InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

Policy Cross-domain

Authenticity/Authentication Definitions and Sources

Compiled by Seth Dalby

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Authentic; authenticity

- Proven of an original when it was written, printed, executed, or signed as it claims to have been.[1]
- Proven of a copy when it is a true copy of the original.[2]
    - *True Copy:* A copy of a legal document exactly the same as the original with notations, court stamps, signatures of parties and the court registrar, insertions and corrections written in the copy within quotation marks.[3]
- Proven of the copy of a letter, telecommunication, or telegram when the original was sent as claimed and received by the addressee.[4]
- A document is considered "authentic" if the sponsoring witness vouches for its authenticity or if the document meets requirements of self authentication.[5]
    - *Self-authentication*: Authentication without extrinsic evidence of truth or genuineness. In federal courts (U.S.), certain writings, such as notarized documents and certified copies of public records, may be admitted into evidence by self-authentication.[6] [See *Federal Rule 902. Self Authentication*]
- Writing is "authentic" if it was written and sent by the party whose name it bears.[7]

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[1] Dukelow, Daphne A., *The Dictionary of Canadian Law,* 2nd ed., s.v. "Authenticity." (Source: Ontario, Rules of Civil Procedure, r. 51.01 (a))
[2] Ibid. (Source: Ontario, Rules of Civil Procedure, r. 51.01 (b))
[3] Ibid, s.v. "True copy." (Source: Ontario, Rules of Civil Procedure, r. 51.01 (c))
[4] Dukelow, s.v. "Authenticity."
[5] *Words and Phrases,* Permanent ed., s.v. "Authentic." (Case: Tex. App.—Houston [1 Dist.] 1994. Rule 901.—Matter of G.F.D., 874 S.W. 2d 729)
[6] *Black's Law Dictionary,* 8th ed., s.v. "Self-authentication."
[7] *Words and Phrases,* s.v. "Authentic." (Case: West Virginia 1976.—*Casto v Martin*, 230 S.E. 2nd 722, 159 W. Va. 761)

- "Authentic" means authoritative, reliable, trustworthy, real, pure, true, or genuine.[8]
    - *Genuine:* (of a thing) authentic or real; something that has the quality of what it is purported to be or to; (of an instrument) free of forgery or counterfeiting.[9]

- "Authentic" is used in Rev.St. p. 208, c. 22, § 69, providing that every person who shall falsely make, alter, forge, or counterfeit any record or other authentic matter of a public nature, shall be deemed guilty of forgery, means vested with all due formality and legally attested; and hence a filing book, which was merely a probate judge's memorandum book, and not required by law to be kept, being merely a convenient book of reference in which entries were made generally by the probate judge, purporting to give the names of certain persons who had made applications for lots, was not an authentic matter of a public nature.[10]

- Where taxpayers, seeking to enjoin highway commission from making further contracts, alleged, on information derived from "authentic" sources, various items chargeable against highway fund, such allegation and supporting affidavit held no more than ordinary verification on information and belief, and insufficient to support injunction. Vernon's Ann.Civ.St. art. 4647. Petition alleged, on information derived from "authentic" sources, certain items which were asserted to be chargeable against highway fund, and supporting affidavit declared that where facts were alleged on information and belief or on estimate affiant verily believed them to be true. Although the word "authentic" in some of its uses has a technical meaning, the word as used in petition in connection with sources of information has no meaning which would require its acceptance by court as conclusive.[11]

- *Authentic photograph*
    - For purposes of determining admissibility of posed photographs, "authentic photograph" is one that constitutes a fair and accurate representation of what it purports to depict.

Authenticate; authentication

- In legal parlance "authenticate" means vested with all due formalities and legally attested, and cannot apply to a memorandum book kept by a probate judge which he is not required to keep.[12]
    - *Downing v Brown*, 3 Colo. 571, 590.

[8] *Words and Phrases,* s.v. "Authentic." (Case: Woods v Jastreminski, 11 So.2d 4, 8, 201 La. 1092)
[9] *Black's Law Dictionary*, s.v. "Genuine." (Source: U.C.C. §1-201 (b)(19))
[10] *Words and Phrases*, s.v. "Authentic." (Case: *Downing vBrown*, 3 Colo. 571, 590)
[11] *Ibid.* (Case: *Johnson v Ferguson, Tex.Civ.App., 55 S.W.2d 153, 159*)
[12] *Words and Phrases,* s.v. "Authenticate." (Case: Ky. 2000. *Gorman v Hunt*, 19 S.W.3d 662)

- "Authenticate" means to give verity, to impart to the instrument its validity and operative effect. Until an ordinary deed has been signed, sealed, and delivered, it is totally invalid as a deed, and all of these several acts must concur, or it cannot be said to have been executed and capable of authentication within a statute providing for the attesting and authentication of a deed of a husband and wife.[13]

- A copy of a judicial record of another state not authenticated as required by the federal statute, or by Code Civ.Proc.Kan. § 371, which relates in terms to the proceedings of the courts of foreign countries, is not rendered admissible in evidence by being certified to in accordance with the requirements of section 372, Code Civ.Proc., which provides for the admission in evidence of copies of records required by law to be kept in any public office; such section having reference only to records kept under authority of the laws of this state or of the United States.[14]

- According to *Webster's Dictionary*, to "authenticate" means to "render authentic; to give authority to, by the proof, attestation, or formalities required by law, or sufficient to entitle to credit." Under Kirby's Dig. §§ 1194-1199 requiring appeals granted by the lower court to be perfected within 90 days by filing an authenticated copy of the record in the Supreme Court at any time within one year after the rendition of the judgement sought to be reviewed, the clerk of the Supreme Court can only grant an appeal when an authenticated copy of the record is presented to him within the year."[15]

- "Authenticate" is defined by Webster "to render authentic, to give authority to or proof, attestation or formality required by law as sufficient to entitle to credit"; in *Bouvier's Dictionary* as "the proper or legal *attestation*, or acts done with a view of executing an instrument to be known and identified"; and in *Burrill's Dictionary* as "the act or mode of giving legal authority to a statute, record, or other legal instrument or certified copy thereof, so as to render it legally admissible in evidence." There is no inherent meaning in the word which requires the authentication to be in writing. The words "properly and legally authenticated so as to entitle them to be received in evidence," in a statute requiring such authentication of certain papers, must be construed as if the expression were "so properly and legally authenticated as to entitle"; that is, "so properly and legally authenticated that they would be entitled to be," etc.[16]

- For purpose of evaluating extradition documents, "authenticate" means that documents are what they purport to be.[17]

[13] Ibid. (Case: *Hartley v Ferrell*, 9 Fla. 374, 380.)
[14] Ibid. (Case: *Ayres v Wm. Deering & Co*., 90 P. 794, 795, 76 Kan. 149)
[15] Ibid. (Case: *Damon v Hammonds*, 84 S.W. 796, 73 Ark. 608)
[16] Ibid. (In re Fowler, 4 F. 303, 310)
[17] Ibid. (Neb. 1992. *State v Wallace*, 484 N.W. 2d 477, 240 Neb. 865)

- Statute regulating issuance of identification cards by private vendors is not unconstitutionally vague in requirement that applicant provide "authenticated or certified copy of proof of age"; "authenticated" is commonly understood as meaning to prove or serve to prove the authenticity of something, while "authenticity" is defined as bona fide, real, or actual.[18]

- Broadly, the act of proving that something (as a document) is true or genuine, especially so that it may be admitted as evidence; the condition of being so proved <authentication of the handwriting>.[19]

    - C.A.5 (Tex.) 1997. Government has duty of laying foundation that tape recordings sought to be entered into evidence accurately reproduce conversations that took place, including that they are accurate, authentic, and trustworthy.—*U.S. v Thompson*, 130 F.3d 676, certiorari denied 118 SCt. 2307, 524 U.S. 920, 141 L.Ed.2d 166.

      Government properly authenticated tape recordings admitted into evidence; government agent testified that he made original recording, that he tested recording equipment before and after tape was made, that he placed recording device in jail library and turned it on, that he observed taped conversation while it was occurring, and that he retrieved tape after conversation ended and turned it over to clerk responsible for maintaining evidence. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.—Id.

      Government authenticated transcripts of tape recordings admitted into evidence through testimony of agent who prepared transcription and indicated that he had listened to tapes several times in preparing and updating transcript.—Id.

- Specifically, the assent to or adoption of a writing as one's own.[20]

    "The concept of authentication, although continually used by the courts without apparent difficulty, seems almost to defy precise definition. Some writers have construed the term very broadly, as does Wigmore when he states that 'when a claim or offer involves impliedly or expressly any element of *personal connection with a corporeal object*, that connection must be made to appear…" So defined, 'authentication' is not only a necessary preliminary to the introduction of most writings in evidence, but also to the introduction of various other sorts of tangibles."[21]

[18] Ibid. (Source: Fla. 1997. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, §9; West's F.S.A. § 877.18.—*State v Mitro*, 700 So.2d 643, rehearing denied)
[19] Ibid., s.v. "Authentication."
[20] *Black's Law Dictionary*, s.v. "Authentication."
[21] John W. Strong et al., *McCormick on Evidence*. § 218, at 350 (5th ed. 1999). Quoted in *Black's Law Dictionary*, s.v. "Authentication."

- An attestation made by an officer certifying that a record is in proper form and that the officer is the proper person to so certify.[22]

- "Authentication" of any document is that which is certified concerning it by the proper certifying officer.[23]

- In providing prior conviction, "authentication" of copy of record of conviction simply means verification.[24]

- An order signed by trial judge appended to transcript of proceedings was a sufficient "authentication" of transcript of proceedings.[25]

- "The authentication of a written instrument is such official attestation as will render it legally admissible in evidence."[26]

- Indorsement on intended bill of exceptions that it was presented to trial judge held not "authentication" of bill of exceptions within statute.[27]

- Verification of judgements, as what they purport to be, is known as "authentication."[28]

- The "authentication" of a written instrument is such official attestation as will render it legally admissible in evidence. "Authentication of any document is that which is certified concerning it by the proper certifying officer. [29]

- The authentication of evidence in a bill of exceptions in a criminal case is the signature of the judge; the certificate of the official stenographer being merely for the information of the parties and the judge in settling the bill.[30]

- Though "authentication" of chattels is ordinarily referred to as "identification," "authentication" presupposes a single object only and refers to it as associated with a person, time, place, or other known conditions.[31]

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[22] Dukelow, s.v. "Authentication."
[23] *Words and Phrases*, s.v. "Authentication." (Case: *Ordway v Conroe*, 4 Wis. 45, 50)
[24] Ibid. (Case: *State v Worsham*, Mo., 416 S.W.2d 940, 943)
[25] Ibid. (Case: *Second National Bank of Robinson v Jones*, 33 N.E.2d 732, 735, 309 Ill.App. 358)
[26] Ibid. (Case: *Mayfield v Sears*, 32 N.E. 816, 133 Ind. 86)
[27] Ibid. (Sources: Code 1923, § 6432 et seq. *Trainum v State*, 167 So. 801, 27 Ala.App. 166)
[28] Ibid. (Case: *Collette v Hanson*, 174 A. 466, 467, 133 Me. 146)
[29] *Words and Phrases*, s.v. "Authentication." (Case: *New Era Milling Co. v Thompson*, 230 P. 486, 487, 107 Okl. 114)
[30] Ibid. (Case: *Richardson v State*, 89 P. 1027, 1034, 15 Wyo. 465, 12 Ann.Cas. 1048)
[31] Ibid. (Case: *State v Foret*, 200 So. 1, 4, 196 La. 675)

- Where trial court's certificate certified the record and proceedings mentioned in writ of error with "all things touching the same," there was no "authentication" of the entire record of the proceedings had on the trial.[32]

- Privy examination and acknowledgment of instrument of adoption as prescribed by Rev.St.1911, arts. 6605,6805,Vernon's Ann. Civ.St. arts. 6605, 6608, for acknowledgements by married women, held not essential to validity of adoption, either proof by witnesses or ordinary acknowledgements being sufficient "authentication," which is an official act, in view of Rev.St.1897, arts. 601, 2255, Vernon's Ann.Civ.St. arts. 3737, 3724; Rev.St.1895, art. 5353, Vernon's Ann.Civ.St.[33]

- "Authentication" is the process of establishing that an item of evidence is what it purports to be; writing offered as a business entry may be authenticated by showing it came through a reliable source from a business whose regular course it was to make a memorandum or record of the particular fact or event.[34]

- "Authentication" is a special aspect of relevancy, concerned with establishing the genuineness of evidence.[35]

- "Authentication" as used in connection with handwriting comparison, means proof of authorship, and whether writing has been authenticated is matter for court to determine.[36]

- Generally, under United States law, "authentication" consists of actor's appearing before notary and swearing that he is who he purports to be, followed by authentication of notary's signature by appropriate local official, whose signature is then authenticated by consul of country in which document is sought to be made effective.[37] [See *notary public*]

- "Authentication" simply requires a party to establish as a preliminary fact the genuineness and authenticity of the writing.[38]

- "Authentication" is simply a process of establishing the relevancy of document by connecting it with a person, place, or thing.[39]

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[32] Ibid. (Case: *State v Haimowicz*, 17 A.8d 472, 473, 125 N. J.L. 526)
[33] Ibid.
[34] Ibid. (Case: ACMR 1979. MCM 1969, par. 144, subd. c.—*U.S. v Chong*, 8 M.J. 592)
[35] *Words and Phrase* , s.v. "Authentication." (Sources: C.A.9 (Cal.) 2002. Fed.Rules Evid. Rule 901 (a), 28 U.S.C.A.—*Orr v Bank of America*, NT & SA, 285F.3d 764)
[36] Ibid. (Sources: o C.A.5 (la.) 1971. *U.S. v White*, 444 F.2d 1274, certiorari denied 92 S.Ct. 300, 404 U.S. 949, 30 L.Ed.2d. 266)
[37] Ibid. (Case: S.D.N.Y. 1986. *Olmeca, S.A. v Manufacturers Hanover Trust Co*., 639 F.Supp. 1142)
[38] Ibid. (Sources: Cal.App. 2 Dist. 1975. West's Ann.Evid.Code, §§ 1400 et seq., 1410, 1417.—*Interinsurance Exchange v Velji*, 118 Cal.Rptr. 596, 77 Cal.App.3d 310)

- "Authentication" is the act of giving legal authority to a written instrument or a certified copy thereof, so as to render it legally admissible into evidence.[40]

- Authentication of a writing is the providing of an evidentiary basis sufficient for the trier of fact to conclude that the writing came from the source claimed.[41]

- Certified copy of robbery conviction offered by state in probation revocation proceeding was sufficiently "authenticated," and was admissible, without need for any authentication other than deputy clerk's stamp; clerk did not have to attach additional certificate stating that he or she was aware of or had independent knowledge of facts stated or offered therein.[42]

Requirements of Authentication [43]

- **§ 1032. Generally**

  "To be admissible, documentary evidence must generally be authenticated, that is, it must be shown to be what its proponent claims it to be.[44] Authentication is the process by which the relevancy of a document is established by connecting it with a person, place or thing.[45]. This requirement existed at common-law[46], and it has also been recognized by Rule 901(a) of the [U.S.] Uniform Rules of Evidence and the Federal Rules of Evidence, which provides that the admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims (FRE 901(a); Uniform Rules of Evidence Rule 901(a))… Although Rule 901(a) speaks of authenticity as a condition precedent to the admission of evidence, common-law authority permits introduction of documentary evidence on the condition that a foundation for its introduction, including authenticity can be laid.[47]"

- **§ 1033. Necessity and nature of authentication in particular circumstances**

  "Compliance with the requirements of authentication is not excused by the fact that an adverse party has received copies of documents or has failed to contest their legitimacy. It is, however, permissible for parties to stipulate to

[39] Ibid. (Case: *Eberhardt v Eberhardt*, 672 N.W.2d 659, 2003 ND 199)
[40] Ibid. (Case: Okla. 1978. *Concannon v Hampton*, 584 P.2d 218, 1978 OK 117)
[41] Ibid. (Case: Tex.Crim.App. 1984. Wilson v State, 677, S.W.2d 518)
[42] Ibid. (Case: Va.App. 1990. Code 1950, §8.07-389.—*Owens v Com*., 391 S.E.2d 605, 10 Va.App. 309)
[43] 29 Am. Jur. 2d *Evidence* **§§** 1033-1039 (2003).
[44] (Case: *Vouras v State* (Del Sup) 452 A2d 1165)
[45] (Case: *Farm Credit Bank v Huether* (ND) 454 NW2d 710)
[46] (Case: *Pressley v State*. 207 Ga 274, 61 Se2d 113)
[47] (Case: *Pratt v Phelps, 23 Cal App 755, 139 P 906*)

the authenticity of a document and thereby forgo proof of the matter. A party who could require proof of authenticity may also waive his or her right to require such proof.[48]

The facts which must be shown to authenticate a document will vary according to the proponent's purpose in offering the document. A document such as a scientific analysis of a substance taken from a human body is typically offered for the purpose of showing the truth of the statements contained in it; in such a case authentication of the report would include evidence indicating that the analysis was free from mistake or tampering.[49] If a document is offered to show that a particular person (such as an opposing party) made the statement contained in it, its authentication must include evidence that the document was in fact written by or is otherwise attributable to him or her.[50] But where the evidentiary value of a writing does not depend on a showing of the truth of its contents, or that a particular person wrote it, its authentication need not relate to such matters, but need only extend to whatever facts are necessary to permit a finding that the document is what its proponent claims it to be.[51] Authentication in the form of proof that a particular person authored or executed a document is not required when only the content of the document[52] or the fact of its existence[53] is at issue. Oral testimony about a document, as distinguished from the document itself, requires no extrinsic evidence of authenticity to be admissible."

- **§ 1037. Necessity of establishing chain of custody**

"It has been said that establishing the chain of custody of a document is not necessary under the Federal Rules of Evidence where there is prima facie evidence of its authenticity which satisfies the requirements of Rule 901(a).[54] Thus, where a litigant sought the admission into evidence of seven completed job application forms, the fact that their chain of custody could not be established did not preclude their admission where other applications were identified by the applicants, and where it could reasonably be concluded that since all the applications appeared to come from the same source and were on the same form, and since the majority were conceded to be authentic application for employment, a prima facie case for the authenticity of the seven disputed applications under the Federal Rules had been made.[55]

[48] (Case: *People v More* (Colo App) 668 P2d 968)
[49] (Case: *State ex rel. Human Services Dept. v Coleman* (App) 104 NM 500, 732 P2d 971)
[50] (Case: *Haury & Smith Realty Co. v Piccadilly Partners I* (Tenn App) 802 SW 2d 612)
[51] (Case: *United States v Mazyak* (CA5 FLA) 650 F2d 788, 8 Fed Rules Evid Serv 1288, cert den 455 US 922)
[52] (Case: *Agnew v State*, 51 MD App 614, 446 A2d 425)
[53] (Case: *People v Adamson*, 118 Cal App 2d 714, 258 P2d 1020)
[54] (Case: *Louis Vuitton S.A. v Spencer Handbags Corp* (CA2 NY) 765 F2d 966)
[55] (Case: *Alexander Dawson, Inc. v NLRB* (CA9) 586 F2 1300, 99 BNA LRRM 3105, 85 CCH LC)

However, under the substantially similar Uniform Rules of Evidence, the courts' decision of the admission of documents has in some cases included an observation that a suitable chain of custody was established.[56]

Neither the Uniform Code of Evidence nor the Federal Rules of Evidence specifically require demonstration of a chain of custody for admission of documentary evidence, although in many instances the authentication of a document will involve testimony as to its custody. The observation by courts in some cases under the Uniform Rules that a proper chain of custody was established for certain documents probably does not mean that a showing was required for their admission; if a witness with knowledge had testified that the documents were what their proponents said they were, the documents probably would have been admitted with any question as to their custody bearing on their weight rather than their admissibility.[57]"

- **§ 1038. Necessity of subscribing witness' testimony—at common law**

"At common law, when a written instrument attested by a subscribing witness is offered into evidence, its execution must be proved by that witness if he or she is available as a witness and competent to testify[58], unless the document is an ancient one, which is self-proving. Under this rule, evidence of the genuineness of handwriting of a party to show the execution of an attested instrument is not sufficient and does not dispose with the necessity of calling the attesting witness if he or she is available[59]…

The rule relating to testimony of an attesting witness applies not only to deeds and other instrument of formal character, but also to contract[60], and to instruments not evidencing contracts, such as notices to quit, receipts, and like papers.[61] The application of the rule is especially called for if the document is one which the law requires to be attested by subscribing witnesses.[62]

At common law, the admission in court as to the execution of the instrument, made for the purpose of dispensing with proof by the attesting witness, will excuse the necessity of producing him or her[63], but an extrajudicial admission will not suffice.[64]

In proving the execution of an instrument other than a will, it is not necessary, if there are two or more attesting witnesses, to call more that one of them; the

[56] (Case: *State ex rel. Corbin v Goodrich* (app) 151 Ariz 118, 726 P2d 215)
[57] (Case: *State v Emery*, 141 Ariz 549, 688 P2d 175)
[58] (Case: *Stamper v Griffin*, 20 Ga 312)
[59] (Case: *McAlpin v Lee*, 57 Ga 281)
[60] (Case: *Sanborn v Cole*, 63 Vt 590, 22 A 716)
[61] (Case: *International & G.N.R. Co. v McRae*, 82 Tex 614, 18 SW 672)
[62] (Case: *Brynjolfson v Northwestern Elevator Co.*, 6 ND 450, 71 NW 555)
[63] (Case: *Planters' & Merchants' Bank v Willis & Co.*, 5 Ala 770)
[64] (Case: *Hogland v Sebring*, 4 NJL 105)

evidence of one of the attesting witnesses will establish a prima facie case for the execution of the instrument.[65]"

- **§ 1039. –Under statutes or codes of evidence.**

  The common-law rule requiring the execution of an attested instrument to be proved by at least one attesting witness has in many jurisdictions been modified by the enactment of statutes or rules of evidence providing that some documents require no attestation unless their genuineness is questioned[66], or that the testimony of the maker of the instrument will suffice to prove its execution.[67] Under some statutes, attested documents may be proved as though they had no subscribing witnesses.[68] An instrument which has been acknowledged or recorded according to law need not be proved by the testimony of an attesting witness.[69]

  Rule 903 of the Uniform Rules of Evidence and the Federal rules of Evidence provides that the testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.[70]

Methods of authentication[71]

- **§ 1040. Generally; pretrial authentication**

  "Rule 901(b) of the Uniform Rules of Evidence and the Federal Rules of Evidence provides an illustrative list of methods of authentication or identification conforming to the requirements of the rule of authentication or identification as stated in Rule 901(a). These illustrations are not the only permissible methods of authentication under the Rules. Other methods by which a document may be authenticated prior to trial include:
    - A request for an admission as to its authenticity pursuant to Federal Rule of Civil Procedure 36
    - Securing an admission of authenticity at a pretrial conference under FR Civ R, Rule 16
    - Use of interrogatories propounded under FR Civ P, Rule 33
    - Attachment of a document as an appendix to pleadings under FR Civ P, Rule 10(c)
    - An admission of authenticity obtained in the course of a deposition taken pursuant to FR Civ P, Rules 30 and 31"

[65] (Case: *Eichelberger v Sifford*, 27 MD 320)
[66] (Case: *Rice v James Hanrahan & Sons*, 20 Mass App 701, 482 NE2d 833)
[67] (Case: *Lovejoy v Franklin* (Ala App) 426 So 2d 841)
[68] (Case: *Robertson v Burstein*, 105 NJL 375, 146 A 355, 65 ALR 324)
[69] (Case: *Mee v Benedict*, 98 Mich 260, 57 NW 175)
[70] (Source: Fed. R. Evid. 903; Uniform Rules of Evidence Rule 903)
[71] 29 Am. Jur. 2d *Evidence* §§ 1040, 1043, 1048 (2003).

- **§ 1043. Source of document**

  "The fact that the party against whom a document is to be offered in evidence produced the document may provide circumstantial evidence of its authenticity.[72] A document is also authenticated where a person in a position to vouch for its authenticity produces it and represents it to be the document described in a subpoena.[73] Such authentication can also be accomplished by counsel acting as agent of the person to whom the subpoena is directed.[74] The fact that documents are produced by a party in answer to an explicit discovery request, while not dispositive on the issue of authentication, is probative.[75]

  The place where a document was found can be circumstantial evidence of its authenticity (*United States v De Gudino* (CA7 Ill), and such evidence can be considered along with evidence of the document's distinctive characteristics (Fed. R. Evid. 901 (b)(4); Uniform Rules of Evidence Rule 901 (b) (4))."

- **§ 1048. Methods provided for by statutes or court rules**

  "Under Rule 901 (b) (10) of the Federal Rules of Evidence, authentication or identification as a condition precedent to admissibility may be made by any method provided by act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority. Rule 901 (b) (10) of the Uniform Rules of Evidence makes the same provision with respect to methods of authentication provided by the constitution, laws, or court rules of the enacting state.

  Under Rule 901 (b) (10), any method of authentication—whether provided by Rule 901 or other rules or statutes—which facilitates authentication with the greatest ease may be used.

  Acts of Congress which provide methods of authentication or identification under the Federal Rule include:

  - **7 USCS § 2217**, which provides for the authentication of an oath, affirmation, or affidavit administered or taken by an officer, agent, or employee of the Department of Agriculture by the seal of the Department

  - **8 USCS § 1454 (e)**, which authorizes the Attorney General to make and issue certification of any part of naturalization records of any court, or of any certificate of naturalization or citizenship, for use in complying with any state or federal statute or in any judicial proceeding

[72] (Case: *Zenith Radio Corp. v Matsushita Electric Industrial Co.*)
[73] (Case: *United States v Brown* (CA7 Wis) 688 F2d 1112, 11 Fed Rules Evid Serv 708)
[74] (Case: *McQueeney v Wilmington Trust Co*. (CA3 PA) 779 F2d 916, 1986 AMC 969)
[75] (Case: *United States v Eisenberg* (CA8 Minn) 807 F2d 1446)

- **15 USCS § 1061**, which provides for trademark acknowledgements and certifications by persons within the United States authorized by law to administer oaths, or, when in a foreign country before any diplomatic or consular officer of the United States or before any official authorized to administer oaths in the foreign country concerned whose authority is proved by a certificate of a diplomatic or consular office of the United States or apostille of an official designated by the foreign country which, by treaty or convention, affords like effect to apostilles of designated officials of the United States.

- **18 USCS § 3190**, which provides for the authentication of depositions, warrants, or other papers, offered in evidence in an extradition hearing, by certification by the principle diplomatic or consular officer of the United States in the foreign country seeking extradition

- **22 USCS § 4221**, which provides for the authentication by a consular officer of any oath, affirmation, affidavit, deposition, or notarial act made before such officer

- **28 USCS § 753 (b)**, which provides for the authentication of records of proceedings by court reporters

- **28 USCS § 1738**, which provides for the authentication of acts of the legislature of any state, territory, or possession of the United States, by the seal of such state, territory, or possession, and authentication of records and judicial proceedings of any court of any state, territory, or possession by attestation of the clerk and seal of the court, if a seal exists, together with the certificate of a judge of the court that the attestation is in proper form

- **28 USCS § 1739**, which provides for the authentication of nonjudicial records or books kept in any public office of any state, territory, or possession of the United States by attestation of custodian such records or books and the seal of his office annexed, if there is a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of a governor, secretary of state, chancellor, or keeper of the great seal of the state, territory, or possession that the attestation is in due form and by the proper officers

- **38 USCS § 5712**, which provides for the authentication by the seal of the Veterans' Administration of any oath, affirmation, affidavit, or examination administered or taken by an employee

- **42 USCS § 269 (b)**, which provides for the certification of bills of health by the proper consular or other officer of the United States over his official signature or seal

- **43 USCS § 13**, which provides for the authentication for papers on file in the General Land Office of the United States by certificate under seal of the Commissioner of General Land Office

Rules prescribed by the Supreme Court which provide methods of authentication or identification include:

- **FR Civ P, Rule 30 (f)**, which deals with the authentication of depositions by certification of the officer taking the deposition

- **FR Civ P, Rule 44**, which deals with the authentication of domestic and foreign official record in civil proceedings

- **FR Civ P, Rule 80 (c)**, which deals with the authentication of records of proceedings by court reporters

- **FR Crim P 27**, which provides that the provision of FR Civ P, Rule 44 are applicable in criminal proceedings

The Federal Rules of Civil Procedure also provide various means by which pretrial authentication of a document may be affected. [See Federal Rules of Civil Procedure]"

- *Authenticated copy of patent*
  - A statute provided that it should be unlawful to sell any patent right until a duly "authenticated copy" of the patent had been filed. It was held that by "authenticated copy" was meant such official attestation as would render the copy admissible in evidence.[76]

- *Authenticated copy of records of judgement*
  - The words "authenticated copies of records of judgement" as contained in the Municipal Court Act providing that such copies shall be filed in the Appellate Court within 40 days after the date of the

[76] *Words and Phrases*, s.v. "Authenticated copy of patent." (Case: *Mayfield v Prosser*, 32 N.E. 1129, 133 Ind. 699)

order or judgement appealed from, means copies which are certified by the clerk to be complete copies of the record.[77]

- *Authenticated report*
  - Statute requiring motor vehicle division to suspend motorist's license and registration certificates and plates upon receiving authenticated report of motorist's failure for 30 days to satisfy judgement against him arising out of operation of his automobile held not so vague, indefinite, and uncertain as to be unenforceable, since "authenticated report" meant certified copy of judgement by clerk of superior court and a showing that such judgement was unsatisfied.[78]

- *Notary Public*

  - A "notary" is a public officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. He is a public functionary, authorized to receive all acts and contracts to which parties wish to give the character of authenticity, attached to the act of public authority, to secure their date, their preservation, and the delivery of copies.[79]

    -- "Attestation" means that the subscribing witness saw the writing executed or heard it acknowledged, and, at the request of the party, thereupon signed his name as witness. [80]

  - An officer who is authorized by the state or federal government to administer oaths and to attest to the authenticity of signatures.[81]

  - A public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions, to take acknowledgements of deeds and other conveyances and certify them, and to perform certain official acts, chiefly in commercial

[77] *Words and Phrases*, s.v. "Authenticated copy of records of judegment." (Case: *Arthur v Doyle*, 141 Ill. App. 432)
[78] *Words and Phrases*, s.v. "Authenticated report." (Case: *State ex rel. Sullivan v Price*, 63 P.2d 653, 654, 49 Ariz. 19, 108 A.L.R. 1156)
[79] *Words and Phrases*, s.v. "Notary public." (Case: La. 1906. *Nolan v Labatat*, 41 So. 713, 117 La. 463)
[80] *Words and Phrases*, s.v. "Attestation." (Case: *Luper v Werts*, 23 P. 850, 855, 19 Or. 122)
[81] *Words and Phrases*, s.v. "Notary public." (Case: Ill.App. 2 Dist. 1998. In re *Estate of Alfaro*, 234 Ill.Dec. 795, 703 N.E.2d 620, 301 Ill.App3d 500)

matters, such as protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.[82]

- *Notary's certificate*
  - A notary's signed and sealed or stamped statement attesting to the time and place that the specified acts and documents were authenticated.[83]

- *Notary's seal* [84]

  - A device, usually a stamp or embosser, that makes an imprint on a notarized document. In most states, a notary public's official seal is ink stamped onto documents and is, therefore, photographically reproducible. It typically includes the notary's name, the state seal, the words *Notary Public*, the name of the country where the notary's bond is filed, and the expiration date of the notary's commission.

- *Authentication of Computer Data*[85]

  "Oftentimes, the admission of computer evidence, typically in the form of active (non-deleted) text or graphical image files, is accomplished without the use of specialized computer forensic software. Federal Rule of Evidence 901(a) provides that the authentication of a document satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. The Canada Evidence Act specifically addresses the authentication of computer evidence, providing that an electronic document can be authenticated by evidence capable of supporting a finding that the electronic document is that which it is purported to be. Under these statutes, a printout of an e-mail message can often be authenticated simply through direct testimony from the recipient or the author.

  The US Federal Courts have thus far addressed the authentication of computer generated evidence based upon Rule 901(a), much in the same manner as statutes that have existed before computer usage became widespread. *United States v Tank*, which involves evidence of Internet chat room conversation logs, is an important illustration.

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[82] Ibid. (Case: *Commercial Union Ins. Co*., 230 A.2d 498, 49 N.J. 389, appeal after remand 253 A.2d 469. 54 N.J. 76)
[83] *Black's Law Dictionary*, s.v. "Notary public."
[84] *Black's Law Dictionary*, s.v. "Notary's seal."
[85] University of Rhode Island Department of Computer Sciences and Statistics, URI's HPR108B: Computer Forensics Fall 2003 "Authentication of Computer Evidence" *Excerpted From Guidance Software Legal Journal 2003*. Available at http://homepage.cs.uri.edu/courses/hpr108b/readings/case_tank.htm

In *Tank*, the Defendant appealed from his convictions for conspiring to engage in the receipt and distribution of sexually explicit images of children and other offences. Among the issues addressed on appeal was whether the government made an adequate foundational showing of the relevance and the authenticity of a co-conspirator's Internet chat room log printouts. A search of a computer belonging to one of Defendant Tank's co-conspirators, Riva, revealed computer text files containing "recorded" online chat room discussions that took place among members of the Orchard Club, an Internet chat room group to which Tank and Riva belonged. Riva's computer was programmed to save all of the conversations among Orchid Club members as text files whenever he was online.

At an evidentiary hearing, Tank argued that the district court should not admit the chat room logs into evidence because the government failed to establish a sufficient foundation. Tank contended that the chat room log printouts should not be entered into evidence because: (1) they were not complete documents, and (2) undetectable "material alterations," such as changes in either the substance or the names appearing in the chat room logs, could have been made by Riva prior to the government's seizure of his computer. The district court ruled that Tank's objection went to the evidentiary weight of the logs rather than to their admissibility, and allowed the logs into evidence. Tank appealed, and the appellate court addressed the issue of whether the government established a sufficient foundation for the chat room logs.

The appellate court considered the issue in the context of Federal Rule of Evidence 901(a), noting that the rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification . . . The government must also establish a connection between the proffered evidence and the defendant.

In authenticating the chat room text files, the prosecution presented testimony from Tank's co-conspirator Riva, who explained how he created the logs with his computer and stated that the printouts appeared to be an accurate representation of the chat room conversations among members of the Orchid Club. The government also established a connection between Tank and the chat room log printouts. Tank admitted that he used the screen name "Cessna" when he participated in one of the conversations recorded in the chat room log printouts. Additionally, several co-conspirators testified that Tank used the chat room screen name "Cessna" that appeared throughout the printouts. They further

testified that when they arranged a meeting with the person who used the screen name "Cessna," it was Tank who showed up.

Based upon these facts, the court found that the government made an adequate foundational showing of the authenticity of the chat room log printouts under Rule 901(a). Specifically, the government .presented evidence sufficient to allow a reasonable juror to find that the chat room log printouts were authenticated.

The Tank decision is consistent with other cases that have addressed the issue of the authenticity of computer evidence in the general context of Fed. R. Evid. 901(a). Tank illustrates that there are no specific requirements or set procedures for the authentication of chat room conversation logs, but that the facts and circumstances of the creation and recovery of the evidence as applied to Rule 901(a) is the approach generally favored by the courts. (See also *United States v Scott-Emuakpor*, [Government properly authenticated documents recovered from a computer forensic examination under Rule 901(a)]).”

U.S. FEDERAL RULES OF EVIDENCE RULES 802-803[86]

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but

[86] FED. R. EVID. 802-803. Available at http://expertpages.com/federal/a8.htm

not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6)**. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to

authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations**. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates**. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records**. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property**. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property**. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents**. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications**. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history**. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history**. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character**. Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction**. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries**. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation

U.S. FEDERAL RULES OF EVIDENCE, RULES 901-903[87]

Rule 901. Requirement of Authentication or Identification

(a) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported

[87] FED. R. EVID. 901-903. Available at http://www.law.cornell.edu/rules/fre/rules.htm#Rule8036

public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule*. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal**. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal**. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents**. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic

without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) **Official publications**. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals**. Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like**. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents**. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents**. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions under Acts of Congress**. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

NOTES TO RULE 901[88]

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1943.)

Notes of Advisory Committee on Rules.

Subdivision (a).

[88] Adisory Committee on Federal Rules of Evidence, Notes to Rule 901 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available from http://www.law.cornell.edu/rules/fre/ACRule901.htm LII, Cornell Unicversity.

Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand.L.Rev. 344, 362 (1952); McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378. (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b).

The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1). Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

Example (2). Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Viet., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans v Commonwealth*, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot. 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon v Collins*, 267 F.2d 731 (2d Cir. 1959); *Wausau Sulphate Fibre Co. v Commissioner of Internal Revenue*, 61 F.2d 879 (7th Cir. 1932); *Desimone v United States*, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a

particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; California Evidence Code § 1420. Language patterns may indicate authenticity or its opposite. *Magnuson v State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), supra, *People v Nichols*, 378 Ill. 487, 38 N.E.2d 766 (1942); *McGuire v State*, 200 Md. 601, 92 A.2d 582 (1952); *State v McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), supra, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v Hoover Co*., 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska v Crutchfield*, 147 Okl. 4. 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co. v Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9). Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co. v Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *State v Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick v United States Rubber Co*., 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am.Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L.Rev. 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

NOTES TO RULE 902[89]

HISTORY:

[89]Advisory Committee on Federal Rules of Evidence, Notes to Rule 902 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available at http://www.law.cornell.edu/rules/fre/ACRule902.htm

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1944; Mar. 2, 1987, eff. Oct. 1, 1987.) (Amended Nov. 1, 1988.)

Notes of Advisory Committee on 1988 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on Rules.

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; California Evidence Code § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and

recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v Johnson*, 163 Miss. 426, 141 So. 762 (1932), Baby *Ruth candy bar; Doyle v Continental Baking Co*., 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; *Weiner v Mager & Throne, Inc*., 167 Misc 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va. Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. *Contra, Keegan v Green Giant Co*., 150 Me. 283, 110 A.2d 599 (1954*); Murphy v Campbell Soup Co*., 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46-606*; State v Wolfley*, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A. (N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore § 2510a. See also the provision of 19 U.S.C. § 1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of

documents are involved. Instances of broadly inclusive statutes are California Evidence Code § 1451 and N.Y.CPLR 4538, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. *United States v Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v Walker-Thomas-Furniture Co*., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

Notes of Committee on the Judiciary, House Report No. 93-650.

Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co. v Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments to Rules.

The amendment is technical. No substantive change is intended.

Committee Notes on Rules - 2000 Amendment

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. Sec. 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. Sec. 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

GAP Report - Proposed Amendment to Rule 902.

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 902:

1. Minor stylistic changes were made in the text, in accordance with suggestions of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The phrase "in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority" was added to proposed Rule 902(11), to provide consistency with Evidence Rule 902(4). The Committee Note was amended to accord with this textual change.

3. Minor stylistic changes were made in the text to provide a uniform construction of the terms "declaration" and "certifying."

4. The notice provisions in the text were revised to clarify that the proponent must make both the declaration and the underlying record available for inspection.

NOTES TO RULE 903[90]

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1945.)

Notes of Advisory Committee on Rules.

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick § 188. Uniform Rule 71; California Evidence Code § 1411; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

Computer Records and the Federal Rules of Evidence [91]

"Most federal courts that have evaluated the admissibility of computer records have focused on computer records as potential hearsay. The courts generally have admitted computer records upon a showing that the records fall within the business records exception, *Fed. R. Evid. 803(6):*

> 'Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.'

- See, e.g., *United States v Cestnik*, 36 F.3d 904, 909-10 (10th Cir. 1994); *United States v Moore*, 923 F.2d 910, 914 (1st Cir. 1991); *United States v Briscoe*, 896 F.2d 1476, 1494 (7th Cir. 1990); *United States v Catabran*, 836 F.2d 453, 457 (9th Cir. 1988); *Capital Marine Supply v M/V Roland Thomas II*, 719 F.2d 104, 106 (5th Cir. 1983). Applying this test, the courts have indicated that computer

[90] Advisory Committee on Federal Rules of Evidence, Notes to Rule 903 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available at http://www.law.cornell.edu/rules/fre/ACRule903.htm

[91] Orin S. Kerr, "Computer Records and the Federal Rules of Evidence" USA Bulletin (March 2001). Available at www.usdoj.gov/criminal/cybercrime/usamarch2001_4.htm

records generally can be admitted as business records if they were kept pursuant to a routine procedure for motives that tend to assure their accuracy."

U.S. FEDERAL RULES OF CIVIL PROCEDURE[92]

VI. Trials

Rule 44-- Proof of Official Record

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position

(i) of the attesting person, or

(ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown,

(i) admit an attested copy without final certification or

[92] FED. R. CIV. PROC. Available at http://www.wvnb.uscourts.gov/frcp.htm#rule44

(ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

[As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.]

CALIFORNIA EVIDENCE CODE SECTION 1410-1421 [93]

1410. Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

1410.5. (a) For purposes of this chapter, a writing shall include any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning.
(b) Any writing described in subdivision (a), or any photograph thereof, may be admitted into evidence in an action for vandalism, for the purpose of proving that the writing was made by the defendant.
(c) The admissibility of any fact offered to prove that the writing was made by the defendant shall, upon motion of the defendant, be ruled upon outside the presence of the jury, and is subject to the requirements of Sections 1416, 1417, and 1418.

1411. Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

1412. If the testimony of a subscribing witness is required by

[93]California Evid. Code §§ 1410-1421. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1410-1421.html

statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

1413. A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

1414. A writing may be authenticated by evidence that:
(a) The party against whom it is offered has at any time admitted its authenticity; or
(b) The writing has been acted upon as authentic by the party against whom it is offered.

1415. A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.

1416. A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:
(a) Having seen the supposed writer write;
(b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
(c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

1417. The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

1418. The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

1419. Where a writing whose genuineness is sought to be proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be genuine, and generally

respected and acted upon as such, by persons having an interest in knowing whether it is genuine.

1420. A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

1421. A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

CALIFORNIA EVIDENCE CODE SECTION 1532[94]

1532. (a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:
(1) The record is in fact a record of an office of a public entity; and
(2) A statute authorized such a writing to be recorded in that office.
(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

CALIFORNIA EVIDENCE CODE SECTION 1600[95]

(a) The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:
(1) The record is in fact a record of an office of a public entity; and
(2) A statute authorized such a document to be recorded in that office.
(b) The presumption established by this section is a presumption affecting the burden of proof.

[94] California Evid. Code § 1532. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1530-1532.html
[95] California Evid. Code § 1600. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1600-1605.html

ONTARIO RULES OF CIVIL PROCEDURE

PRETRIAL PROCEDURES

RULE 51 ADMISSIONS

INTERPRETATION

51.01 In rules 51.02 to 51.06, "authenticity" includes the fact that,

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been;

(b) a document that is said to be a copy is a true copy of the original; and

(c) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed. [96]

UNIFORM ELECTRONIC EVIDENCE ACT[97]

Authentication

3. The person seeking to introduce an electronic record [in any legal proceeding] has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Comment:

Section 3 codifies the common law on authentication, which applies equally to paper records. The proponent needs only to bring evidence that the record is what the proponent claims it is (e.g. "This record is an invoice.") This evidence is usually given orally and is subject to attack, like any other.

The Act does not open an electronic record to attacks on its integrity or reliability at this stage. That question is reserved for the new "best evidence" rule. Logically the question of integrity could be included in authentication, but the Conference decided that the question should be dealt with only once.

The words "in any legal proceeding" relate to the application of this Act. If the enacting jurisdiction places the Act in a general evidence statute, then the application of that statute will govern, and the bracketed phrase can be omitted, here and in subsequent sections.

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[96] Ontario Rules of Civil Procedure , R.R.O. 1990, Reg. 194 Section 51. Available at http://www.canlii.org/on/laws/regu/1990r.194/20041104/part1.html

[97] Uniform Law Conference of Canada, Uniform Electronic Evidence Act, September 1998. Available at http://www.law.ualberta.ca/alri/ulc/current/eeeact.htm

PROPOSALS FOR A UNIFORM ELECTRONIC EVIDENCE ACT

APPENDIX N to the Proceedings of the Uniform Law Conference of Canada

Authentication[98]

[107] Many lawyers are unclear on the meaning of "authentication" and how it relates to the "admissibility" of documentary evidence. A good explanation is found in Rule 901(a) of the U.S. Federal Rules of Evidence, which describes authentication in the following manner: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In other words, "authentication" is to the admissibility of documentary evidence what "identification" is to the admissibility of an exhibit. Some documents --usually documents under the seal or signature of a public official -- are self-authenticating, but normally the common law requires that the proponent have the document identified by a witness who is acquainted with it. Where the document is a copy, the court must be satisfied that it is an authentic copy of the original. Statutory provisions may also impose conditions that must be met before a document can be treated as authentic: see, for example, s. 29(2) of the Canada Evidence Act with respect to the reception of a copy of an entry in the records of a financial institution (*See supra at fn. 1.)* and s. 30(3) with respect to the reception of a copy of a business record (*Supra, fn. 8.)*.

[108] As Rule 901(a) of the U.S. Federal Rules of Evidence states, satisfying the court of the authenticity of a document is a condition precedent of admissibility, but it does not guarantee that court will find the document to be admissible in evidence: for example, the court may find that the document is an authentic copy of the original, but it will be excluded under the Best Evidence Rule if the original is subsequently produced and authenticated; or an authentic original document will be ruled inadmissible if it is being tendered to prove the truth of its contents and it does not fall within one of the exceptions to the Hearsay Rule.

[109] There are no statutory rules relating specifically to the authentication of a computer printout, so, as with documents in other forms, it is necessary for the proponent to establish that it is what he claims it to be. However, given the technical complexity of the computer, the possibility (remote though it may be) of system failure, and the potential for alteration of the text due to human interference (caused either deliberately or negligently), this may not be easy. The clearest judicial statement to that effect is found in *R. v McMullen* (referred to above), dealing with whether a computer printout was a

[98] John D. Gregory, Ministry of the Attorney General of Ontario, and Ed Tollefson, Q.C. for the Department of Justice, Appendix N to Proceedings of The Uniform Law Conference of Canada (*Proposals for a Uniform Electronic Evidence Act*, 1995 “Authentication.”) Available at http://www.law.ualberta.ca/alri/ulc/95pro/e95n.htm

copy for the purposes of s. 29(2) of the Canada Evidence Act, where Morden J.A. (for the court) said:

> The nature and quality of the evidence put before the Court has to reflect the facts of the complete record-keeping process -- in the case of computer records, the procedures and processes relating to the input of entries, storage of information and its retrieval and presentation . . . If such evidence be beyond the ken of the manager, accountant or the officer responsible for the records . . . then a failure to comply with s. 29(2) [of the Canada Evidence Act] must result and the print-out evidence would be inadmissible.

[110] However, this investigative approach was not repeated in the judgment of the same court in R. v Bell and Bruce (*Supra, fn. 3.*), where, shortly after stating that in order to qualify as a bank record a document "must have been produced for the bank's purposes as a reference source, or as part of its internal audit system and, at the relevant time must be kept for that purpose", Weatherston J.A. (for the Court) said that "[t]he authenticity of the record as evidence is sufficiently guaranteed by compliance with s-s.(2) of s. 29." (*Supra, fn. 4.*)

[111] Section 29 only applies to financial institutions, which are required by the nature of their business to balance their books at the end of each day and are subject to regular and stringent audits. Moreover, their computer security systems are presumably such that they are not readily accessible by unauthorized persons. In such circumstances, where a bank manager or accountant swears under s. 29(2) that the entry in question was made in one of the ordinary books or records of the bank, that the book or record is in the custody or control of the bank and that the copy adduced is a true copy of the entry, a court (as in R. v Bell and Bruce) might reasonably assume that it is a true copy, leaving it to the opponent of the evidence to produce evidence and arguments to challenge its weight.

[112] But the sense of confidence we may have with respect to the record-keeping of financial institutions is not readily transferable to every business, for the term "business", as defined in the business records section (s. 30(12)), covers everything from the largest multi-national corporation to a one-person business or a volunteer agency. Yet, while the authentication requirements of s. 30(3) for copies of business records are almost as stringent as those in s. 29(2) for copies of financial records, the only authentication requirements imposed by s. 30(1) with respect to the admissibility of the record itself are that what is produced is the record (not a copy) and that it was "made in the usual and ordinary course of business". The assumption upon which this provision is based is that a business, as a matter of self-interest, will maintain accurate and truthful records.

[113] Perhaps in recognition that many businesses are distinctly "unbusinesslike" in the conduct of their affairs and the control of access to their records, s. 30(6) give the court fairly broad investigatory powers, which it appears to be able to exercise on request or ex proprio motu:

> (6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information

contained in any record admitted into evidence under this section, the court may on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

[114] The opening words of s. 30(6) are usually interpreted as being a roundabout way of saying that the court may inquire into either the admissibility or the probative value of a record produced. The court also has powers which it may exercise under s. 30(9):

(9) Subject to section 4, [which deals with the competence and compellability of the accused and spouse as witnesses] any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with the leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

[115] In addition to the powers expressly given to the court under ss. 30(6) and 30(9), Barry J. in R. v Sheppard excluded a computer printout even though it was found to have been made in the usual and ordinary course of business, because he found that the Crown had failed to prove that the record was reliable. Barry J. said: "In my view the authorities hold that s. 30(1) carries the necessary implication that such a record will be admitted when the judge has examined it and exercised his discretion to accept it as being an authentic record of its contents made in the ordinary course of the company's business."

[116] Therefore, there is authority for the judge to permit or require proof of details of circumstances relating to the operation of the record-keeping system, which in the context of a computerized system could involve proof of "the procedures and processes relating to the input of entries, storage or information and its retrieval and presentation" as suggested by the Ontario Court of Appeal in R. v McMullen.

[117] Critics of s. 30, many of whom are involved in records management, say that its present provisions do not give enough guidance regarding what the court will be looking for in determining the admissibility of a computer-produced record. As a result, litigants do not know how to prepare for trial, and businesses do not know what steps to take in their record-keeping in order to assure that their documents will be found admissible. If it is left to the courts it may take years to arrive at a satisfactory solution that would apply across the country. Kenneth Chasse, a lawyer with expertise in the law relating to computers, maintains that another reason that s. 30 requires change as far as computer-produced evidence is concerned is that computer-stored records are subject to risks of destruction or alteration that no other form of stored information is. The risks are in the form of system failures, software problems and the danger of unauthorized access to the file through other terminals in the network or by hackers who may be hundreds of miles away. Moreover, in the case of a text stored on a computer it is extremely difficult and costly to identify alterations as being improper, for the computer leaves few traces that the text was interfered with. Chasse feels that it is unfair to put the party opposing the admissibility of computer-produced evidence to the high cost of conducting an

investigation of someone else's computer system. Instead, the proponent of such evidence should be obliged to establish a higher threshold of reliability before the evidence is found to be authentic and admitted. In a paper presented to the Uniform Law Conference at its annual meeting in 1994, Chasse suggests that the problems regarding the reliability of computer-produced records might be resolved by amending the Canada Evidence Act (and the provincial Evidence Acts) to include special requirements for the admissibility of computer printouts as a business record under s. 30, such as proof that the record was made contemporaneously with the event recorded and was made as part of a routine of the business by someone with no motive to misrepresent. Alternatively, he suggests an amendment that would require the judges, in determining the admissibility and weight of records produced by a computer, to go through a checklist of questions such as the following:

-- What are the sources of data and information recorded in the databases upon which the record is based?

-- Was the data and information in those databases recorded within a reasonable time after the events to which the data and information relates?

-- Was the data and information upon which the record is based of a type that is regularly supplied to the computer during the regular activities of the organization?

-- Were the entries into the databases made in the regular course of business?

-- Did the business rely on those databases in making business decisions at or about the time the record was made?

-- Did the computer programs used to produce the output, accurately process the data and information in the databases involved?

-- Did the security features used provide a guarantee of the integrity of the record?

[118] He suggests that a supervising officer of any well-run information or record-keeping facility would be the only witness required to answer these questions, except in cases where a unique software was being used and the supervisor cannot testify to its history of reliability.

[119] Those who oppose the introduction of special requirements with respect to computer-produced evidence argue that the fact that a record was made in the usual and ordinary course of business shows that the business was prepared to rely on it in making business decisions, and this should be enough to satisfy the admissibility threshold for any form of business record. They point out that s. 30 already contains extensive means for challenging both the admissibility and weight of computer-produced records tendered in evidence. They warn that in a large business it might be very difficult, time-consuming and costly to answer some of the questions in Mr. Chasse's checklist, and might require calling several witnesses.

[120] While the two sides do not agree on the appropriate solution, there is a measure of agreement on the problems with the current law. First, there is a great deal of uncertainty about how the law, particularly s. 30(6), will be applied, and this makes it difficult for the parties to prepare for litigation and for businesses to know how they should keep their records. Second, there are risks to the integrity of records kept on a computer that do not exist with respect to other forms of information processing and storage, and if alterations are made, either negligently or deliberately, they can be extremely difficult to detect. Third, s. 30(1) provides little assurance that the record produced to the court is the same as the one that was originally made in the usual and ordinary course of business, for while self-interest may be an adequate guarantee that most businesses will maintain accurate and truthf ul records, it is not true for many others. The second and third problems combined place the party opposing the introduction of computer-produced business records in a difficult situation."

CANADA EVIDENCE ACT: Part I §§ 19-31.6 (Documentary Evidence)[99]

Copies by Queen's Printer

19. Every copy of any Act of Parliament, public or private, published by the Queen's Printer, is evidence of that Act and of its contents, and every copy purporting to be published by the Queen's Printer shall be deemed to be so published, unless the contrary is shown.

R.S., 1985, c. C-5, s. 19; 2000, c. 5, s. 52.

Imperial proclamations, etc.

20. Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations or other Imperial official records, Acts or documents may be proved

(a) in the same manner as they may from time to time be provable in any court in England;

(b) by the production of a copy of the Canada Gazette, or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or

(c) by the production of a copy of them purporting to be published by the Queen's Printer.

R.S., 1985, c. C-5, s. 20; 2000, c. 5, s. 53.

[99] Canada Evidence Act, Part I §§ 19- 31.6

Proclamations, etc., of Governor General

21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways:

(a) by the production of a copy of the Canada Gazette, or a volume of the Acts of Parliament purporting to contain a copy of the treaty, proclamation, order, regulation or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be published by the Queen's Printer;

(c) by the production of a copy of the treaty purporting to be published by the Queen's Printer;

(d) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and

(e) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

R.S., 1985, c. C-5, s. 21; 2000, c. 5, s. 54.

Proclamations, etc., of lieutenant governor

22. (1) Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the following ways:

(a) by the production of a copy of the official gazette for the province purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment purporting to be published by the government or Queen's Printer for the province; and

(c) by the production of a copy or extract of the proclamation, order, regulation or appointment purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, by the head of any department of the government of a province, or by his deputy or acting deputy, as the case may be.

In the case of the territories

(2) Evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to September 1, 1905, or by the Commissioner in Council of the Northwest Territories or the Legislature of Yukon or the Legislature for Nunavut, may be given by the production of a copy of the Canada Gazette purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice of it.

R.S., 1985, c. C-5, s. 22; 1993, c. 28, s. 78; 2000, c. 5, s. 55; 2002, c. 7, s. 96.

Evidence of judicial proceedings, etc.

23. (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or of any other foreign country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever.

Certificate where court has no seal

(2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

R.S., 1985, c. C-5, s. 23; R.S., 1985, c. 27 (1st Supp.), s. 203; 1993, c. 34, s. 15; 1997, c. 18, s. 117; 2002, c. 8, s. 118.

Certified copies

24. In every case in which the original record could be admitted in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

R.S., c. E-10, s. 24.

Books and documents

25. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

R.S., c. E-10, s. 25.

Books kept in offices under Government of Canada

26. (1) A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch of the public service of Canada, shall be admitted as evidence of that entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the office or department, commission, board or other branch of the public service of Canada that the book was, at the time of the making of the entry, one of the ordinary books kept in the office, department, commission, board or other branch of the public service of Canada, that the entry was made in the usual and ordinary course of business of the office, department, commission, board or other branch of the public service of Canada and that the copy is a true copy thereof.

Proof of non-issue of licence or document

(2) Where by any Act of Parliament or regulation made thereunder provision is made for the issue by a department, commission, board or other branch of the public service of Canada of a licence requisite to the doing or having of any act or thing or for the

issue of any other document, an affidavit of an officer of the department, commission, board or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, setting out that he has charge of the appropriate records and that after careful examination and search of those records he has been unable to find in any given case that any such licence or other document has been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that in that case no licence or other document has been issued.

Proof of mailing departmental matter

(3) Where by any Act of Parliament or regulation made thereunder provision is made for sending by mail any request for information, notice or demand by a department or other branch of the public service of Canada an affidavit of an officer of the department or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, setting out that he has charge of the appropriate records, that he has a knowledge of the facts in the particular case, that the request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating that address) and that he identifies as exhibits attached to the affidavit the post office certificate of registration of the letter and a true copy of the request, notice or demand, shall, on production and proof of the post office receipt for the delivery of the registered letter to the addressee, be admitted in evidence as proof, in the absence of evidence to the contrary, of the sending and of the request, notice or demand.

Proof of official character

(4) Where proof is offered by affidavit pursuant to this section, it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit.

R.S., c. E-10, s. 26.

Notarial acts in Quebec

27. Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be admitted in evidence in the place and stead of the original and has the same force and effect as the original would have if produced and proved, but it may be proved in rebuttal that there is no original, that the copy is not a true copy of the original in some material particular or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or registered by a notary in that Province.

R.S., c. E-10, s. 27.

Notice of production of book or document

28. (1) No copy of any book or other document shall be admitted in evidence, under the authority of section 23, 24, 25, 26 or 27, on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

Not less than 7 days

(2) The reasonableness of the notice referred to in subsection (1) shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days.

R.S., c. E-10, s. 28.

Copies of entries

29. (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

Admission in evidence

(2) A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

Cheques, proof of "no account"

(3) Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not that person has an account with the financial institution or branch and that he has been unable to find such an account, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that that person has no account in the financial institution or branch.

Proof of official character

(4) Where evidence is offered by affidavit pursuant to this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Compulsion of production or appearance

(5) A financial institution or officer of a financial institution is not in any legal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special cause.

Order to inspect and copy

(6) On the application of any party to a legal proceeding, the court may order that that party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding, and the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

Warrants to search

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything in it shall, with respect to the books or records of the institution, be construed as limited to the searching of those premises for the purpose of inspecting and taking copies of entries in those books or records, and section 490 of the Criminal Code does not apply in respect of the copies of those books or records obtained under a warrant referred to in this section.

Computation of time

(8) Holidays shall be excluded from the computation of time under this section.

Definitions

(9) In this section,

"court" «tribunal»

"court" means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

"financial institution" « institution financière »

"financial institution" means the Bank of Canada, the Business Development Bank of Canada and any institution that accepts in Canada deposits of money from its members or the public, and includes a branch, agency or office of any of those Banks or institutions;

"legal proceeding" «procédure judiciaire»

"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.

R.S., 1985, c. C-5, s. 29; 1994, c. 44, s. 90; 1995, c. 28, s. 47; 1999, c. 28, s. 149.

Business records to be admitted in evidence

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to

each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

Construction of this section

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Definitions

(12) In this section,

"business" «affaires»

"business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

"copy" and "photographic film" «copie» et «pellicule photographique»

"copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

"court" «tribunal»

"court" means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

"legal proceeding" «procédure judiciaire»

"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

"record" «pièce»

"record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

R.S., 1985, c. C-5, s. 30; 1994, c. 44, s. 91.

Definitions

31. (1) In this section,

"corporation" « personne morale »

"corporation" means any bank, including the Bank of Canada and the Business Development Bank of Canada, any authorized foreign bank within the meaning of section 2 of the Bank Act and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company;

"government" «gouvernement»

"government" means the government of Canada or of any province and includes any department, commission, board or branch of any such government;

"photographic film" «pellicule photographique»

"photographic film" includes any photographic plate, microphotographic film and photostatic negative.

When print admissible in evidence

(2) A print, whether enlarged or not, from any photographic film of

(a) an entry in any book or record kept by any government or corporation and destroyed, lost or delivered to a customer after the film was taken,

(b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost or delivered to a customer after the film was taken, or

(c) any record, document, plan, book or paper belonging to or deposited with any government or corporation,

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been admitted on proof that

(d) while the book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and

(e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.

Evidence of compliance with conditions

(3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of the destruction, loss or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

Proof by notarial copy

(4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit.

R.S., 1985, c. C-5, s. 31; 1992, c. 1, s. 142; 1995, c. 28, s. 47; 1999, c. 28, s. 150.

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

2000, c. 5, s. 56.

Application of best evidence rule -- electronic documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 31.4 applies.

Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

2000, c. 5, s. 56.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

2000, c. 5, s. 56.

Presumptions regarding secure electronic signatures

31.4 The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting

(a) the association of secure electronic signatures with persons; and

(b) the integrity of information contained in electronic documents signed with secure electronic signatures.

2000, c. 5, s. 56.

Standards may be considered

31.5 For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

2000, c. 5, s. 56.

Proof by affidavit

31.6 (1) The matters referred to in subsection 31.2(2) and sections 31.3 and 31.5 and in regulations made under section 31.4 may be established by affidavit.

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in subsection (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

2000, c. 5, s. 56.

Application

31.7 Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

2000, c. 5, s. 56.

VII. EVIDENCE—DOCUMENTS [100]

1. INTRODUCTION

§ 528 When a party offers a document into evidence, its authenticity must also be shown. If the document is offered to prove its contents, the best evidence rule requires production of the original. The requirements of authentication and the best evidence rule are discussed in the Part.

§ 529 A party must offer some evidence of the authenticity of a document before it becomes admissible as an exhibit.[101] In the absence of evidence that the document is genuine, it is inadmissible and the court cannot refer to it in judging the case.[102] When a party first presents a document to the court, the judge may order that it be marked for identification, but this is often an unnecessary formality and may be omitted.[103] After adducing some evidence of authenticity, the party tendering the document asks that it be marked and entered as an exhibit, at shich point it becomes evidence in the case.[104] The use to which the trier of fact may put the document depends on such rules of admissibility as the hearsay and opinion evidence rules.

[100] *Canadian Encyclopedic Digest (Western)* Third ed., s.v. "Evidence."
[101] *R. v Petersen* (1983), 45 N.B.R. (2d) 271 at 282-85, 294-96.
[102] *R. v Rahkola*, [1979] 5 W.W.R. 464 at 466 (B.C.C.A.)
[103] *R. v Knittel*, [1983] 3 W.W.R. 42 at 46-47 (Sask. C.A.)
[104] *R. v Knittel*, ante

§ 530 If a party tenders a document which is inadmissible because of the absence of authentication, the judge should grant an adjournment and allow a further opportunity to prove the document rather than dismiss the case for lack of evidence.[105]

§ 531 Evidence of authenticity or genuineness takes various direct and circumstantial forms. Direct evidence of authentication may consist of the identification of the document by the writer, a signatory, or an eye-witness to the writing or signing.[106] Circumstantial evidence of authentication may involve handwriting or typewriting identification by a witness who did not see the making or signing of the actual document but who can identify the writing. An expert witness on the identification of handwriting or typewriting is known as an examiner of questioned documents. A non-expert witness who is sufficiently acquainted with the alleged author's handwriting as a result of seeing it on other occasions is qualified to testify that the document in issue is also in the alleged author's handwriting.[107] Comparison of hands is another form of circumstantial authentication. The Evidence Acts provide that a comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine will be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting such writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writings in dispute.[108] Finally, the reply letter doctrine is another method of circumstantial authentication whereby a witness testifies that he received the disputed letter through the mail, and it was in response to an earlier letter which he had mailed to the alleged author.[109]

§ 531.1 The doctrine of "documents in possession" is another circumstantial form of authenticating documents; it is based on proof that a party to litigation had possession of the document. In the case of an individual, possession of a document is evidence of knowledge of its contents; but knowledge of a document's existence by a proper officer or employee is also required before knowledge is imputed to a corporation.[110]

(b) Authentication not required

§ 532 When the authenticity of a document is presumed, further proof of it is unnecessary, in the absence of evidence to the contrary. The authenticity of ancient documents is presumed. At common law there is uncertainty about the period

[105] *First Nat. Bank of Boston v Christy Crops Ltd*. (1981), 47 N.S.R. (2d) 224 at 226-27 (T.D.)

[106] *First Nat. Bank of Boston v Christy Crops Ltd*., ante
[107] *First Nat. Bank of Boston v Christy Crops Ltd*., ante
[108] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s.8; *Alberta Evidence Act* R.S.A. 1980, c. A-21, s. 59; *Evidence Act, R.S.B.C.* 1979, c. 116, s. 51; *Manitoba Evidence Act*, R.S.M. 1987, c. E150 (also C.C.S.M., c. E150), s. 56; *Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16, s. 47; *Evidence Act R.S.O*. 1990, c. E.23, s. 57, Evidence.
[109] *Stevenson v Dandy*, [1920] 2 W.W.R. 643 (Atla. C.A.)
[110] *Dassen Gold Resources Ltd. V Royal Bank* (1993), 12 C.P.C. (3d) 141 (Atla. Q.B.)

required to qualify a document as an ancient document; in most jurisdictions it is thirty years, but in some jurisdictions the court or the legislature has reduced it to twenty years. The presumption applies to a wide range of documents.[111] Thus, an ancient document is one produced from proper custody,[112] or otherwise free from suspicion, over twenty or thirty years old depending on the jurisdiction.

§ 533 If the party against whom the document is tendered admits its authenticity, further evidence is unnecessary to prove it.[113] In a civil proceeding, rules of court provide for the formal admission of authenticity. The rules generally provide the a party may serve the other party with a notice or request to admit a document's authenticity for the purpose of the proceeding. If the party does not respond or does not specifically deny the authenticity of the document, it is deemed to have been admitted. In some cases, in the absence of specific denial a party is deemed to admit the authenticity of documents listed in an affidavit of documents.[114]

§ 534 Evidence of authenticity is unnecessary if the party against whom the document is tendered claims an interest under it[115] or is stopped from denying its authenticity.[116]

(c) Authentication of specific documents

§ 535 Common law and statutory provisions may dispense with, or facilitate proof of authenticity. The Evidence Acts and many other federal and provincial statues substitute a certificate or affidavit of a public official or other appropriate person for viva voce evidence of authenticity.[117] Common law rules of evidence and statutory provisions dispense with proof of genuineness of official seals, signatures, and publications,[118] and there are various common law and statutory presumptions of authenticity.

§ 536 In a proceeding having an international element, such as an extradition proceeding, a treaty between Canada and another country may facilitate the authentication of documents.

(d) Attested documents

§ 537 To authenticate an attested document, the common law required the party to call one attesting witness, unless the attendance of an attesting witness could not be obtained.[119] The common law rule has largely been swept away. If a

[111] *Doe d. Maclem v Turnbull* (1848), 5 U.C.Q.B. 129 at 131 (C.A.)
[112] *Tobias v Nolan*, ante 100
[113] *Lowe v Jenkinson* (1995), 5 B.C.L.R. (3d) 195 (S.C.)
[114] See *Alberta Rules of Court*, R.R. 190(1), 230(2).
[115] *Chisholm v Sheldon* (1851), 2 Gr. 178
[116] *Perry v Lawless* (1849), 5 U.S.Q.B. 514 (C.A.)
[117] *R. v John & Murray Motors Ltd*., [1979] 4 W.W.R. 364 (B.C.C.A.)
[118] *R. v Bear* (1981), 35 N.B.R. (2d) 181 at 182 (Q.B.)
[119] *Clark v Stevenson* (1864), 23 U.C.Q.B. 525 (C.A.)

document is not required by law to be attested, the Evidence Acts provide that it is not necessary to prove its authenticity by the attesting witness,[120] and the document may be authenticated as if there were no such witness.[121]

§ 538 In some jurisdictions, legislation dispenses with the need for an attesting witness to authenticate a document required by law to be attested.[122]

§ 539 Special rules govern the proof of a will or codicil. A will or codicil containing a proper attestation clause may not need an affidavit of a subscribing witness.[123] If no attesting witness is available to testify in person, evidence of the genuineness of an attesting witness's signature may be sufficient.[124] The unavailability of an attesting witness is justifiable for many reasons such as death, illness, or infirmity. A 30-year old will or codicil which satisfies the other requirements of an ancient document is presumed authentic in the absence of contrary evidence.[125]

[120] *Canada Evidence Act*, s. 34(1)
[121] *Canada Evidence Act*, s. 34(2)
[122] *Yukon Evidence Act*, s. 55; Northwest Territories Evidence Act, s. 63
[123] *Re Gardner*, [1935], 1 D.L.R. 308 (C.A.)
[124] *Madill v McConnell* (1908), 16 O.L.R. 314 at 320, 322-23
[125] *Doe d. Oldnall v Deakin* (1828), 172 E.R. 474

Bibliography

American Jurisprudence 2d (American Jurisprudence: A Modern Comprehensive Text Statement of American Law, State and Federal). St. Paul, MN: West Group, 1962-

Dukelow, Daphne A. *The Dictionary of Canadian Law,* 2nd ed. Scarborough, Ont.: Thomson Carswell, 2004.

Garner, Bryan A., editor in chief. *Black's Law Dictionary,* 8th ed. St. Paul, MN: Thomson/West, 2004.

Gregory, John D., and Ed Tollefson. Appendix N to Proceedings of The Uniform Law Conference of Canada (*Proposals for a Uniform Electronic Evidence Act*, 1995 "Authentication.") Available at http://www.law.ualberta.ca/alri/ulc/95pro/e95n.htm.

Kerr, Orin S. "Computer Records and the Federal Rules of Evidence" in U.S. Department of Justice Executive Office for United States Attorneys *United States Attorneys' USA Bulletin.* Vol. 49, No.2 (*March 2001).* Available at www.usdoj.gov/criminal/cybercrime/usamarch2001_4.htm.

Mullan, David J. *Canadian Encyclopedic Digest (Western)* [*Administrative Law*] Third ed. Calgary, Alta.: Carswell, 1996.

Strong, John W. et al. *McCormick on Evidence* 5th ed. St. Paul, MN: West Group, 1999.

University of Rhode Island Department of Computer Sciences and Statistics, URI's HPR108B: Computer Forensics Fall 2003 "Authentication of Computer Evidence" Excerpted from *Guidance Software Legal Journal 2003*. Available *http://homepage.cs.uri.edu/courses/hpr108b/readings/case_tank.htm*

Words and Phrases, Permanent ed. St. Paul, MN: West, 1940-

Legislation

Advisory Committee on Federal Rules of Evidence, Notes to Rule 901 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available from http://www.law.cornell.edu/rules/fre/ACRule901.htm LII, Cornell University.

_____, Notes to Rule 902 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available at http://www.law.cornell.edu/rules/fre/ACRule902.htm.

_____, Notes to Rule 903 in *Federal Rules of Evidence Notes of Advisory Committee on Rules*. Available at http://www.law.cornell.edu/rules/fre/ACRule903.htm.

Alberta Evidence Act R.S.A. 1980, c. A-21, s. 59.

Alberta Rules of Court, R.R. 190(1), 230(2).

California Evid. Code §§ 1410-1421. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1410-1421.html.

California Evid. Code § 1532. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1530-1532.html.

California Evid. Code § 1600. Available at http://caselaw.lp.findlaw.com/cacodes/evid/1600-1605.html.

Canada Evidence Act, R.S.C. 1985, c. C-5, s.8.

Canada Evidence Act, s. 34(1).

Canada Evidence Act, s. 34(2).

Evidence Act, R.S.B.C. 1979, c. 116, s. 51.

Evidence Act R.S.O. 1990, c. E.23, s. 57, Evidence.

Fed. R. Civ. Proc. r. 44. Available at http://www.wvnb.uscourts.gov/frcp.htm#rule44.

Fed. R. Evid. rules 802-803. Available at http://expertpages.com/federal/a8.htm

Fed. R. Evid. rules 901-903. Available at http://www.law.cornell.edu/rules/fre/rules.htm#Rule8036.

Manitoba Evidence Act, R.S.M. 1987, c. E150.

Ontario, Rules of Civil Procedure, r. 51.01 (a), (b), (c).

Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194 Section 51. Available at http://www.canlii.org/on/laws/regu/1990r.194/20041104/part1.html

Saskatchewan Evidence Act, R.S.S. 1978, c. S-16, s. 47.

U.C.C. §1-201 (b)(19).

Uniform Law Conference of Canada, Uniform Electronic Evidence Act. (September 1998) Available at http://www.law.ualberta.ca/alri/ulc/current/eeeact.htm.

Yukon Evidence Act, s. 55.

Cases

Agnew v State, 51 MD App 614, 446 A2d 425.

Alexander Dawson, Inc. v NLRB (CA9) 586 F2 1300, 99 BNA LRRM 3105, 85 CCH LC.

Arthur v Doyle, 141 Ill. App. 432.

Ayres v Wm. Deering & Co., 90 P. 794, 795, 76 Kan. 149.

Brandon v Collins, 267 F.2d 731 (2d Cir. 1959).

Brynjolfson v Northwestern Elevator Co., 6 ND 450, 71 NW 555.

Capital Marine Supply v M/V Roland Thomas II, 719 F.2d 104, 106 (5th Cir. 1983).

Casto v Martin, 230 S.E. 2nd 722, 159 W. Va. 761 (1976).

Chisholm v Sheldon (1851), 2 Gr. 178.

City of Pawhuska v Crutchfield, 147 Okl. 4. 293 P. 1095 (1930).

Clark v Stevenson (1864), 23 U.C.Q.B. 525 (C.A.).

Clearfield Trust Co. v United States, 318 U.S. 363 (1943).

Collette v Hanson, 174 A. 466, 467, 133 Me. 146.

Commercial Union Ins. Co., 230 A.2d 498, 49 N.J. 389, appeal after remand 253 A.2d 469. 54 N.J. 76.

Concannon v Hampton, 584 P.2d 218, 1978 OK 117 (OK. 1978).

Contra, Keegan v Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954).

Curtiss Candy Co. v Johnson, 163 Miss. 426, 141 So. 762 (1932).

Damon v Hammonds, 84 S.W. 796, 73 Ark. 608.

Dassen Gold Resources Ltd. V Royal Bank 12 C.P.C. (3d) 141 (Atla. Q.B 1993).

Desimone v United States, 227 F.2d 864 (9th Cir. 1955).

Doe d. Maclem v Turnbull 5 U.C.Q.B. 129 at 131 (C.A. 1848).

Doe d. Oldnall v Deakin, 172 E.R. 474 (1828).

Downing v Brown, 3 Colo. 571, 590.

Doyle v Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928).

Eberhardt v Eberhardt, 672 N.W.2d 659, 2003 ND 199.

Eichelberger v Sifford, 27 MD 320.

Erie Railroad Co. v Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Estate of Alfaro, 234 Ill.Dec. 795, 703 N.E.2d 620, 301 Ill.App3d 500 App. 2 Dist. (1998).

Evans v Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929).

Exchange v Velji, 118 Cal.Rptr. 596, 77 Cal.App.3d 310.

Farm Credit Bank v Huether (ND) 454 NW2d 710.

First Nat. Bank of Boston v Christy Crops Ltd.,47 N.S.R. (2d) 224 at 226-27 (T.D. 1981).

In re Fowler, 4 F. 303, 310.

Re Gardner, 1 D.L.R. 308 (C.A.) [1935].

Globe Automatic Sprinkler Co. v Braniff, 89 Okl. 105, 214 P. 127 (1923).

Gorman v Hunt, 19 S.W.3d 662 (Ky. 2000).

Hartley v Ferrell, 9 Fla. 374, 380.

Haury & Smith Realty Co. v Piccadilly Partners I, (Tenn App) 802 SW 2d 612.

Hogland v Sebring, 4 NJL 105.

International & G.N.R. Co. v McRae, 82 Tex 614, 18 SW 672.

Johnson v Ferguson, Tex.Civ.App., 55 S.W.2d 153, 159.

Louis Vuitton S.A. v Spencer Handbags Corp (CA2 NY) 765 F2d 966.

Lovejoy v Franklin (Ala App) 426 So 2d 841).

Lowe v Jenkinson , 5 B.C.L.R. (3d) 195 (S.C. 1995).

Luper v Werts, 23 P. 850, 855, 19 Or. 122.

Madill v McConnell,16 O.L.R. 314 at 320, 322-23 (1908).

Magnuson v State, 187 Wis. 122, 203 N.W. 749 (1925).

Matter of G.F.D., 874 S.W. 2d 729.

Matton v Hoover Co., 350 Mo. 506, 166 S.W.2d 557 (1942).

Mayfield v Prosser, 32 N.E. 1129, 133 Ind. 699.

Mayfield v Sears, 32 N.E. 816, 133 Ind. 86.

McAlpin v Lee, 57 Ga 28.

McGuire v State, 200 Md. 601, 92 A.2d 582 (1952).

McQueeney v Wilmington Trust Co. (CA3 PA) 779 F2d 916, 1986 AMC 969.

Mee v Benedict, 98 Mich 260, 57 NW 175.

Merrick v United States Rubber Co., 7 Ariz.App. 433, 440 P.2d 314 (1968).

Murphy v Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933).

New Era Milling Co. v Thompson, 230 P. 486, 487, 107 Okl. 114.

Nolan v Labatat, 41 So. 713, 117 La. 463 (La. 1906).

Olmeca, S.A. v Manufacturers Hanover Trust Co., 639 F. Supp. 1142.

Ordway v Conroe, 4 Wis. 45, 50.

Orr v Bank of America, NT & SA, 285F.3d 764.

Owens v Com., 391 S.E.2d 605, 10 Va.App. 309 (1990).

People v Adamson, 118 Cal App 2d 714, 258 P2d 1020.

People v More (Colo App) 668 P2d 968.

People v Nichols, 378 Ill. 487, 38 N.E.2d 766 (1942).

Perry v Lawless , 5 U.S.Q.B. 514 (C.A. 1849).

Pittsburgh, Ft. W. & C. Ry. v Callaghan, 157 Ill. 406, 41 N.E. 909 (1895).

Planters' & Merchants' Bank v Willis & Co., 5 Ala 770.

Pratt v Phelps, 23 Cal App 755, 139 P 906.

Pressley v State, 207 Ga 274, 61 Se2d 113.

R. v Bear, 35 N.B.R. (2d) 181 at 182 (Q.B. 1981).

R. v John & Murray Motors Ltd., 4 W.W.R. 364 (B.C.C.A.) [1979].

R. v Knittel, 3 W.W.R. 42 at 46-47 (Sask. C.A. 1983).

R. v Petersen, 45 N.B.R. (2d) 271 at 282-85, 294-96 (1983).

R. v Rahkola, 5 W.W.R. 464 at 466 (B.C.C.A.) [1979].

Rice v James Hanrahan & Sons, 20 Mass App 701, 482 NE2d 833.

Richardson v State, 89 P. 1027, 1034, 15 Wyo. 465, 12 Ann.Cas. 1048.

Robertson v Burstein, 105 NJL 375, 146 A 355, 65 ALR 324.

Sanborn v Cole, 63 Vt 590, 22 A 716.

Second National Bank of Robinson v Jones, 33 N.E.2d 732, 735, 309 Ill.App. 358.

Stamper v Griffin, 20 Ga 312.

State ex rel. Corbin v Goodrich (app) 151 Ariz 118, 726 P2d 215.

State ex rel. Human Services Dept. v Coleman (App) 104 NM 500, 732 P2d 971.

State ex rel. Sullivan v Price, 63 P.2d 653, 654, 49 Ariz. 19, 108 A.L.R. 1156.

State v Emery, 141 Ariz 549, 688 P2d 175.

State v Foret, 200 So. 1, 4, 196 La. 675.

State v Haimowicz, 17 A.8d 472, 473, 125 N. J.L. 526.

State v McGee, 336 Mo. 1082, 83 S.W.2d 98 (1935).

State v Wallace, 484 N.W. 2d 477, 240 Neb. 865 (1992).

State v Wolfley, 75 Kan. 406, 89 P. 1046 (1907).

State v Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968).

State v Worsham, Mo., 416 S.W.2d 940, 943.

Stevenson v Dandy, 2 W.W.R. 643 (Atla. C.A.) [1920].

Tobias v Nolan, ante 100.

Trainum v State, 167 So. 801, 27 Ala.App. 166.

Transport Indemnity Co. v Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

U.S. v Briscoe, 896 F.2d 1476, 1494 (7th Cir. 1990).

U.S. v Brown (CA7 Wis) 688 F2d 1112, 11 Fed Rules Evid Serv 708.

U.S. v Catabran, 836 F.2d 453, 457 (9th Cir. 1988).

U.S. v Chong, 8 M.J. 592 ACMR 1979. MCM 1969, par. 144, subd. c.

U.S. v De Gudino (CA7 Ill).

U.S. v Eisenberg (CA8 Minn) 807 F2d 1446.

U.S. v Mazyak (CA5 FLA) 650 F2d 788, 8 Fed. R. Evid. Serv. 1288, cert den 455 US 922.

U.S. v Moore, 923 F.2d 910, 914 (1st Cir. 1991).

U.S. v White, 444 F.2d 1274, certiorari denied 92 S.Ct. 300, 404 U.S. 949, 30 L.Ed.2d. 266 C.A.5 (LA1971).

U.S. v Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966).

Vouras v State (Del Sup) 452 A2d 1165.

Wausau Sulphate Fibre Co. v Commissioner of Internal Revenue, 61 F.2d 879 (7th Cir. 1932).

Weiner v Mager & Throne, Inc., 167 Misc 338, 3 N.Y.S.2d 918 (1938).

Williams v Walker-Thomas-Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965).

Wilson v State, 677, S.W.2d 518 (Tex.Crim.App. 1984).

Woods v Jastreminski, 11 So.2d 4, 8, 201 La. 1092.

Zurich General Acc. & Liability Ins. Co. v Baum, 159 Va. 404, 165 S.E. 518 (1932).