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AUTHENTICATION, IDENTIFICATION, AND THE BEST EVIDENCE RULE

The branch of evidence law dealing with authentication, identification, and best evidence is encountered in almost every trial, often when an unsuspecting practitioner is met with a relevancy objection to his proffered evidence. As recently enacted, Articles IX and X of the Federal Rules of Evidence preserve the most desirable common law rules of evidence law relating to authentication, identification and best evidence, expanding them where necessary to update and simplify the law. This comment will examine Articles IX and X of the Federal Rules, giving special consideration to the changes from traditional evidence law and to the differences in comparable Louisiana law.

The Federal Rules treat both authentication and identification of evidence in a single rule;¹ however, in explicitly separating the two concepts the Rules are superior to prior codifications,² which referred only to authentication as the condition precedent to admission of documents and thus merged the separate concept of identification with that of authentication.³ Although the terms have at times been used indiscriminately,⁴ authentication has traditionally referred

1. FED. R. EVID. 901(a) (1975): "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."

2. MODEL CODE OF EVID. rule 601(a)(1942): "A writing, offered in evidence as authentic, is admissible, if (a) sufficient evidence has been introduced to sustain a finding of its authenticity." UNIFORM RULE OF EVID. 67 (1953): "Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law."

3. For the purpose of this comment, the term "identification" will refer only to proof of real evidence, while the term "authentication" will be reserved for proof of documents.

4. 7 J. WIGMORE, EVIDENCE § 2129 (3d ed. 1940) [hereinafter cited as 7 WIGMORE]: "This process of authenticating chattels is ordinarily referred to as *identifying* them" (emphasis added). Wigmore explains that identification presupposes two objects, the issue revolving around whether they are identical or distinct. Although he is theoretically correct, his definition of identification is based on a foundation requirement, *i.e.*, is the witness competent to testify as to this object or some other object, and not on the requirement of connecting the proffered item of real evidence with a certain person, place, or thing, as the term "identification" is generally used today. For examples of cases using "authentication" and "identification" indiscriminately, *see*

to proof of authorship or personal connection to a writing, while identification is proof of a personal connection with real evidence.⁵ The distinction between the two concepts is not merely semantic and should be maintained to promote clear analysis.

Any item offered as evidence which allegedly has a particular association with an individual, time, or place must be linked with that individual, time, or place either before or at the time of its admission.⁶ This requirement underlies both identification and authentication.⁷ For example, when a knife found at the scene of a crime is offered as evidence against X, the proponent must first show that the knife was owned by X or was within his control—identification is necessary. Similarly, when a document claimed to be the will of T is offered in a probate proceeding it is inadmissible until the proponent gives some proof that T in fact wrote the will, *i.e.*, authentication is required. Evidence becomes admissible only upon a showing of the condition of fact upon which its relevancy depends, thus authentication and identification have been referred to as “special aspects of relevancy”;⁸ until the necessary connection is made, evidence is simply irrelevant.⁹

Although evidence of a proper connection between the parties or subject matter of the dispute and the tendered physical evidence is necessary to the admission of real and documentary evidence, neither authentication nor identification assures admissibility, since some other exclusionary

United States v. Lykes Bros. S.S. Co., 432 F.2d 1076 (5th Cir. 1970) and Corkern v. Main Ins. Co., 268 So.2d 138 (La. App. 1st Cir. 1972), *writ not considered*, 263 La. 608, 268 So. 2d 673 (1972).

5. C. MCCORMICK, EVIDENCE §§ 212, 218 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].

6. When tendered evidence “involves impliedly or expressly any element of *personal connection with a corporal object*, that connection must be made to appear, like the other elements, else the whole thing fails in effect.” 7 WIGMORE § 2129.

7. *Id.* “The foundation on which rests the necessity of authentication [and identification] is not any artificial principle of evidence, but an *inherent logical necessity*” (emphasis added).

8. FED. R. EVID. 901, Adv. Comm. Note. See J. WEINSTEIN & M. BERGER, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 901(a)[02] at 901-18 (1975) [hereinafter cited as WEINSTEIN & BERGER]; Michael & Adler, *Real Proof*, 5 VAND. L. REV. 344, 362 (1952). See also FED. R. EVID. 104(b).

9. WEINSTEIN & BERGER ¶ 901(a)[02] at 901-18. See E. MORGAN, BASIC PROBLEMS OF EVIDENCE 378 (1962) [hereinafter cited as MORGAN].

rule might apply. For example, a document fully authenticated may be excluded because of the hearsay rule if offered for the truth of its assertion,¹⁰ because it is a privileged communication,¹¹ or because it is logically irrelevant.¹²

In addition to requiring authentication or identification of all evidence, Rule 901(a) specifies the degree of proof necessary to establish connexity with the party or subject matter in dispute: the evidence must be "sufficient to support a finding that the matter in question is what its proponent claims."¹³ Though Rule 901(b) provides illustrations of the traditional methods of authentication, its preamble clearly indicates that any evidence, direct or circumstantial, which satisfies the requirements of Rule 901(a) is sufficient.¹⁴

Self Authentication

Although real evidence must be identified and has no intrinsic significance, certain documents by their existence relate, without further proof, to their author. Rule 902 lists all documents deemed to be self-authenticating at common law, making necessary additions so that the Rule serves contemporary needs.¹⁵ The theory underlying Rule 902 is that

10. See WEINSTEIN & BERGER ¶ 901(a)[02]; Comment, *Hearsay Evidence and the Federal Rules: Article VIII*, 36 LA. L. REV. 139, 142 (1975); see also *Rhoads v. Virginia-Florida Corp.*, 476 F.2d 82 (5th Cir. 1973); *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954); *Lathrop v. Henkels & McCoy, Inc.*, 351 F. Supp. 1052 (E.D. Pa. 1972).

11. FED. R. EVID. 501: "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with State law."

12. See Comment, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70, 71 (1975).

13. FED. R. EVID. 901(a).

14. The best possible direct evidence of a document's authenticity is to have a party who executed or signed it testify as to its genuineness or to have a witness to the execution of the document give like testimony. See *Cottingham v. Doyle*, 122 Mont. 301, 202 P.2d 533 (1949). See also *United States v. Rizzo*, 418 F.2d 71 (7th Cir. 1969). Authenticity of documents may also be established by circumstantial evidence. See, e.g., *Champion v. Champion*, 368 Mich. 84, 117 N.W.2d 107 (1962); *MacFarland v. MacFarland*, 176 Pa. Super. 342, 107 A.2d 615 (1954); *Harlow v. Commonwealth*, 204 Va. 385, 131 S.E.2d 293 (1963).

15. FED. R. EVID. 902. Ten categories are listed: (1) domestic public documents under seal, (2) domestic public documents not under seal, (3) foreign public documents, (4) certified copies of public records, (5) official

the vast majority of these documents will be genuine,¹⁶ that they will invariably show their origin,¹⁷ and that in some cases, the party against whom the document is offered will be in a better position to show its lack of authenticity.¹⁸ In such cases any benefit to be derived from a requirement of authentication is outweighed by considerations of time, expense, and fairness to the offering litigant.¹⁹ The Advisory Committee's statement in its notes to Rule 902 that the opponent of self-authenticating evidence is in no case foreclosed from opposing the authenticity of the offered document is not true as to the document's admission in the first instance, at least insofar as objections to admissibility based on failure to authenticate.²⁰

Public Documents and Records

At common law and in Louisiana a public document under seal is presumed genuine;²¹ Rule 902 incorporates this doctrine with some modification. A main concern at common law was which seals of various sovereigns were to be presumed genuine. Generally, seals of foreign officers and of some low-

publications, (6) newspapers and periodicals, (7) trade inscriptions, (8) acknowledged documents, (9) commercial paper, and (10) presumptions under acts of Congress.

16. MCCORMICK § 228 at 557; FED. R. EVID. 902, Adv. Comm. Note.

17. MCCORMICK § 228. The difficulty of forging the kinds of documents accorded the status of self-authentication, the comparative ease of the detection of forgeries, and the criminal sanctions imposed for forging these kinds of documents lend support to the Rule. 7 WIGMORE § 2161 at 638 (seals); 7 WIGMORE § 2158 at 626 (custodian of records); Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195 (1969).

18. WEINSTEIN & BERGER ¶ 902[01] at 902-10. See, e.g., *Mancari v. Frank P. Smith, Inc.*, 114 F.2d 834, 837-38 (D.C. Cir. 1940).

19. C. MCCORMICK, EVIDENCE § 185 at 395-96 (1st ed. 1954). The danger of injustice and delay is greater in these cases than the danger of forgery. *The Atlanta*, 82 F. Supp. 218, 236 (S.D. Ga. 1948).

20. *Hedger v. Reynolds*, 216 F.2d 202 (2d Cir. 1954). See generally WEINSTEIN & BERGER ¶ 902[01] at 902-10. See also *Eschete v. Kraemer*, 129 So. 2d 475 (La. App. 1st Cir. 1961) (party denying signature on notarial instrument bears burden of proving forgery, since authentic act is proof of itself); *American Creosote Co. v. Springer*, 232 So. 2d 532 (La. App. 4th Cir. 1970).

21. 7 WIGMORE § 2161. LA. CODE CIV. P. arts. 1393-95, 1397 provide in general that certified copies of public documents of Louisiana, other states, the United States, and territories thereof are self-authenticating. However, nothing prevents the proponent of a document from proving them just like any other item of evidence.

ranking domestic officers were not considered self-authenticating, although universally the great seal of a state, either domestic or foreign, made the document presumptively genuine.²²

In the United States, serious problems of admissibility arose because each state was considered a foreign sovereign, and only documents under the great seal of a state were presumed genuine by courts in the other states.²³ The separate federal court system adopted the position that documents under the great seal of a state or under the seals of certain lower echelon state officials were self-authenticating only if the state was within the particular federal court's territorial jurisdiction.²⁴

In an attempt to eliminate confusion, Congress, under the full faith and credit clause, passed legislation giving extraterritorial effect to sealed documents.²⁵ The Congressional scheme provided a complicated procedure for certification of sealed documents.²⁶ The inadequacies of the federal statute eventually prompted Congress to enact Rule 44 of the Federal Rules of Civil Procedure, which eliminated many of the formalities of the former statute and provided a more convenient method of handling sealed documents.²⁷

Rule 902(1)²⁸ continues the Congressionally-initiated pro-

22. WEINSTEIN & BERGER ¶ 902(1)[01] at 902-10. Louisiana simply requires a certification by the officer or employee having custody of the document accompanied by a certificate of his authority to certify. LA. CODE CIV. P. art. 1393-97.

23. WEINSTEIN & BERGER ¶ 902(1)[01] at 902-11.

24. As to official seals of inferior state officers outside its territorial jurisdiction, federal courts were faced with the same problems as state courts. *Id.*

25. U.S. CONST. art. IV, § 1; 1 STAT. 122 (1790).

26. 28 U.S.C. §§ 1738, 1739 (1964). These statutes provide a method of authenticating public documents by the seal of the state and authenticating "other" documents by a "double authentication of clerk or custodian plus a guaranteeing certificate under seal." WEINSTEIN & BERGER ¶ 902(1)[01] at 902-11.

27. The method in Rule 44 provided a more convenient form of authentication. WEINSTEIN & BERGER ¶ 902(1)[01] at 902-14.

28. FED. R. EVID. 902(1): "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) 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."

cess of simplifying authentication of documents under seal by establishing a practical formula for determining whether a sealed document is admissible as self-authenticating. The rule precluding private signets is retained, since the Federal Rule is limited to seals of political bodies. The traditional common law is changed, however, because the new Rule is applicable to sealed documents from all levels of government, rather than exclusively to documents bearing a state's great seal.²⁹

In contrast with the common law, Federal Rule 902(2) denies self-authenticating status to a document bearing an official signature but unaccompanied by a seal;³⁰ a public document must be accompanied by the seal of an officer with the requisite duties in the respective political body. Notwithstanding Rule 902(2), a court should be able to accept as authenticated a document bearing only the signature of the officer without a seal if a proper showing³¹ is made under this Rule or Rule 901(a), the general authentication provision.

Federal Rule 902(3),³² in providing for self-authentication of foreign public documents, continues the liberal trend of Rule 44(a) of the Federal Rules of Civil Procedure by abolishing all unnecessary procedural requirements³³ and by eliminating the requirement that an American officer be stationed in a foreign country for the purpose of certifying documents as genuine.³⁴ The judge is also given the same

29. See generally 7 WIGMORE § 2161.

30. *Id.*

31. *Cf. Morgan v. Curtenius*, 17 F. Cas. 747 (C.C.D. Ill. 1848), *aff'd* 61 U.S. 1 (1859) (signature of probate judge accepted without his seal because certificate of judge indicated his court, formerly one of record, no longer had a seal).

32. FED. R. EVID. 902(3): "A document purporting to be executed or attested in his 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. . . . If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for a good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidence by an attested summary with or without final certification."

33. WEINSTEIN & BERGER ¶ 902(3)[01] at 902-16.

34. FED. R. EVID. 902(3) modifies Rule 44(a) of the FED. R. CIV. P., how-

degree of discretion under Rule 902(3) which he has under Federal Rule of Civil Procedure 44(a) to dispense with final certification altogether, or to admit attested summaries.³⁵

Original public documents and records are best preserved in the place where they are originally filed, and the only practical method of using public records is by copy.³⁶ In order to preserve the integrity of a document and keep it within the class of documents considered self-authenticating, federal law and that of virtually all states, including Louisiana, require that the custodian whose duty it was to preserve the original certify the copy as genuine.³⁷ Rule 44(a) of the Federal Rules of Civil Procedure provides that copies of official records or entries therein may be authenticated by the attestation of the custodian of the record, together with a certificate of the custodian's authority.³⁸ Rule 902(4), however, requires only that the custodian certify the accuracy of a copy,³⁹ eliminating as unnecessary the requirement of certification of the custodian's authority. In the alternative, the new Rule provides for authentication of an offered document by any method provided by Congress or the Supreme Court.⁴⁰

At common law and in Louisiana, officially printed documents are presumed genuine without further authentication.⁴¹ Rule 902(5) expands the rule to include books, pam-

ever, providing that copies as well as original foreign documents may be treated as self-authenticating. WEINSTEIN & BERGER ¶ 902(3)[01] at 902-16.

35. The court in its discretion may require the attested summary to be certified. However, "where parties have had an opportunity to check on the authenticity of the document, exclusion for lack of a final certificate is seldom justified. Certainly it should be too late to raise the issue for the first time on appeal." WEINSTEIN & BERGER ¶ 902(3)[01] at 902-18. *See also* United States v. Pacheco-Lovio, 463 F.2d 232 (9th Cir. 1972).

36. WEINSTEIN & BERGER ¶ 902(4)[01] 902-19.

37. United States v. Percheman, 32 U.S. 51 (1833); LA. CODE CIV. P. art. 1394: "An official record, or an entry therein, of the State of Louisiana or of any political subdivision, corporation, or agency thereof, when admissible for any purpose, may be evidenced by copies certified as being true copies by the officer or employee having custody thereof." *See also* LA. CODE CIV. P. art. 1936; 5 J. WIGMORE, EVIDENCE §§ 1677, 1680 (Chadbourn rev. 1974).

38. FED. R. CIV. P. 44(a).

39. The Advisory Committee pointed out that this method does not apply to public documents generally, but only to public records. FED. R. EVID. 902, Adv. Comm. Note.

40. *See, e.g.*, 15 U.S.C. § 16 (1955) (judgment in favor of government as evidence); 25 U.S.C. § 199(a) (1934) (certified copies of Indian tribal records); 43 U.S.C. § 83 (1904) (certified copies of records in district land offices).

41. WEINSTEIN & BERGER ¶ 902(5)[01] at 902-25; LA. CODE CIV. P. arts. 1392, 1393; LA. R.S. 13: 3711-13 (1950).

phlets, or other publications, presumably including "officially printed volumes of court decisions and miscellaneous public documents."⁴² The Rule fails to state the level of government to which the presumption of genuineness applies; however, it should extend at least as far down the political scale as is provided in Rule 902(1).⁴³

Periodical Publications and Trade Inscriptions

Newspapers and periodical publications are treated as self-authenticating under Rule 902(6)⁴⁴ primarily because of the numerous sanctions against misrepresentation and forgery under which they are published.⁴⁵ Their treatment as self-authenticating marks a substantial change from the strict requirements at common law for extrinsic authentication of newspapers and periodicals.⁴⁶

Rule 902(7)⁴⁷ also treats trade inscriptions as self-authenticating. The rationale supporting self-authentication of trade inscriptions and trade names is that they are usually registered with various federal and state agencies, are heavily regulated,⁴⁸ and are unlikely to be forged. Rule 902(7) will undoubtedly avoid the harsh effect of the traditional rules of authentication in the field of products liability, in which plaintiffs were "frustrated in legitimate attempts to link the

42. WEINSTEIN & BERGER ¶ 902(5)[01] at 902-25. *See also, e.g.*, *Walkins v. Holman*, 41 U.S. 25, 55-56 (1842) (American state papers).

43. *See generally* WEINSTEIN & BERGER ¶ 902(5)[01] at 902-26. *Compare Frates v. Eastman*, 57 F.2d 522 (10th Cir. 1932) *with* *District of Columbia v. Johnson*, 12 D.C. (1 Mackey) 51, 63-64 (1881).

44. FED. R. EVID. 902(6): "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . [p]rinted materials purporting to be newspapers or periodicals."

45. Due to the inherent unlikelihood of forgery and the fact that the party disputing authenticity is usually in the better position to come forward with proof of its forged character, Rule 902(b) is realistic in providing prima facie authenticity. *See Note*, 15 S. CAL. L. REV. 115, 117 (1941). *See, e.g.*, N.Y. GEN. BUS. L. § 335 (McKinney 1968).

46. *See* 7 WIGMORE § 2150; 2 J. WIGMORE, EVIDENCE § 440 (3d. ed. 1940) [hereinafter cited as 2 WIGMORE]; 4 J. WIGMORE, EVIDENCE § 1234 (Chadbourn ed. 1972) [hereinafter cited as 4 WIGMORE].

47. FED. R. EVID. 902(7): "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required to the following: . . . [i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin."

48. *See Doyle v. Continental Baking Co.*, 262 Mass. 516, 160 N.E. 325 (1928); *Weimer v. Mager & Thoane Co.*, 167 Misc. 338, 3 N.Y. Supp. 918 (Misc. Ct. 1938).

defendants to the defective product by means of labels on the product which bear defendant's brand name or trademark."⁴⁹ The Rule will make establishing a party's responsibility for faulty products easier by making proof of ownership or control easier.⁵⁰ The only requirement of the Rule is that the inscription, tag, name, or symbol must have been placed on the product in the course of business. The term "business" undoubtedly includes businesses which are nonprofit.⁵¹

Private Writings and Commercial Paper

Private writings, accompanied by a certificate of acknowledgement executed by a notary public or one authorized by law to make such certificate, are classified as self-authenticating documents under Federal Rule 902(8).⁵² The theory behind Rule 902(8) is that notaries, due to penalties for a violation of their duties, will not certify a document unless the purported writer, presumably known to the notary, swears to the latter in his presence that he executed the questioned writing. The notary's certificate attached to the document appears to be at least presumptive proof that the document is what its proponent claims.⁵³ This is the preferable view and is applied in Louisiana.⁵⁴

49. WEINSTEIN & BERGER ¶ 902(7)[01] at 902-28. See *Keegan v. Green Giant*, 150 Me. 283, 110 A.2d 599 (1954). "[T]his evidence will be admitted regardless of the evidence the opposing party may have to the contrary, by the terms of the rule. The opposing party is relegated in this contrary evidence to argument before the jury." WEINSTEIN & BERGER ¶ 902(7)[01] at 902-28.

50. See *Pittsburg v. Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895).

51. MCCORMICK § 283 at 599 (1954). "Non-profit businesses would include numerous social and fraternal organizations that distribute manufactured goods with inscriptions." *Id.*

52. FED. R. EVID. 902(8): "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . [d]ocuments accompanied by a certificate of acknowledgement executed in the manner provided by law by a Notary Public or other officer authorized by law to take acknowledgements."

53. See generally WEINSTEIN & BERGER ¶ 902(8)[01] at 902-31. "This manner of self-authentication was recognized at common law for certain types of commercial paper and by statute for other private writings including deeds, oaths, and like private documents." 7 WIGMORE § 2165. The basis for this extension is the theory that "if the Notary is permitted to so authenticate documents of title, which are covenants of great legal effect, there is no reason for not allowing other writings to be proved in the same way." WEINSTEIN & BERGER ¶ 902(8)[01] at 902-30.

54. If there were no special treatment given to acknowledged documents

Commercial paper, the signatures thereon, and documents relating thereto are self-authenticating under Rule 902(9)⁵⁵ to the extent provided by the "general commercial laws."⁵⁶ Since federal jurisdiction in most cases involving negotiable paper will be predicated on diversity of citizenship of the parties, under the doctrine of *Erie v. Tompkins*⁵⁷ state law will govern. The relevant state law is the Uniform Commercial Code,⁵⁸ which has been adopted at least in part by every state.⁵⁹ Even in federal question cases involving commercial paper,⁶⁰ the Advisory Committee's Notes correctly point out that "one would have difficulty in determining the general commercial law without referring to the code."⁶¹

*Traditional Methods of Authentication
and Identification*

Although the courts give many documents the special status of self-authenticating, the genuineness of most docu-

there would be no reason to go through the formality of acknowledgement. LA. CIV. CODE art. 2236: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." Although the authentic act, which is peculiar to Louisiana law, is not an acknowledged private act as envisioned by Rule 902(9), it actually is more trustworthy and should be given at least the same probative effect. LA. CIV. CODE art. 2242: "An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act"; LA. R.S. 13:3720 (1950); LA. R.S. 15:456 (1950); LA. CIV. CODE art. 1647.

55. FED. R. EVID. 902(9): "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law."

56. *Id.*

57. 304 U.S. 64 (1938).

58. Particularly relevant portions of the Uniform Commercial Code are: § 1-202 (making certain documents required by contract to be issued by a third party prima facie evidence of their own authenticity), § 3-307 (making signatures on negotiable instruments self-authenticating in certain circumstances), § 3-510 (relating to formal certificates of protest and providing that they are presumptive evidence of dishonor), and § 8-105 (creating a presumption of genuineness for signatures on negotiable securities). Note that the latter provision has not been adopted in Louisiana.

59. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS at 951 (1974). Presumably, the general commercial law in Louisiana is the Negotiable Instruments Law to the extent it has not been superseded by the legislature's adoption of portions of the Uniform Commercial Code.

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

61. FED. R. EVID. 902, Adv. Comm. Note.

ments and all items of real evidence⁶² is established by traditional methods of proof. For the most part, the illustrations of 901(b) relate to documentary evidence;⁶³ however, Rule 901(a) clearly indicates that both real and documentary evidence⁶⁴ must be proved genuine in order to be admissible.

Testimony of a Witness with Knowledge

As in Louisiana,⁶⁵ Rule 901(b)(1) provides that both documentary and real evidence may be authenticated or identified by the testimony of a witness with knowledge that it is what its proponent claims it to be.⁶⁶ Testimony of a witness who, for example, saw a questioned document signed or who had custody of a particular bag of narcotics is the simplest and most effective way for proponents of evidence to prove its genuineness.

Testimony may be in the form of an admission⁶⁷ by an adverse party, either on the stand or out of court and reported by another witness;⁶⁸ it may also be acquired by call-

62. See FED. R. EVID. 901(a) (requires *all* evidence to be identified or authenticated prior to its admission); FED. R. EVID. 902 (applies only to documentary evidence).

63. "No special rules have grown up about the [identification of] chattels." 7 WIGMORE § 2129. "One method that has developed, however, and has been illustrated in Rule 901(b)(1) is testimony of a witness with knowledge." See MCCORMICK § 212 at 525-26.

64. Tangible evidence may be offered which is not "real evidence" but merely demonstrative, *i.e.*, it played no part in the event, but is relevant in helping the trier of fact to understand other evidence, for example, a map, a chart, or a model. In such cases, the specific identity of the item is of no consequence and therefore identification is not necessary. MCCORMICK § 212 at 528. For the difference between "real" and "demonstrative" evidence, see *Smith v. Ohio Oil Co.*, 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956).

65. LA. CIV. CODE art. 2245: "If a party disavowed the signature it must be proved by witnesses or comparison"; LA. R.S. 15:460 (1950): "Any document, other than an authentic act, may be proved by anyone who saw it written, or by a comparison of hands, or by anyone who, from his knowledge of the handwriting of the person alleged to have written the document can testify that the document produced is in the handwriting of said person." *Renard v. Champagne*, 14 Orl. App. 179 (La. App. 1917), enunciated the general rule in Louisiana. See *State v. McCranie*, 192 La. 163, 187 So. 278 (1939); *City Stores, Inc. v. Jordan*, 211 So. 2d 709 (La. App. 4th Cir. 1968); *Lawney v. Travelers and Gen. Ins. Co.*, 169 So. 2d 757 (La. App. 3d Cir. 1964).

66. FED. R. EVID. 901, Adv. Comm. Note.

67. See MCCORMICK § 219 at 545; Comment, *Hearsay Evidence and the Federal Rules: Article VIII*, 36 LA. L. REV. 139, 154 (1975).

68. *Cottingham v. Doyle*, 122 Mont. 301, 202 P.2d 533 (1949); *Durham v. State*, 422 P.2d 691 (Wyo. 1967).

ing a witness who has gained familiarity⁶⁹ with the evidence to the extent that his testimony is relevant to the issue of identification or authentication.⁷⁰ Absolute precision and certainty is not necessary,⁷¹ nor does the Rule require that the witness by his testimony alone authenticate or identify the evidence in question.⁷²

Non-Expert Opinion on Handwriting

Under Federal Rule 901(b)(2), as in Louisiana,⁷³ any non-expert witness who is familiar with a purported writer's handwriting is competent to testify as to the genuineness of a document claimed to be authored by that writer.⁷⁴ To gain sufficient familiarity, a witness need not actually see the purported author write, if, under the circumstances, the witness is familiar with samples of his handwriting.⁷⁵ The sufficiency of a witness's familiarity with the purported writer's hand does not determine a writing's admissibility, but is a matter for the jury to consider when determining the weight to be given to the witness's testimony. Although on its face

69. *Rice v. United States*, 411 F.2d 485 (8th Cir. 1969); WEINSTEIN & BERGER ¶ 901(b)(1)[01] at 901-21.

70. See WEINSTEIN & BERGER ¶ 901(b)(1)[01] at 901-22; Comment, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70, (1975).

71. *Craft v. United States*, 403 F.2d 360 (9th Cir. 1968); WEINSTEIN & BERGER ¶ 901(b)(1)[01] at 901-22.

72. "Any combination of items of evidence illustrated by 901(b)(1-10) will suffice so long as Rule 901(a) is satisfied." WEINSTEIN & BERGER ¶ 901(b)(1)[01] at 901-22.

73. LA. CIV. CODE art. 2245; LA. R.S. 15:460, 460.1 (1950); *Reynard v. Champagne*, 14 Or. App. 174 (La. App. 1917). See also *Behan v. Bullard*, 2 McGloin 228 (La. App. 1884) (expert testimony); *Olympic Homes, Inc. v. Ory*, 207 So. 2d 258 (La. App. 1st Cir. 1968) (both expert and non-expert witnesses).

74. FED. R. EVID. 901(b)(2) provides that "non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation" is an available method of authenticating documents. MCCORMICK § 221 at 547. McCormick criticizes this method as "essentially meaningless" due to the minimum requirements of familiarity, since when a document is seriously challenged, a layman's testimony could not possibly sufficiently authenticate it. MCCORMICK at 548. See, e.g., *Bennett v. Cox*, 167 Ga. 843, 146 S.E. 835 (1929) (expertise not necessary); *Apple v. Commonwealth*, 296 S.W. 2d 717 (Ky. 1956); *Noyes v. Noyes*, 224 Mass. 125, 112 N.E. 850 (1916). See also 2 WIGMORE § 570; WEINSTEIN & BERGER ¶ 901(b)(2)[01] at 901-23.

75. *Rogers v. Ritter*, 79 U.S. 317 (1870); *Ryan v. United States*, 384 F.2d 379 (1st Cir. 1967); MCCORMICK § 221 at 547.

Rule 901(b) seems dangerously broad, the Rule 602 requirement of personal knowledge could exclude the witness's testimony if the court is not satisfied that he has sufficient familiarity with the writer's hand to make a reasonable identification.⁷⁶

Comparison by Expert or Trier of Fact

Proof of evidence by comparison with previously admitted evidence is a procedure applicable to both real and documentary evidence, and is appropriately called "explanation of results by tracing them to their causes";⁷⁷ the Federal Rules sanction the comparison mode of proof of genuineness.⁷⁸ Louisiana evidence law, which also permits authentication and identification of evidence by comparison,⁷⁹ differs from the new Federal Rule in one significant respect: a party tendering the comparative specimen in Louisiana must prove the genuineness of that specimen to the court's satisfaction before the fact finder may compare it to the document he seeks to authenticate;⁸⁰ under the Federal Rules the specimen is subject to the same scrutiny as the evidence intended to be proven, and is authenticated or identified by evidence sufficient to satisfy Rule 901(a).⁸¹

When the similarity of the compared items of evidence is obvious to a person of ordinary understanding, the comparison under Rule 901(b)(3) can properly be made by the trier of fact; otherwise, an expert should conduct the comparison.⁸²

76. WEINSTEIN & BERGER ¶ 901(b)(2)[01] at 901-25, 901-27. See also *In re Goldberg*, 91 F.2d 996, 997 (2d Cir. 1937); *Rinker v. United States*, 151 F. 755 (8th Cir. 1907).

77. *People v. Fisher*, 340 Ill. 216, 172 N.E. 743 (1930) (early case of gun identification by comparison of bullet markings). See generally WEINSTEIN & BERGER ¶ 901(b)(3)[01] at 901-30.

78. FED. R. EVID. 901(b)(3). In general, writings can be used as specimens when they have been authenticated sufficiently to pass the requirements of Rule 901(a), including any of the illustrative methods in Rules 901(b) and 902 if the document to be used for comparison is self-authenticating.

79. LA. R.S. 15:460.1 (1950); LA. CIV. CODE art. 2245; *State v. Burch*, 261 La. 3, 258 So. 2d 851 (1972); *State v. Reinhardt*, 229 La. 673, 86 So. 2d 530 (1956); *State v. Barrow*, 31 La. Ann. 691 (1879).

80. See, e.g., *Fox v. McDonogh's Succession*, 18 La. Ann 419 (1866).

81. WEINSTEIN & BERGER ¶ 901(b)(3)[02] at 901-31.

82. The propriety of this interpretation has been questioned, however. "The Advisory Committee's Note to Rule 901(b)(3) justifies the reduction in proof required to establish the authenticity of exemplars on the ground that such high standards are not required in non-writing instances as in the case

Distinctive Characteristics

Any item of evidence, real or documentary, may possess distinctive qualities which serve to identify or authenticate it.⁸³ Various characteristics of a writing may be sufficiently distinctive, including its subject matter,⁸⁴ appearance,⁸⁵ or internal language and thought patterns.⁸⁶ A writing's contents may provide a necessary inference as to its authenticity where the instrument contains details known only to the writer. If the person alleged to be the writer is shown to have known those details, then one may infer that the document was written by that particular person.⁸⁷

Another traditional method of authentication sanctioned by Rule 901(b)(4) is known at common law as the "reply letter doctrine," which recognizes that a letter purporting to be a response to a previous correspondence, which is in fact responsive to the prior letter's terms and was mailed within a reasonable period of time after the prior letter's receipt, is presumptively genuine.⁸⁸ The basis of the reply letter doctrine is knowledge. In the overwhelming majority of letters sent, the addressee alone, having obtained exclusive control of the letter, knows its terms and can meaningfully respond to it.⁸⁹ Since the reliability of this method of authentication

of ballistics. This analogy is not persuasive since ballistics cases almost invariably involve *known* sources, *i.e.*, one bullet from a body or a wall and the other fired by the expert from a *known* gun. Such precision in source determination is often missing where documents are involved." WEINSTEIN & BERGER ¶ 901(b)(3)[02] at 901-31, n.3. However, the Federal Rules do have a built-in safety valve in Rule 403, which provides for exclusion of otherwise relevant evidence because of prejudice, confusion, or waste of time. In view of this, a reduction in strictness of Rule 901 is justified.

83. WEINSTEIN & BERGER ¶ 901(b)(4)[01] at 901-46.

84. *Wood v. United States*, 84 F.2d 749, 751 (5th Cir. 1936) (activity of writer which only a few persons could know).

85. *Maynard v. Bailey*, 85 W. Va. 679, 102 S.E. 480 (1920) (certain letterheads).

86. *Magnusen v. State*, 187 Wis. 122, 203 N.W. 749 (1925).

87. WEINSTEIN & BERGER ¶ 901(b)(4)[01] at 901-46; 7 WIGMORE § 2148. Wigmore states that only one person need know for the necessary proof to be made. 7 WIGMORE § 2148. Weinstein concludes that Wigmore's theory is unsound. According to 901(a) only evidence "sufficient to support a finding that the matter in question is what its proponent claims" is necessary. "Even if the other persons would have known the details of the writing, it can be shown under the circumstances, it was unlikely that they would have written the letter." WEINSTEIN & BERGER ¶ 901(b)(4)[01] at 901-47.

88. MCCORMICK § 225 at 552.

89. *Id.* at 553.

depends upon receipt of the original letter by the purported author of the reply, the proponent must prove that the first letter was properly dated, mailed and addressed.⁹⁰

Voice Identification and Telephone Communication

With the advent of modern communications, a speaker frequently is heard but not seen. When the identity of a speaker is a relevant inquiry, Rule 901(b)(5) provides that identification of a voice can be made by any person who is familiar both with the voice of the alleged speaker and the voice sought to be identified. As in the situation where lay opinion of handwriting is authorized,⁹¹ the required degree of familiarity with the alleged speaker's voice is minimal,⁹² only an allegation of "some familiarity" being required.⁹³ Whether a witness actually has sufficient familiarity with the alleged speaker's voice to make an identification is a question of fact to be determined by the jury. Under Rule 901(b)(5) however, unlike that for handwriting authentication, familiarity with the alleged speaker's voice may be acquired for the sole purpose of the litigation.⁹⁴

As an alternative to a witness's hearing the alleged speaker's voice directly, the Federal Rule 901(b)(5) recognizes that a witness may acquire sufficient familiarity by hearing the voice indirectly through "mechanical or electronic transmission or recordings." To identify a voice heard by these methods, however, the witness must first testify that "the device was capable of accurately reproducing the sound."⁹⁵

Voice prints create problems under the Federal Rules since voice prints are not *heard*⁹⁶ but are seen as visual rep-

90. Consolidated Grocery Co. v. Hammond, 99 C.C.A. 195, 175 F. 641 (5th Cir. 1910). See McCORMICK § 225 at 553. One commentator has suggested that the first letter would have to be authenticated but such a requirement seems to be out of line with the Federal Rules' liberal attitude. WEINSTEIN & BERGER ¶ 901(b)(4)[05] at 901-59.

91. See text at note 73, *supra*.

92. United States v. McCartney, 264 F.2d 628 (7th Cir. 1959).

93. WEINSTEIN & BERGER ¶ 901(b)(5)[01] at 901-62. See United States v. McCartney, 264 F.2d 628 (7th Cir. 1959).

94. WEINSTEIN & BERGER ¶ 901(b)(5)[01] at 901-62.

95. *Id.* ¶ 901(b)(5)[02] at 901-70. See also Annot., *Admissibility of Sound Recording in Evidence*, 58 A.L.R.2d 1024 (1958); 1939 LA. OPP. ATTY. GEN. at 1344 (dictograph probably admissible upon laying proper foundation).

96. FED. R. EVID. 901(b)(5) requires a voice to have been "heard first-hand or through mechanical or electronic transmission or recording. . . ."

resentations of the air vibrations projected by a speaker's throat and speech organs.⁹⁷ However, because the preamble to Rule 901(b) clearly states that its illustrations are not exclusive, and due to the overwhelming accuracy of voice prints, Rule 901(b)(5) should not be so narrowly construed as to exclude their use.⁹⁸

Closely related to voice identification is the problem of identification of parties to a telephone conversation. Federal Rule 901(b)(6) sanctions a liberal method for proof of the identity of a party to a telephone call. The proponent need only prove that the call was made⁹⁹ under circumstances which, taken as a whole, indicate that the party answering was the person called. The Rule adopts the position of most jurisdictions for outgoing calls: proof of the fact that the call was made combined with the self-identification of the person answering is sufficient¹⁰⁰ to establish identity.

A more difficult problem not expressly covered by the Rule arises when the identity of a caller must be established. Certainly, mere self-identification by a caller will not suffice¹⁰¹ unless accompanied by circumstances clearly justifying an inference that the caller is who he claims to be.¹⁰² Supporting circumstances can take the form of the recipient's general familiarity with the speaker's voice,¹⁰³ the caller's access to information known only by the speaker,¹⁰⁴ or any of the methods for proving documents.¹⁰⁵

97. See Kersta, *Speaker Recognition and Identification by Voice Prints*, 40 CONN. B. J. 586 (1966).

98. WEINSTEIN & BERGER ¶ 901(b)(5)[01] at 901-69; *People v. Straehel*, 53 Misc. 2d 512, 279 N.Y.S.2d 115 (court permitted use of a voice print). *Contra*, *People v. King*, 266 Cal. App. 2d, 72 Cal. Rptr. 478 (1968) (overtaken conviction based on voice print). *But see* FED. R. EVID. 901(b)(4), 901(b)(5).

99. WEINSTEIN & BERGER ¶ 901(b)(6)[01] at 901-77.

100. MCCORMICK § 266. Courts recognize the practical accuracy of the telephone system and are persuaded in the normal case that recipients of phone calls lack both motive and opportunity for premeditated fraud.

101. *Robilio v. United States*, 291 F. 975, 982 (6th Cir. 1923); *Price v. State*, 208 Ga. 695, 69 S.E.2d 253 (1952); *State v. Berezuk*, 331 Mo. 626, 55 S.W.2d 949, 951 (1932); *Texas Candy & Nut Co. v. Horton*, 235 S.W.2d 518, 521 (Civ. App. Tex. 1950).

102. WEINSTEIN & BERGER ¶ 901(b)(6)[02] at 901-81.

103. *See* Annot., 105 A.L.R. 326 (1936), 71 A.L.R. 3 (1931).

104. *E.g.*, *United States v. Ross*, 321 F.2d 61 (2nd Cir. 1963).

105. A telephone call, like a letter, can be authenticated by the fact that it is a reply to previous correspondence. *See Van Riper v. United States*, 13 F.2d 961, 968 (2nd Cir. 1926); *Morris v. Finkelstein*, 145 S.W.2d 439, 443 (Mo. App. 1940) (telephone call in response to letter).

When a telephone call is placed to a business, and the answerer purports to act in behalf of the business and engages in transactions customarily performed over the phone, the Federal Rules permit the assumption that the call reached the business. The Rule rests on the assumption that listing a business number in a public directory is an invitation to the public to carry on business over the phone; the proprietor of a business cannot thereafter bar the admission of the call's substance by denying the authority of one answering the call to act in behalf of the business.¹⁰⁶

Public Records

Because of the belief that public officers regularly comply with their statutory obligations in accepting for recordation only those writings which are genuine,¹⁰⁷ courts have traditionally assumed that records found in the custody of the public officers authorized to record such documents are authentic. Two requisites are generally considered necessary for authentication of public records.¹⁰⁸ First, the writing must be a public record actually recorded;¹⁰⁹ and second, the custodianship of the public officer must be proved.¹¹⁰ The Rule

106. *Merich v. Baum*, 53 F.2d 986, 988 (8th Cir. 1931); WEINSTEIN & BERGER ¶ 901(b)(6)[01] at 901-79: "Identification of the speaker is not necessary when the issue is the identity of the place of business called and not the individual purporting to represent the business." WEINSTEIN & BERGER ¶ 901(b)(6)[01] at 901-79.

107. MCCORMICK § 224 at 551.

108. Most public records will be self-authenticating under Rule 902. See text beginning at note 20, *supra*.

109. Public records as used in Federal Rule 901(b)(7) is intended to include "any writing or data compilation authorized by law to be recorded or filed in a public record." WEINSTEIN & BERGER ¶ 901(b)(7)[01] at 901-94. See also *United States v. Ward*, 173 F.2d 628 (2nd Cir. 1949) (judicial records); *Maroon v. Immigration & Nationalization Serv.*, 364 F.2d 982 (8th Cir. 1966); *O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951) (military records); *Lewis v. United States*, 38 F.2d 406 (9th Cir. 1930). Similarly, where a public office is the depository of private papers, such as wills or conveyances, these too qualify as public records. See generally MCCORMICK § 224 at 551.

110. WEINSTEIN & BERGER ¶ 901(b)(7)[01] at 901-97. Proper custody can be established by testimony of a person from the office authorized to retain the documents, *United States v. Locke*, 425 F.2d 313, 315 (5th Cir. 1970), by certification from such an office, *Woods v. Turk*, 171 F.2d 244 (5th Cir. 1948), by the testimony of a witness with knowledge of its recordation, *Wausau Sulphate Fibre Co. v. Commissioner*, 61 F.2d 879 (7th Cir. 1932), by judicial notice, *Maroon v. Immigration & Nationalization Serv.*, 364 F.2d 982, 984 (8th Cir. 1966), or by other proof sufficient to support a finding that the material is from the proper office.

seems far too broad. The basic assumption necessary for its justification is that the custodian actually inspects a document's authenticity before accepting it for recordation. This is true for documents of the type found in Rule 803(8),¹¹¹ but not of recorded documents generally.

In addition to written public records, Federal Rule 901(b)(7) recognizes that evidence from "other data compilation" devices may be authenticated, including "video-tapes or other non-print matter kept by a public officer. . . ."¹¹² Although Rule 901(b)(7) does not expressly cover private writings in private custody, since Rule 901(b) is illustrative only no reason exists why a court should not recognize private writings as authentic after a proper showing of custodianship and other circumstantial evidence indicating the authenticity of the document.¹¹³

Ancient Documents and Data Compilation

The common law early developed a rule for authentication of ancient documents:¹¹⁴ a document was admissible when "thirty years old, . . . unsuspecting in appearance, and . . . produced from a place of custody natural for such a document."¹¹⁵ In Federal Rule 901(b)(8) Congress codified the common law requirements and those of Louisiana also¹¹⁶ with

111. FED. R. EVID. 803(8): "Records, reports, statements, or data compilations, in any form, of public offices or agencies. . . are not excluded by the hearsay rule."

112. See generally Sullivan, *Court Record by Video-tape Experiment—A Success*, 50 CHI. B. REC. 336 (Ap. 1969).

113. LA. CIV. CODE art. 2268; Preferred Inv. Corp. v. Denson, 251 So. 2d 455 (La. App. 1st Cir. 1971).

114. The principal impetus for its development was necessity. Problems of loss of memory and the death of witnesses were remedied by application of the ancient documents rule. See generally MCCORMICK § 223.

115. MCCORMICK § 223 at 549-50.

116. LA. R.S. 13:3727-31 (1950) authorize admission of ancient documents, notwithstanding the requirements of both the hearsay rule and authentication of documents, and presume genuine written acts recorded in the conveyance records of any parish in the state for a period not less than 22 years, or "any instrument of writing, including maps, plats and surveys, which [have] been recorded in the conveyance, mortgage, donation, miscellaneous or other official records of any parish of the state . . . for a period of thirty years or more at the time such instrument is offered in evidence." The Louisiana scheme is more onerous than that of either the common law or the Federal Rule in its requirement of recordation before the ancient documents

two modifications. The time period is reduced to twenty years,¹¹⁷ and the category of materials subject to the rule is expanded to include non-traditional documents such as electronically-stored data.¹¹⁸

The age of a document offered under Rule 901(b)(8) may be proved by "any facts supporting the inference that the document or data compilation has been in existence for twenty years or more."¹¹⁹ Erasures, inconsistent assertions, discontinuity of handwriting, and unexplained changes in authorship usually create a "suspicious appearance";¹²⁰ however, certain documents are by their nature "unsuspicious."¹²¹ Finally, though reasonable custody of a document must be established,¹²² the document need not remain in the same place for the entire custodial period.¹²³

rule applies. *See* *United States v. Buras*, 332 F. Supp. 1007 (E.D. La. 1971); *Broussard v. Guidry*, 127 La. 708, 53 So. 964 (1911); *Roy v. Elmer*, 153 So. 2d 209 (La. App. 2d Cir. 1963). The presumption of genuineness is rebuttable with the burden of proof on the party assailing the document. *Watkins v. Zeigler*, 147 So. 2d 435 (La. App. 2d Cir. 1962).

117. The Advisory Committee thought a fraud lasting twenty years highly improbable. FED. R. EVID. 901, Adv. Comm. Note.

118. Query, does the Rule include photostatic copies, magnetic impulse, or mechanical records? Rule 1001 ends the list of illustrations of writings by the clause "or other forms of data compilations," which suggests that the previously listed items are considered "data compilations." Rule 901(b)(8) expressly covers "data compilations in any form." Because Rule 901(b)(8) is merely illustrative, it should not be given a narrow interpretation, and should be read to include photostatic copies, magnetic impulse, or mechanical records. *See* WEINSTEIN & BERGER, ¶ 901(b)(8)[01] at 901-98.

119. Federal judges hopefully will recognize the shift of emphasis to the presumption of authenticity based on custody and admit evidence when circumstances otherwise point to its genuineness although its age falls short of the required period. *See* *Lee Pong Tai v. Acheson*, 104 F. Supp. 503 (E.D. Pa. 1952).

120. WEINSTEIN & BERGER ¶ 901(b)(8)[01] at 901-102.

121. *See, e.g., Dallas County v. Commercial Assur. Co.*, 286 F.2d 388, 397 (5th Cir. 1961) (newspaper stored in warehouse for long period).

122. To establish the appropriateness of a document's custody, the proponent of the evidence must show the document was kept where it would have been likely to be kept if it was in fact genuine. For example, if the questioned document is a deed to land, custody by a legatee would satisfy the Rule. *See* *Fulkerson v. Holmes*, 117 U.S. 389 (1886). *See also* *Smyth v. New Orleans Canal & Banking Co.*, 93 F. 899 (5th Cir. 1899).

123. If the document does change hands, however, the Rule requires a showing that all of the places of custody were appropriate. *See* *McGuire v. Blount*, 199 U.S. 142 (1905).

The Best Evidence Rule

Although the "best evidence rule" at its inception was a very liberal principle requiring only "the best proof that the nature of the thing will afford,"¹²⁴ it quickly developed into a "converse and narrowing doctrine that a man must produce the best evidence that is available—second best will not do."¹²⁵ Though variously expressed in different jurisdictions, the traditional view treats the best evidence rule as a narrowly applicable rule requiring that "in proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."¹²⁶

The obvious purpose of the best evidence rule is to insure the reliability and trustworthiness of written evidence.¹²⁷ Continued viability of the rule is mandated by the intrinsic importance of written evidence in the litigation process, the possibility of intentional fraud,¹²⁸ the danger of human error in transcription,¹²⁹ and the danger of misrepresentation, whether innocent or fraudulent, which may result from reliance on parts of a document taken out of context.¹³⁰ Provid-

124. *Ford v. Hopkins*, 91 Eng. Rep. 250 (1700) (secondary documentary evidence admitted over objection that only the original should be admissible).

125. MCCORMICK § 229 at 559.

126. MCCORMICK § 230 at 560. Even though the best evidence rule applies only to proving the contents of a writing, "the fact that a man does not produce the best evidence in his power must always afford strong ground of suspicion." THAYER at 507.

127. A. OSBORN, *QUESTIONED DOCUMENTS* XVI (2nd ed. 1929). See also Note, *A Critical Appraisal of the Application of the Best Evidence Rule*, 21 RUT. L. REV. 526, 528 (1967).

128. The assertion that the best evidence rule prevents fraud has been heavily criticized and has lost much of its force, though it would be erroneous to completely discount it. Wigmore strongly attacks earlier commentators' assertions that the best evidence rule had as its basis the prevention of fraud. 4 WIGMORE § 1180.

129. "[T]here is substantial hazard of inaccuracy in many commonly utilized methods of making copies of writings, and . . . oral testimony purporting to give from memory the terms of a writing is probably subject to a greater risk of error than oral testimony concerning other situations generally." MCCORMICK § 231 at 561. See also Broun, *Authentication and Contents of Writings*, 1969 LAW AND THE SOCIAL ORDER 611, 616. However, most of these theoretical bases for the best evidence rule have been undercut in recent years, due to modern techniques of copying and discovery devices. WEINSTEIN & BERGER ¶ 1001[02] at 1002-6.

130. At least one case has recognized that the original writing furnishes

ing the jury with the exact words contained in a writing is especially important when a document may be dispositive of the rights of the parties, as in the case of wills, trusts, or mortgages, since a minor variation in terms can radically change the meaning of the document.¹³¹

The Contemporary Best Evidence Rule Under the Federal Rules of Evidence

Although the jurisprudence is unclear whether the best evidence rule in Louisiana is to be given its narrow meaning, or whether it is to apply broadly to the admission of all evidence,¹³² the Federal Rules of Evidence have adopted the preferable view that restricts the rule's application to documentary evidence.¹³³ Rule 1002¹³⁴ is a restatement of the traditional best evidence rule¹³⁵ expanded to encompass not only writings,¹³⁶ but also recordings and photographs, includ-

its full content and eliminates misrepresentation caused by taking part of the writing out of context. *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418 (2d Cir. 1959); 4 WIGMORE § 1177 (Chadbourn rev. 1972).

131. See generally MCCORMICK § 231. at 561; MORGAN at 385.

132. LA. R.S. 15:436 (1950) establishes a broad "best evidence" requirement for criminal cases. Most civil cases in Louisiana recognize a simple "original writing" requirement only, while some call for the "best evidence" in its broad sense. See, e.g., *Ascension Builders, Inc. v. Jumonville*, 262 La. 519, 263 So. 2d 875 (1972); *State v. McCrory*, 237 La. 747, 112 So. 2d 432 (1959). For cases limiting the best evidence rule's application to documents, see *United States v. Ponder*, 475 F.2d 37 (5th Cir. 1973), *Washington Aluminum Co. v. Pittman Construction Co.*, 383 F.2d 789 (5th Cir. 1967), *Auto-For-Rent, Inc. v. Provenza*, 242 So. 2d 353 (La. App. 2d Cir. 1970), *In re Fischbein*, 194 So. 2d 388 (La. App. 4th Cir. 1967). For cases not so limiting the best evidence rule's application, see *Southern Discount Co. v. Marchand*, 218 So. 2d 645 (La. App. 4th Cir. 1969), *Ward v. State Farm Mutual Auto Ins. Co.*, 182 So. 2d 130 (La. App. 4th Cir. 1966), *cert. denied*, 248 La. 1103, 184 So. 2d 26 (1966). Even in criminal cases, however, the broad best evidence rule provided by statute has been tempered by a common sense approach taken by the Louisiana Supreme Court. See, e.g., *State v. Fallon*, 290 So. 2d 273 (La. 1974).

133. FED. R. EVID. 1002: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these Rules or by Act of Congress."

134. For text of Rule 1002, see note 133, *supra*.

135. The omission of the term "best evidence" from the Federal Rules was intentional, as the Advisory Committee felt that the label "best evidence" was "misleadingly broad in its scope." WEINSTEIN & BERGER ¶ 1001[01] at 1002-3.

136. Rather than giving the word "writing" an artificial definition in order to expand the best evidence rule, as did the MODEL CODE OF EVID. rule

ing video tapes, X-rays, and motions pictures. Clearly, the best evidence rule as traditionally understood does not apply to wholly uninscribed chattels,¹³⁷ but problems do arise with items such as badges, tombstones, and flags which have inscriptions in varying degrees of detail and which are frequently relevant to some issue in litigation.¹³⁸ Although the Federal Rules do not specifically cover these items, Rule 1008¹³⁹ should be construed to permit the court in its discretion to require production of the original item; factors to be considered by the court are the need for the exact information, the relative ease or difficulty of producing the item, and the degree of detail involved in the inscription.¹⁴⁰

When a document is offered into evidence a fundamental question is whether the writing is in fact the *best* evidence available. Merely because the events are recorded in written form, oral testimony of a witness with knowledge of the events is not precluded.¹⁴¹ Some transactions, however, are

1(17) and UNIFORM RULE OF EVID. 1(13), the Advisory Committee expressly enlarged the coverage of items subject to the rule to include various kinds of recordings. See generally WEINSTEIN & BERGER ¶ 1001(1)[01] at 1001-11; Comment, *Authentication and the Best Evidence Rule under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195 (1969). Federal Rule 1001 broadly defines "writings" as "letters, words, or numbers, or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."

137. WEINSTEIN & BERGER ¶ 1001(1)[01] at 1001-11. *But see* 4 WIGMORE § 1181.

138. MCCORMICK § 232 at 562.

139. FED. R. EVID. 1008 provides: "When the admissibility of other evidence of contents of writings, recordings, or photographs under these Rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact."

140. 4 WIGMORE § 1182. Only a few federal cases have dealt with problems of admissibility of inscribed chattels, but cases that have considered the issue have generally refused to apply the best evidence rule to evidence other than documents. See, e.g., *Burney v. United States*, 339 F.2d 91 (5th Cir. 1964) (oral testimony as to contents of bottle sufficient). *But see* *Watson v. United States*, 224 F.2d 910 (5th Cir. 1955) (conviction based on oral testimony of defendant's failure to obtain whiskey tax labels reversed because bottles not introduced into evidence).

141. MORGAN at 386. For example, payment can be proved without pro-

by nature reduced to writing, such as a will, trust, or mortgage; in such cases, the original must be introduced, since proof of the document necessarily involves the proof of its contents.¹⁴² Since by its terms Rule 1002 applies only when the contents of a document are to be proved, the original need not be produced when the witness uses a document merely to refresh his memory,¹⁴³ as the basis of an expert opinion,¹⁴⁴ or to establish that particular language is not contained in the document.¹⁴⁵ Also, evidence of the existence or execution of a document is not within the coverage of the rule and may be accepted without production of the original document.¹⁴⁶

Photographs are normally used to illustrate oral testimony¹⁴⁷ rather than to prove their content;¹⁴⁸ thus the best evidence rule does not usually apply. However, in some situations, as in cases involving pornography, copyright infringe-

duction of a receipt, which records an "essentially non-written transaction." MCCORMICK § 233 at 563-64.

142. See generally WEINSTEIN & BERGER ¶ 1002 [03] at 1002-9, 10. These writings are described by McCormick as endowed by substantive law "with a degree of either indispensability or primacy." MCCORMICK § 233. See 4 WIGMORE § 1242. *Accord*, LA. CIV. CODE art. 2276.

143. *Wier v. Commissioner*, 283 F.2d 675, 678 (6th Cir. 1960). *Cf.* *United States v. Riccardi*, 174 F.2d 883 (3rd Cir. 1949), *cert. denied*, 337 U.S. 941 (1949).

144. This conclusion is necessary since Rules 703 and 705 allow the expert to utilize information which would be inadmissible at trial in forming his opinion. See, e.g., *Grummons v. Gallinger*, 240 F. Supp. 63, 72 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965) (best evidence rule not applicable to an expert questioned about another expert's report).

145. Though many courts accept this conclusion, it has not been without its detractors. McCormick considers that under some circumstances, the absence of language in a document will have positive evidentiary value, and that in such cases the best evidence rule should be applied. MCCORMICK, *supra* note 19, § 198 at 411. See *United States v. Jewett*, 438 F.2d 495, 498 (8th Cir. 1971). *Compare* *Burney v. United States*, 339 F.2d 91 (5th Cir. 1964).

146. See, e.g., *Fish v. Fleishman*, 87 Idaho 126, 391 P.2d 344 (1964) (check stub utilized to show existence of check); *Succession of Gussman*, 288 So. 2d 665 (La. App. 3rd Cir. 1974); *Redwine v. King*, 366 P.2d 921 (Okla. 1961) (document not required to prove execution of lease). *But see* 4 WIGMORE § 1242.

147. See generally MCCORMICK § 232 at 563.

148. WEINSTEIN & BERGER ¶ 1001(2)(04) at 1001-43 (use of X-ray entails proof of its content, thus the original print must be produced). *But see* FED. R. EVID. 703. The minority rule is that "the expert testimony itself is the best evidence and therefore the X-rays do not have to be produced." WEINSTEIN & BERGER ¶ 1001(2)(04) at 1001-46. See FED. R. EVID. 1002, Adv. Comm. Note. See also *Arnold v. Metropolitan Life Ins. Co.*, 89 S.W.2d 81 (Mo. 1936) (applying the minority rule).

ment, or defamation, the contents of a photograph will be at issue. In these situations, Rule 1000(2) provides that the "original" must be produced.¹⁴⁹

Originals, Duplicates, and Copies

An "original" as defined in Rule 1001 is a document which according to substantive law¹⁵⁰ or the intent of the parties, has legal effect between the parties to the document. Under the Federal Rules, chronology is not decisive, since the document's "jural significance makes it the original."¹⁵¹

Common law accorded carbon copies, distinguished from other copies, the status of duplicates and made them admissible without accounting for the original.¹⁵² In recent years more reliable photographic reproduction has generally replaced the carbon copy, but the former remains at common law secondary evidence.¹⁵³ The definition of "duplicate" in Rule 1001(4) differs from the common law and expands the term to include any method of reproduction which assures accuracy.¹⁵⁴

149. See generally WEINSTEIN & BERGER, ¶ 1001(2)(01) at 1001-16. It will generally be to the proponent's advantage to produce the photograph, so this problem will seldom arise.

150. WEINSTEIN & BERGER ¶ 1001(3)(01) at 1001-50; MCCORMICK § 235 at 566. Often "copy" is used to describe what is, under the Federal Rules, an original, and therefore terminology is not decisive. WEINSTEIN & BERGER ¶ 1001(3)(01) at 1001-49. See *McDonald v. Hanks*, 52 Tex. Civ. App. 140, 113 S.W. 604 (1908). See LA. R.S. 13:3733 (Supp. 1952) (record of a business, industry, profession, occupation and calling of every kind produced by a photographic process assuring reliability treated as an original). See also *State v. Jackson*, 296 So. 2d 320 (La. 1974) (admission of duplicate copy not reversible error).

151. WEINSTEIN & BERGER 1001(3)(01) at 1001-49. Documents which at common law would be called duplicate originals will be treated as originals under Rule 1001(3). See, e.g., *Wright v. Michigan Cent. R.R.*, 130 F. 843 (6th Cir. 1904).

152. See MCCORMICK ¶ 236 at 568. The reason for the distinction was that carbon copies were created by the same stroke of the pen. See, e.g., *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N.W. 252 (1907).

153. MCCORMICK § 236 at 569. See, e.g., *Cox v. State*, 93 Ga. App. 533, 92 S.E.2d 260 (1956) (photostats are secondary evidence).

154. The definition limits the effect of the common law rule that copies created subsequent to the original are merely secondary evidence to those situations where they are produced manually. The purpose for which a copy is made is totally disregarded as a factor in determining its status under the definition, so that a photostat created for the trial is a duplicate. WEINSTEIN & BERGER ¶ 1001(4)(01) at 1001-68. The Rule reduces expense and provides a

Rule 1003¹⁵⁵ provides that duplicates should generally be treated as originals and admitted into evidence without the necessity of accounting for the original.¹⁵⁶ The general rule, however, is qualified in two ways. First, fairness requires that the original be produced when to allow anything less would result in substantial prejudice to the other party.¹⁵⁷ For example, when the reproduction process results in a faulty copy,¹⁵⁸ or when only a part of the original is copied so that the duplicate lacks proper context,¹⁵⁹ fairness demands production of the original. Second, when genuine questions arise regarding the authenticity of the original, its production may be necessary to resolve the conflict.

Proof of a Writing's Contents by Secondary Evidence

The best evidence rule is one of preference rather than exclusion, and "if failure to produce the original is satisfactorily explained, secondary evidence is admissible."¹⁶⁰ Rule 1004¹⁶¹ articulates a modified restatement of the common law

reliable document for use at trial. *Id.* at 1001-75. *See also* HEARINGS BEFORE THE SUB-COMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93rd Congress, 1st Sess. on Proposed Rules of Evidence, Supp. Serv. no. 2 at 83-84 (1973). *Accord*, *State v. Jackson*, 296 So. 2d 320 (La. 1974); LA. R.S. 13:3733 (Supp. 1952).

155. FED. R. EVID. 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

156. Rule 1003 is subject to the provisions of Rule 1009 which affords the trial judge broad discretion in determining whether an opposing party has raised a legitimate objection to an offered duplicate. WEINSTEIN & BERGER ¶ 1003[01] at 1003-06.

157. *Id.*

158. *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964).

159. *Marker v. Prudential Ins. Co. of America*, 273 F.2d 158 (5th Cir. 1959); Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence*, 16 WAYNE L. REV. 227 (1969). *See also* *Hi-Hat Elkhorn Coal Co. v. Kelly*, 205 F. Supp. 764 (E.D. Ky. 1962) (duplicate excluded because available only to one party while original available to both); *Sance v. Burnett*, 316 S.W.2d 761 (Tex. 1958) (duplicate of libelous letter excluded because publication of original not proved). Fairness also demands exclusion of a duplicate when it is substantially unreliable. *See* *Evans v. Holsinger*, 242 Iowa 990, 48 N.W.2d 250 (1951).

160. FED. R. EVID. 1004, Adv. Comm. Note; 4 WIGMORE § 1192 (Chadbourn Rev. 1972).

161. FED. R. EVID. 1004: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll

rules and is in substantial accord with Louisiana jurisprudence.¹⁶² The Rule provides that when the original is proved unavailable, secondary evidence may be used to satisfy the best evidence rule. Unavailability of the original may be actual, through loss, destruction, or insusceptibility to judicial process, or constructive as when it is in the possession of an adverse party who refuses to produce it after notice. Rule 1004 strikes a delicate balance between the danger of fraud and the need for relevant information¹⁶³ by allowing secondary evidence, in those instances in which the best evidence rule applies, only after the proponent proves he has made a diligent, good faith¹⁶⁴ attempt to secure production of the lost, destroyed or unobtainable document.¹⁶⁵

originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) . . . [n]o original can be obtained by any available judicial process or procedure; or (3) . . . [a]t a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or (4) . . . [t]he writing, recording, or photograph is not closely related to a controlling issue."

162. The production of the original is excused in Louisiana because of loss or destruction. LA. CIV. CODE art. 2270 (not affected by LA. CIV. CODE art. 2280, *White v. White*, 156 La. 324, 100 So. 442 (1924)); LA. CIV. CODE art. 2279, 2280; *Airey v. Sampson*, 262 La. 383, 263 So. 2d 330 (1972); *Fidelity Nat'l Bank v. Jack Neilson, Inc.*, 248 So. 2d 412 (La. App. 4th Cir. 1971); *Tri-State Ins. Co. v. Elmore Labiche Plumbing Co.*, 212 So. 2d 255 (La. App. 4th Cir. 1968). Even if the proponent of the secondary evidence destroyed the original, the secondary evidence is still admissible provided he shows lack of fraudulent intent. *Harrison v. Occhipinti*, 251 So. 2d 188 (La. App. 4th Cir. 1971). Other excuses for not producing the original include possession by the adversary, *Boyd v. United States*, 116 U.S. 616 (1881), *Breaux v. Laird*, 230 La. 221, 88 So. 2d 33 (1956), *State v. McBrayer*, 188 La. 567, 177 So. 669 (1937), when the original is on file in the public records, *Beauvais v. Wall*, 14 La. Ann. 199 (1859), and when the original is beyond the jurisdiction of the court, *State v. Brooks*, 173 La. 9, 136 So. 71 (1931).

163. WEINSTEIN & BERGER, ¶ 1004(2)[01] at 1004-23, 24: "The phrase 'to the extent practicable and reasonable' should be read into the Rule." *Id.* at 1004-24. The condition of Rule 1004(2) should generally be satisfied by proof of service of a notice to take depositions and the attached subpoena duces tecum required by FED. R. CIV. P. 30(b)(1).

164. See, e.g., *McDonald v. United States*, 89 F.2d 128 (8th Cir. 1937). See also 4 WIGMORE § 1178.

165. WEINSTEIN & BERGER ¶ 1004(1)[04] at 1004-13; Annot., *Degree or Quantum of Evidence Necessary to Establish a Lost Instrument and Its Contents*, 148 A.L.R. 400 (1944). The degree of diligence varies with the circumstances of the case. *Hacker v. Price*, 166 Pa. Supp. 404, 71 A.2d 851 (1950). In the majority of cases the fact of loss or destruction will be proved by

Witnesses often refer to documents in their testimony, and as a "necessary concession to expedition of trials and clearness of narration,"¹⁶⁶ an exception has developed providing that the documents need not be produced when they are merely incidental or collateral to the issue tried. The Federal Rules recognize this exception to Rule 1004(4), and in doing so, give needed flexibility to the best evidence rule¹⁶⁷ and provide another method for the exercise of common sense.¹⁶⁸

When an original is justifiably unavailable, both Louisiana and the common law have established rules of preference favoring written copies over oral evidence, and recent copies over remote ones.¹⁶⁹ Federal Rule 1004 represents a substantial departure from the rule of preferences by providing that where the original is justifiably unavailable, a party seeking to prove the contents of a writing may utilize any evidence otherwise admissible.¹⁷⁰ Rule 1005 retains the common law distinction between public documents and non-public documents, providing that when the former are to be proved, the additional requirement that the proponent make a diligent effort to obtain an appropriate copy must be met before any other admissible evidence may be used to prove their contents.¹⁷¹ The procedure sanctioned by the Federal Rules ap-

circumstantial evidence "showing a diligent but unsuccessful search and inquiry . . . for the document." WEINSTEIN & BERGER ¶ 1004(1)[05] at 1004-19.

166. MCCORMICK § 234 at 565. *See, e.g.*, *Joseph Durst Corp. v. Coastal Development Co.*, 177 So. 2d 123 (La. App. 3rd Cir. 1965).

167. WEINSTEIN & BERGER ¶ 1004(4)[01] at 1004-30.

168. *Id.* at 1004-32. "Whether a document is collateral is practically a question of whether it is important enough under all the circumstances to need production; and the judge presiding over the trial is fittest to determine this question finally." 4 WIGMORE § 1253. *See also* FED. R. EVID. 1008.

169. *Succession of Hilton*, 165 So. 2d 332 (La. App. 2d Cir. 1964); *Warwick v. Louisiana Hwy Comm'n*, 4 So. 2d 607 (La. App. 1st Cir. 1944). MCCORMICK § 241 at 576 states: "This view is justifiable chiefly on the ground that there is some incongruity in pursuing the policy of obtaining the terms of writings with fullest accuracy, by structuring a highly technical rule to that end, only to abandon it upon the unavailability of the original."

170. WEINSTEIN & BERGER ¶ 1004[01] at 1004-4.

171. FED. R. EVID. 1005 provides: "The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by a copy certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by exercise of a reasonable diligence, then other evidence of the contents may be given." The Rule relaxes the common law rule of "impossibility."

pears less expensive and easier to administer than the rule presently applicable in Louisiana, while at the same time accomplishing in practical effect most, if not all, of what is accomplished by an extended scheme of preferences.¹⁷²

Conclusion

Commentators assert that the rules requiring authentication and identification, together with the best evidence rule, constitute necessary safeguards for the prevention of forgery or fraud, mistaken attribution, and mistransmission.¹⁷³ The Advisory Committee felt that the traditional rules express sound policy and are necessary because of the difficulty of discovering evidence outside the jurisdiction, and because unanticipated documents may be undiscoverable as a practical matter.¹⁷⁴

Several commentators, however, have severely criticized the traditional rules as unnecessarily burdensome and of slight benefit when weighed against the loss of time and expense entailed in complying with them.¹⁷⁵ Although the Federal Rules retain the best evidence rule and the requirement of authentication and identification with the safeguards that the traditional rules were designed to provide, a number of well-considered provisions are available to prevent them from becoming over-burdensome.¹⁷⁶ Furthermore, the federal court's application of the doctrines of harmless error, waiver, and procedural devices such as requests for admissions and pre-trial conferences should do much to mitigate any harsh application of the Rules.¹⁷⁷

172. An advocate will normally want to come forward with the most convincing evidence available. See FED. R. EVID. 1004, Adv. Comm. Note.

173. See generally MCCORMICK § 231 at 561; 7 WIGMORE § 2130 at 570.

174. FED. R. EVID. 1001, Adv. Comm. Note.

175. MCCORMICK § 220 at 545; 7 WIGMORE § 2148. Broun, *Authentication and Content of Writings*, 1969 LAW AND THE SOCIAL ORDER 611; Strong, *Liberalizing the Authentication of Private Writings*, 52 CORNELL L. Q. 284 (1967). See *Mancari v. Smith*, 72 U.S. App. D.C. 398, 114 F.2d 834 (1940); *Keegan v. Green Giant Co.*, 150 Me. 283, 11 A.2d 599 (1954).

176. See discussion of Rule 1001 in text at note 150, *supra*; Rule 1002 in text at note 134, *supra*; Rule 1004 in text at note 161, *supra*; and Rule 1005 in text at note 170, *supra*.

177. See, e.g., *Atkins v. United States*, 240 F.2d 849 (5th Cir. 1957) (applying waiver); *Ahlstedt v. United States*, 315 F.2d 62 (5th Cir. 1963) (applying harmless error). See also, e.g., FED. R. CIV. P. 16, 36, 61; LA. CODE CIV. P. art. 1551.

The Federal Rules in Articles IX and X incorporate the best rules of the common law and modify them where necessary to accomplish their goal of insuring that the trier of fact has available as much accurate and reliable evidence as possible without infringing upon the particular rights and privileges of the parties. However, the primary value of the Federal Rules in this area is not in the few changes that they provide; rather, it is in their concise yet thorough expression of the law.¹⁷⁸ Because many of the present Louisiana rules regarding authentication, identification, and the best evidence rule correspond to those provided in the Federal Rules, the latter, along with their voluminous legislative history, should be studied very carefully as possible models for codification of Louisiana evidence law.

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178. Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence*, 16 WAYNE L. REV. 195 (1969).