civ. P. 44. Additionally, there exist numerous other statutes providing for the admissibility of specific public records. See, e.g., Ala. Code 1975, § 12-21-35 (official record of person to whom license plate has been issued; superseded as to civil cases by Ala. R. Civ. P. 44); § 40-7-6 (tax assessment as proof of value or ownership); § 35-16-3 (mortality tables); § 35-16-1 (annuity tables); § 12-17-270 (official reporter's transcript); § 15-16-20 (adjudication of competency to stand trial); § 15-16-22 (report of lunacy commission); § 11-7-8 (survey or plat of county surveyor); § 40-10-30 (recitals in a tax deed); § 12-21-99 (sheriff's deed or return; superseded in civil cases by Ala. R. Civ. P. 44); § 12-21-93 (statutes of other states).

APPENDIX D

Advisory Committee's Notes to Amendment to Advisory Committee's Notes to Rule 803
Effective January 30, 2020

The original Advisory Committee's Notes to Rule 803(7), upon the adoption of Rule 803 in 1996, included a sentence that read: "This paragraph, like Rule 803(6), recognizes the trial court's power to exclude evidence otherwise permitted if a lack of trustworthiness is indicated by 'the sources of information or other circumstances.'" Similarly, the 1996 Notes to Rule 803(8) included a sentence that read: "While admissibility is assumed if the requirements of Rule 803(8)(C) are met, the trial judge is vested with discretion, as under Rule 803(6), to exclude factual findings if 'the sources of information or other circumstances indicate lack of trustworthiness.'" Those two sentences have been deleted and replaced by this sentence and citation: "The party objecting to the admissibility of the record, for lack of trustworthiness, carries the burden of proof in that regard. In re Japanese Electronic Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), reversed, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)." The sentence referencing Matsushita is identical to a sentence contained in the Advisory Committee's Notes to Paragraph (6) of Rule 803, upon its adoption in 1996.

Paragraphs (6), (7), and (8) of Federal Rule of Evidence 803 were amended in 2014 to make it more plain that the intent of these paragraphs is that, if the proponent has established the requirements of the exception, then the burden of proving a lack of trustworthiness is on the opponent of the evidence. The Advisory Committee's Notes to paragraphs (7) and (8) of Rule 803 are amended to acknowledge agreement with the 2014 Federal amendments, i.e., that the opponent of the evidence has the burden of proving a lack of trustworthiness.

APPENDIX E

Rule 803(16)

(16) Statements in Ancient Documents. Statements in a document that was prepared before January 1, 1998, the authenticity of which is established.

APPENDIX F

Advisory Committee's Notes to Amendment to Rule 803(16) Effective January 30, 2020

Rule 803(16), Federal Rules of Evidence, was amended in 2017 to provide: "A statement in a document that was prepared before January 1, 1998, and whose authenticity is established." The corresponding Alabama Rule is amended to be consistent with the Federal amendment.

The ancient-documents exception to hearsay is now limited to statements in documents prepared before January 1, 1998, because of the risk that the former 30-year rule could, in the near future, be used to admit vast amounts of unreliable electronically stored information ("ESI") published on the Internet or in other unreliable electronic archives.

The ancient-documents exception remains available for hard-copy documents "prepared" before 1998. A document is "prepared" when the statement was recorded in the hard-copy document. For example, if a hard-copy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995, even though the scan was made after 1998. The relevant point is the date on which the information is recorded, not when the information is prepared in a certain format for presentation at trial. However, if the content of the document is itself altered after the 1998 cutoff date, then the hearsay exception will not apply to statements that were added in the post-1998 alteration.

Going forward, it is anticipated that any need to admit old hard-copy documents produced after January 1, 1998, will decrease, e.g., because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. For example, Rule 803(6) may be used for many of these ESI documents. Also, many old documents can be admitted for the nonhearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient-documents hearsay exception is not intended to have any effect on authentication of ancient documents. The methods of authenticating old documents remain unchanged.

APPENDIX G

Rule 902(13)

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

APPENDIX H

Rule 902(14)

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

APPENDIX I

Advisory Committee's Notes to Adoption of Rule 902(13) and Rule 902(14)
Effective January 30, 2020

Paragraph (13). Certified Records Generated by an Electronic Process or System. This amendment is taken verbatim from the Federal amendments of 2017, which added paragraph (13) to Rule 902 of the Federal Rules of Evidence. This amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. Similar to the purposes for adding the provisions on business records in Rules 902(11) and (12), the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that the adversary party stipulates authenticity or fails to challenge the authentication testimony once it is presented. This amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made.

Nothing in this amendment is intended to limit a party from establishing authenticity of electronic evidence on any other ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this paragraph (13) must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this rule. This amendment specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this paragraph (13) to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this rule can establish only that the proffered item has satisfied the requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds, such as hearsay or relevance.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert. Such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Paragraph (14). Certified Data Copied from an Electronic Device, Storage Medium, or File. This amendment is taken verbatim from the Federal amendments of 2017, which added paragraph (14) to Rule 902, Federal Rules of Evidence. This amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or file, other than through the testimony of a foundation witness. Similar to the purposes for adding the provisions on business records in Rules 902(11) and (12), the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that the adversary party stipulates authenticity or fails to challenge the authentication testimony once it is presented. This amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made.

Today, data copied from electronic devices, storage media, and files are ordinarily authenticated by "hash value." A "hash value" is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person

that the person checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any other ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record of the certifying person testified, then authenticity is not established under this rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds, such as hearsay or relevance.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert. Such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.