Authentication and Identification under Article IX of the Texas Rules of Evidence.

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AUTHENTICATION AND IDENTIFICATION UNDER ARTICLE IX OF THE TEXAS RULES OF EVIDENCE*

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I. INTRODUCTION

Prior to the adoption of the Texas Rules of Evidence, the law in Texas concerning authentication and identification consisted of a combination of common law doctrines and statutes. Many of the statutes that were repealed in conjunction with the promulgation of the Rules dealt with authentication of writings.[1] That entire subject, along with the related matter of identification of evidence other than writings, is now covered in Article IX of the Rules. Although in substance Article IX does not bring about any radical changes in Texas law, it does replace statutes and doctrines with which Texas trial lawyers and judges were familiar, using a format and language new to Texas. The purpose of this article is to describe the basic

1. When it adopted the Rules of Evidence, the Texas Supreme Court ordered the repeal, as to civil actions, of a number of statutes, pursuant to TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962) (supreme court may promulgate rules of procedure for civil actions and may order repeal of inconsistent statutes). More than half of the repealed provisions dealt with authentication matters now covered by Article IX of the Rules. *See* TEX. REV. CIV. STAT. ANN. arts. 3718-3732, 3734a, 3737a-3737c, 3737e (Vernon 1926 & Supp. 1984), *repealed as to civil matters by* Court Rules, Tex. Sup. Ct., Tex. Cases 641-642 S.W.2d xxxv (1982) (order effective Sept. 1, 1983). This order may be found in the Texas Rules of Evidence.

structure and features of the new Rules and their relationship to prior Texas law.[2]

II. Comparison of the Texas Rules and the Federal Rules

Article IX of the Texas Rules of Evidence is nearly identical to its model, Article IX of the Federal Rules of Evidence. There are three rules, the first two of which contain a number of component provisions. Of the seven provisions in the Texas Rules that contain any differences at all from the federal counterparts, only two could be said to differ in substance: a minor substantive variation appears in Rule 901(a)(3), and Texas Rule 902(10) adds a device not found at all in the Federal Rules. The insertion of Texas Rule 902(10) required that Federal Rule 902(10) be renumbered to become Texas Rule 902(11). The other differences are insignificant. Texas Rule 902(3) contains a sentence that does not appear in the Federal Rules, but the addition amounts to a clarification rather than a change.[3] Finally, in Texas Rules 901(b)(10), 902(4), and 902(11) the language used to refer to other laws was changed in order to suit the state setting.

III. Provision-by-Provision Analysis of Article IX

A. *Rule 901(a): General Provision*

"Authentication and identification," according to the drafters of the Federal Rules, "represent a special aspect of relevancy."[4] They explain: "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."[5] As the example shows, the problem of authentication or identification is not confined to documentary and real evidence. It arises whenever the relevancy of any evidence depends upon its identity, source, or connection with a particular person, place, thing, or event. As Wigmore put it, "the foundation on which the necessity of authentication rests, is not any

2. The text of Article IX is reproduced as the appendix to this article.
3. *See infra* text accompanying notes 111-12.
4. Fed. R. Evid. 901(a) advisory committee note.
5. *Id.* Authentication of telephone conversations is governed by Rules 901(b) (5) and (b)(6). *See infra* text accompanying notes 49-60.

artificial principle of evidence, but an *inherent logical necessity.*"[6] This idea is borne out by the fact that neither the common law nor the Federal and Texas Rules of Evidence contains any comprehensive attempt to prescribe the circumstances in which authentication is required. Whether authentication is called for must in every instance be determined by "logical necessity," that is, by whether the relevancy of the proffered evidence depends upon its identity, source, or connection with a particular person, place, thing, or event.

Rule 901(a), then, while styled the "General provision" on authentication, does not indicate when and in what respect evidence must be authenticated. That can only be determined, as just indicated, by asking whether the identity, source, etc. of the evidence, in the context in which it is offered, are material; if so, then to that extent authentication or identification are by "logical necessity" required. All that Rule 901(a) tells us is that when authentication or identification is required, the requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[7] The Federal Advisory Committee's Note to Rule 901(a) explains: "The requirement of showing authenticity or identity falls 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)."[8] Federal Rule 104(b) provides: "Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[9] One of the illustrations given by the Federal Advisory Committee in its Note to Rule 104(b) is: "[I]f a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled 'conditional relevancy.' "[10]

Both at common law[11] and under the Rules, preliminary ques-

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6. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2129, at 703 (Chadbourn rev. ed. 1978) (emphasis in original).

7. TEX. R. EVID. 901(a).

8. FED. R. EVID. 901(a) advisory committee note.

9. *Id.* 104(b).

10. *Id.* 104(b) advisory committee note.

11. *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2550, at 640-41 (Chadbourn rev. ed. 1978).

tions of fact thus determinative of "conditional relevancy"—including, as in this example, questions of authenticity or identity—are generally given to juries. The only role of the judge with respect to these preliminary questions is to determine whether a "prima facie case"—evidence sufficient to support a jury finding—has been presented. This is quite unlike the treatment accorded other preliminary fact questions that determine the admissibility of evidence, such as fact questions concerning the existence of a privilege or the applicability of a hearsay exception. Fact questions determinative of the competency, as distinguished from the relevancy, of evidence are decided outright by the judge, both at common law[12] and under Federal and Texas Rules 104(a). Why are questions of conditional relevancy, including authenticity, treated differently? The Federal Advisory Committee explains:

> If preliminary questions of conditional relevancy were determined solely by the judge, . . . the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.[13]

The "prima facie case" standard of authentication or identification under Rule 901(a) is supported by prior Texas law and practice.[14]

B. *Rule 901(b): Illustrations*

Rule 901(b) appears to be designed to permit as much flexibility as possible in matters of authentication. It lists nine examples of authentication techniques, plus a tenth provision incorporating by reference any additional methods that might be recognized by statute or court rule. The examples, even with the addition of those

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12. *See id.* at 641.

13. FED. R. EVID. 104(b) advisory committee note.

14. *See* Barrera v. Duval County Ranch Co., 135 S.W.2d 518, 520 (Tex. Civ. App.—San Antonio 1939, writ ref'd); Tartt & Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 553 (1983).

incorporated by reference, are explicitly stated not to be exclusive. As one commentator has noted, however:

> While the ten subdivisions of Rule 901(b) are illustrative and not limiting, they are in aggregate so comprehensive—especially with the general language in subdivision (b)(1) on testimony that a matter "is what it is claimed to be" and subdivision (b)(4) on "distinctive characteristics" and "circumstances"—that it is hard to envision a reasonable form of authenticating proof that would not be embraced by these illustrations.[15]

C. *Rule 901(b)(1): Testimony of Witness With Knowledge*

An obvious method of satisfying the requirement of prima facie identification of an item and/or its source, etc., is to present the testimony of a person with personal knowledge that the item is what it is claimed to be. In the case of an object or document that has unique or distinctive characteristics, testimony of a single person who perceived the item at the relevant time normally suffices to identify it in court. Where the object is not distinctive in appearance, a so-called "chain of custody" may be required in order to establish that the item presented at trial is indeed the same one that had a role in the events in issue. A "chain of custody" consists of testimony of each person who had custody of the item from the time of its discovery or initial connection with the case to the time of its presentation at trial.[16]

When real evidence is offered, often its condition, as well as its identity, is important. When this is so, a proper foundation must include evidence that the item is in substantially the same condition when presented as at the legally material time, e.g., the time of the accident, the time of first discovery, etc.[17] Like identity, continuity of condition can sometimes be shown by a single witness. If any plausible material change in the object would be palpable, it suffices that the witness who identifies the object also testifies that it appears

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15. 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 506, at 24 (1981).

16. *See, e.g.*, United States v. Zink, 612 F.2d 511, 514 (10th Cir. 1980); *In re* Swine Flu Immunization Prods. Liab. Litig., 533 F. Supp. 567, 578 (D.C. Colo. 1980); Luna v. State, 493 S.W.2d 854, 856 (Tex. Crim. App. 1973); *see also* Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 AM. CRIM. L. REV. 527, 556 (1983).

17. *See* Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960); Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 AM. CRIM. L. REV. 527, 533 (1983).

to be in the same condition as when previously perceived by him.[18] If, on the other hand, the object is of a nature that admits a risk of material but impalpable change—such as a chemical or bodily fluid specimen—then mere assertion by the identifying witness of the absence of any apparent change in its condition may not suffice. In such a case, continuity of condition must be established by a "chain of custody."[19] It is not required, however, that all possibility of tampering or adulteration be eliminated.[20] Moreover, even if a change in the condition of an item has occurred, it is not necessarily thereby rendered inadmissible. So long as the probative value of the item, despite the change, outweighs the danger of misleading the jury, it will still be admissible, and the change in its condition will be a matter going only to its weight as evidence.[21]

D. *Rule 901(b)(2): Nonexpert Opinion on Handwriting*

Rule 901(b)(2) perpetuates the rather liberal receptivity of the common law toward lay identification of handwriting. Any person claiming some familiarity with the handwriting of the putative author is permitted to testify to his opinion as to the genuineness of the disputed document, and an affirmative opinion ordinarily suffices to make out a prima facie case of authenticity.[22] Normally, the requisite familiarity will have been acquired by the witness having actually seen the person write,[23] or by having exchanged correspondence

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18. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 212, at 667-68 (3d ed. 1984).

19. *See* Hammett v. State, 578 S.W.2d 699, 708 (Tex. Crim. App. 1979) (quoting C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 212, at 527 (2d ed. 1972)); Easley v. State, 472 S.W.2d 128, 129 (Tex. Crim. App. 1971).

20. *See* United States v. Cyphers, 553 F.2d 1064, 1073 (7th Cir.), *cert. denied,* 434 U.S. 843 (1977); Salinas v. State, 407 S.W.2d 730, 731 (Tex. Crim. App. 1974); Winegarner v. State, 505 S.W.2d 303, 306 (Tex. Crim. App. 1974); Wright v. State, 420 S.W.2d 411, 413 (Tex. Crim. App. 1967).

21. *See* Young v. State, 629 S.W.2d 247, 251 (Tex. App.—Fort Worth 1982), *appeal dismissed,* __ U.S. __, 104 S. Ct. 1262, __ L. Ed. 2d __ (1984); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401.4, at 156 (1981); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 212, at 668 (3d ed. 1984).

22. *See* Bodiford v. State, 630 S.W.2d 847, 852 (Tex. App.—Fort Worth 1982, pet. ref'd); Janak v. Security Lumber Co., 513 S.W.2d 300, 302 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ) (quoting 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1433, at 287 (1956)).

23. *See* Southern Kan. Ry. v. Barnes, 173 S.W. 880, 882 (Tex. Civ. App.—Amarillo 1915, writ ref'd).

with him.[24] Courts have recognized, however, that "in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or correspond[ed] with him,"[25] and any plausible source of familiarity has been regarded as sufficient.[26]

Rule 901(b)(2) codifies this common law method, with the qualification, not mentioned in Texas cases,[27] that a lay witness is not competent to give an opinion on handwriting if his familiarity with the putative author's hand was acquired for purposes of the litigation. The purpose of the limitation is to reserve such testimony to experts testifying under Rule 901(b)(3).[28]

E. *Rule 901(b)(3): Comparison by Trier or Expert Witness*

901(b)(3) is the only provision in Rule 901 in which the Texas Rule is substantively different from the federal version. While the Texas Rule authorizes authentication of a disputed document or item by comparison by the trier of fact, or by an expert witness, with an exemplar or exemplars "which have been found by the court to be genuine,"[29] the federal version permits comparison with exemplars "which have been authenticated."[30] "Authenticated," as a reference to Rule 901(a) indicates, means simply that a prima facie case of authenticity has been presented. Therefore, under the Federal Rule it is permissible to authenticate a disputed writing or object by comparison with an exemplar which is itself of disputed authenticity, so long as there is evidence sufficient to support a finding that the exemplar is authentic. In such a case, the jury is given the initial issue of the authenticity of the exemplar, as well as the

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24. *See* Sartor v. Bolinger, 59 Tex. 411, 415 (1883).

25. Rogers v. Ritter, 79 U.S. 317, 322 (1870).

26. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 901.2, at 949 (1981) ("Remarkably little familiarity has been found sufficient."); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 221, at 690 (3d ed. 1984) ("qualifications are minimal to say the least"); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(2)[01], at 901-32 (1983) (any familiarity is sufficient if it satisfies trial court); *cf.* Askins, Inc. v. Sparks, 56 S.W.2d 279, 281 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (whenever one is acquainted with writing of person he may testify to its authenticity).

27. *See* Tartt and Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 556 (1983).

28. *See* FED. R. EVID. 901(b)(2) advisory committee note.

29. TEX. R. EVID. 901(b)(3).

30. FED. R. EVID. 901(b)(3).

issue of the authenticity of the writing or object with which the exemplar is to be compared. Under the Texas Rule, the exemplar must be stipulated or found by the judge to be genuine, and the jury is never given both a primary dispute and an accompanying secondary dispute about an exemplar.

The Texas provision is consistent with prior law in Texas[31] and in most other jurisdictions.[32] The Federal Advisory Committee dispensed with the requirement that the exemplar be found by the court to be genuine as being "at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact."[33] While perhaps theoretically sound, this analysis was rejected by the Texas drafters for practical reasons. The federal approach contemplates that sometimes a jury must resolve a preliminary dispute concerning an exemplar, and only then move on to the question of the document ultimately in controversy. Such a process, the Texas drafters believed, is apt to be confusing and distracting. If a party wishes to employ the comparison-with-exemplar method of authentication, surely it is not too much to ask that he produce at least one specimen, the authenticity of which can be shown to the court by a preponderance of the evidence.

The most common applications of the comparison-with-exemplar method of authentication are handwriting,[34] typewriting,[35] and ballistics;[36] but the possible range of applications is probably infinite:

> Much the same technique is used in connection with tire tread marks, jimmy marks on door jambs, shoe prints, hair, blood and the like. It depends on a statistical demonstration or assumption that the markings or other identifying characteristics are so rare (alone or in combination) that it is likely that they had the same source.[37]

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31. *See, e.g.,* Nass v. Nass, 149 Tex. 41, 46, 228 S.W.2d 130, 132 (1950); Alexander v. State, 115 S.W.2d 1122, 1125-26 (Tex. Civ. App.—Amarillo 1938, writ ref'd); Askins, Inc. v. Sparks, 56 S.W.2d 279, 281 (Tex. Civ. App.—Beaumont 1933, writ ref'd); *see also* TEX. REV. CIV. STAT. ANN. art. 3737b (Vernon Supp. 1984) (repealed as to civil actions effective, Sept. 1, 1983).

32. *See* 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2000, 2016 (Chadbourn rev. ed. 1978).

33. FED. R. EVID. 901(b)(3) advisory committee note.

34. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(3) [03], at 901-40 (1983).

35. *See id.* ¶ 901(b)(3) [04], at 901-44.

36. *See id.* ¶ 901(b)(3) [05], at 901-46.

37. *See id.* ¶ 901(b)(3) [01], at 901-34.

The Rule, like the common law, permits comparison by the trier of fact either alone or with the assistance of an expert witness. Whether expert testimony is permitted in the particular situation is governed by the "helpfulness" standard of Rule 702.[38] Whether expert testimony is required is determined by whether ordinary persons would be able to draw conclusions from the data as presented, without assistance from someone having special skill or knowledge.

F. *Rule 901(b)(4): Distinctive Characteristics and the Like*

Rule 901(b)(4) is a very broad provision encompassing a "great variety"[39] of circumstantial modes of authentication. The basic pattern of reasoning embodied in the provision is as follows: (1) the questioned item or document, X, possesses a distinctive feature, Y; (2) Y is shown to be more or less exclusively associated with a particular person or source, Z; (3) therefore, X probably emanates from Z. This is the basic pattern of reasoning commonly employed in the identification of such non-documentary items as fingerprints,[40] palmprints,[41] and shoe marks.[42] It is also a common method to identify the author of a writing or the speaker in a telephone conversation; for example, "[a] letter can be shown to have emanated from a particular person or business by the fact that it would be unlikely for anyone other than the purported writer to be familiar with the subject matter of the letter."[43] A speaker over the telephone may similarly exhibit special knowledge which serves to identify him.[44]

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38. Rule 702, "Testimony by Experts," provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. EVID. 702. For an analysis of Rule 702 in relation to prior Texas law, see Sutton, *Article VII: Opinions and Expert Witnesses,* 20 HOUS. L. REV. 445, 451-61 (1983).

39. FED. R. EVID. 901(b)(4) advisory committee note.

40. *See, e.g.,* Gibbs v. State, 544 S.W.2d 403, 404 (Tex. Crim. App. 1976); Matula v. State, 390 S.W.2d 263, 266 (Tex. Crim. App. 1965); Robertson v. State, 168 Tex. Crim. 35, 37, 322 S.W.2d 620, 622 (1959).

41. *See* Xanthull v. State, 403 S.W.2d 807, 809-10 (Tex. Crim. App. 1966).

42. *See* Martinez v. State, 169 Tex. Crim. 229, 232-33, 333 S.W.2d 370, 373 (1960); Fletcher v. State, 168 Tex. Crim. 157, 159, 324 S.W.2d 2, 4 (1959).

43. 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(4) [01], at 901-49 (1983).

44. *See, e.g.,* Gleason v. Davis, 155 Tex. 467, 473, 289 S.W.2d 228, 232 (1956); Earnhart v. State, 582 S.W.2d 444, 448-49 (Tex. Crim. App. 1979); City of Ingleside v. Stewart, 554 S.W.2d 939, 944 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *see also* Liberty Mutual Ins. v. Preston, 399 S.W.2d 367, 370 (Tex. Civ. App.—San Antonio 1966, writ ref'd

The traditional "reply letter doctrine" is simply an instance of the special knowledge method of circumstantial authentication.[45] Under this doctrine, it suffices to authenticate a letter to show that it was received in due course in response to a previous letter addressed to the purported author. In addition to letters,[46] this doctrine has been applied in Texas to telegrams[47] and could also properly apply to return telephone calls or to any other mode of responsive communication.[48]

G. *Rule 901(b)(5): Voice Identification*

The common law has recognized that individual human voices have distinctive characteristics which can be identified by others.[49] Rule 901(b)(5) merely restates the common law on this point. Its requirements for admissibility are, accordingly, quite liberal. It permits identification "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."[50] "Minimal" familiarity has been held to be sufficient to support admissibility under this Rule,[51] as under prior common law in Texas.[52]

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n.r.e.); Texas Candy & Nut Co. v. Horton, 235 S.W.2d 518, 521 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.).

45. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225, at 696 (3d ed. 1984); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(4) [05], at 901-62 to -64 (1983); 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2153, at 752-53 (Chadbourn rev. ed. 1978).

46. *See, e.g.,* General Missionary Soc. v. Real Estate Land Title & Trust Co., 134 Tex. 564, 567, 136 S.W.2d 599, 601 (1940); National Mut. Accident Ins. Co. v. Davis, 46 S.W.2d 351, 352 (Tex. Civ. App.—Amarillo 1932, no writ); Western Union Tel. Co. v. Sharp, 5 S.W.2d 567, 569 (Tex. Civ. App.—Texarkana 1928, no writ).

47. *See* Menefee v. Bering Mfg., 166 S.W. 365, 366 (Tex. Civ. App.—Fort Worth 1914, no writ); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225, at 696 (3d ed. 1984).

48. *See* Swift & Co. Employees Benefit Ass'n v. Lemire, 145 S.W.2d 698, 700 (Tex. Civ. App.—Fort Worth 1940, writ dism'd judgmt cor.) (telephone conversation compared to reply letter).

49. *See* Massey v. State, 160 Tex. Crim. 49, 53-54, 266 S.W.2d 880, 883 (1954) (witness may identify person by voice despite having not met person until after conversation); Stepp v. State, 31 Tex. Crim. 349, 352, 20 S.W. 753, 754 (1892) (person's voice may be identified and distinguished); 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2155, at 758 (Chadbourn rev. ed. 1978).

50. TEX. R. EVID. 901(b)(5).

51. United States v. Cuesta, 597 F.2d 903, 915 (5th Cir.) (minimal showing of familiarity required), *cert. denied,* 444 U.S. 964 (1979).

52. *See, e.g.,* Locke v. State, 453 S.W.2d 484, 485 (Tex. Crim. App. 1970) (allowed identification of defendant based on single hearing during telephone conversation); McKee v. State, 118 Tex. Crim. 479, 42 S.W.2d 77, 80 (1931) (witness identified defendant based on

Moreover, in contrast to the treatment of lay handwriting identification under Rule 901(b)(2), voice familiarity may be acquired for purposes of the litigation, a feature likewise supported by precedent in Texas.[53]

H. *Rule 901(b)(6): Telephone Conversations*

Rule 901(b)(6) is designed to illustrate identification of the party who received a telephone call. Identification of the calling party is not covered by this example but by examples (4) and (5).[54] This provision distinguishes between business and personal numbers. Its treatment of business numbers is substantially equivalent to prior case law in Texas.[55] Although some Texas authorities suggested that the proponent had to show by independent evidence the authority of the speaker to take the call on behalf of the business,[56] other Texas cases permitted the speaker's authority to be "deemed"[57] or "presumed"[58] from the contents of the conversation and the circumstances of the call. Therefore, as a practical matter,

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comparison of hearing of defendant's voice at time of murder and while defendant was in jail); Collins v. State, 77 Tex. Crim. 156, 178, 178 S.W. 345, 355 (1915) (identification may be based on one hearing).

53. *See* Lomax v. State, 146 Tex. Crim. 531, 534, 176 S.W.2d 752, 753 (Tex. Crim. App. 1943) (voice identification of defendant by witness based on hearing voice after his arrest); McKee v. State, 118 Tex. Crim. 479, 42 S.W.2d 77, 80 (1931) (witness testified to identity of defendant based on voice identification made after defendant incarcerated).

54. *See supra* text accompanying notes 39-53.

55. *See, e.g.,* Gleason v. Davis, 155 Tex. 467, 472-73, 289 S.W.2d 228, 232 (1956) (call made to business on line used for business purposes admissible if recipient "represents that he is the person called and is one authorized to take the message"); Colbert v. Dallas Joint Stock Land Bank, 136 Tex. 268, 274, 150 S.W.2d 771, 775 (1941) (when call is made to business number, evidence of conversation with person answering admissible without further evidence of speaker's identity); Group Life & Health Ins. Co. v. Turner, 620 S.W.2d 670, 673 (Tex. Civ. App.—Dallas 1981, no writ) (general rule that contents of call to business admissible if made to person authorized to receive call); *see also* City of Ingleside v. Stewart, 554 S.W.2d 939, 944 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (telephone call received by bookkeeper of contractor admissible to show defendant had requested plaintiff company to do certain work); Sanderlin v. Dransfield, 523 S.W.2d 794, 796 (Tex. Civ. App.—Fort Worth 1975, no writ) (message received over business lines presumed to have been received by person authorized by business to receive messages).

56. *See* Gleason v. Davis, 155 Tex. 467, 472-73, 289 S.W.2d 228, 232 (1956); Tartt & Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 566 (1983).

57. *See* Group Life & Health Ins. Co. v. Turner, 620 S.W.2d 670, 673 (Tex. Civ. App.—Dallas 1981, no writ).

58. *See* Sanderlin v. Dransfield, 523 S.W.2d 794, 796 (Tex. Civ. App.—Fort Worth 1975, no writ).

the new Rule probably does not substantially change Texas law concerning authentication of calls to business numbers.

As for calls to personal numbers, some pre-Rules Texas authorities suggested that the facts that a number was listed in the name X and the answerer identified himself as X would not suffice to identify the speaker as X.[59] Clearly these facts should be, and under the new Rules are, sufficient to make out a prima facie case of identity.[60]

I. *Rule 901(b)(7): Public Records or Reports*

Rule 901(b)(7) covers two types of items: (1) writings, public or private, that are lawfully filed in a public office, and (2) public records that are kept in a public office. A sufficient foundation for introduction of a writing in the first category consists of showing that the proffered document was in fact filed in the public office where such documents are lawfully filed.[61] For example, a document that appears to be a deed to a parcel of land in X County can be authenticated by showing that it is filed in the office in X County where conveyances are lawfully filed.[62] Ordinarily, the requisite showing will not be by testimony of the custodian, which would be inconvenient, but by certified copy, as prescribed in Rules 902(4) and 1005.[63] The foundation required for the second category, public records, is even simpler: a showing that the item is a record of a public office kept in the office. Again, testimony of the custodian will not normally be presented to satisfy this requirement; certification of the copy is the traditional method and the method approved in Rules 902(4) and 1005.[64]

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59. *See* Colbert v. Dallas Joint Stock Land Bank, 136 Tex. 268, 273-74, 150 S.W.2d 771, 774-75 (1941); Blakely, *Summary of Changes Effected by the Texas Rules of Evidence,* 20 HOUS. L. REV. 625, 661 (1983).

60. Rule 901(b)(6) provides that a telephone conversation may be authenticated "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 . . . ." *See* TEX. R. EVID. 901(b)(6) (emphasis added).

61. *See* 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2158, at 772 (Chadbourn rev. ed. 1978).

62. *Cf.* Smithers v. Lowrance, 100 Tex. 77, 79, 93 S.W. 1064, 1065 (1906) (copy of record pointed out by commissioner showing classification of lands in particular counties is presumed true and is admissible).

63. *See infra* text accompanying notes 115-21.

64. *See* Amoco Prod. Co. v. United States, 619 F.2d 1383, 1390 (10th Cir. 1980) (FED. R. EVID. 1005 designed to avoid need for custodian to produce originals); 5 D. LOUISELL &

The authentication doctrines embodied in these provisions are not new; they existed at common law[65] and under previous statutes[66] in Texas. The only significant change effected by the new Rule is the abolition of the notice requirement of the previous official records statute.[67]

Presentation of any document as evidence potentially presents at least three issues: authentication, best evidence, and hearsay. When a purported public record is offered, Rule 901(b)(7) treats only the first of these issues. The best evidence problem is treated in Rule 1005,[68] and the hearsay problem is treated in Rules 803(8)-(10), (14), (22), and (23).[69]

C. MUELLER, FEDERAL EVIDENCE § 592, at 521 (1981) (Rules 902(4) and 1005 are complimentary, eliminate inconvenience of having public officer called away from duties for "trivial purpose of authenticating a public document").

65. *See* Houston v. Perry, 5 Tex. 462, 465-66 (1849); 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2159, at 775-76 (Chadbourn rev. ed. 1978).

66. *See* TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

67. *See id.* art. 3731a, § 3.

68. Rule 1005, Public Records, 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 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 the exercise of reasonable diligence, then other evidence of the contents may be given.

TEX. R. EVID. 1005. For an analysis of Rule 1005, see Hippard, *Article X: Contents of Writings, Recordings, and Photographs,* 20 HOUS. L. REV. 595, 613-16 (1983).

69. Rule 803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (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, or (C) 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.

J. *Rule 901(b)(8): Ancient Documents or Data Compilation*

In Texas, as in other states, courts have long permitted a document to be received upon a showing that it is ancient, fair on its face, and located in an appropriate place.[70] Rule 901(b)(8) embodies this doctrine, with two modifications of prior Texas law. First, the Rule covers "data compilations" as well as documents. Second, the Rule reduces the requisite antiquity to twenty years from the previous thirty-year period of the common law.[71]

The rationale for the ancient document rule of authentication is similar to the rationale for the corresponding hearsay exception now covered by Rule 803(16).[72] As to both, the justification is part necessity and part circumstantial indicia of trustworthiness. The passage of such a long time suggests the likely absence of witnesses, either to the substance contained in the document, or to its creation or execu-

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. . .

(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.

. . .

(22) *Judgment of previous conviction.* Evidence of a 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 felony, to prove any fact essential to sustain the judgment of conviction. The pendency of an appeal renders such evidence inadmissible.

(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.

TEX. R. EVID. 803. For an analysis of the hearsay exceptions for public records covered by these provisions, see Wellborn, *Article VIII: Hearsay,* 20 HOUS. L. REV. 477, 521-24, 528-30 (1983).

70. *See, e.g.,* Emory v. Bailey, 111 Tex. 337, 340, 234 S.W. 660, 662 (1921) (ancient documents admissible if shown to come from authorized custody, to lack suspicion, and to have existed minimum of 30 years); City of Fort Worth v. Bewley, 612 S.W.2d 257, 260 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.) (admitted title opinions written in 1899 and stored in city library's archives); Cowan v. Mason, 428 S.W.2d 96, 102 (Tex. Civ. App.—Amarillo 1968, no writ) ("introduction of ancient instrument is prima facie proof of its genuineness").

71. *Compare* TEX. R. EVID. 901(b)(8) (requires document to have been in existence 20 years to qualify as ancient) *with* Rivere v. Wilkens, 72 S.W. 608, 610 (Tex. Civ. App.—1903, no writ) (allegedly forged deed admissible as ancient document provided shown to be at least 30 years old).

72. Rule 803(16) creates a hearsay exception for: "Statements in a document in existence twenty years or more the authenticity of which is established." *See* TEX. R. EVID. 803(16); *see also* Wellborn, *Article VIII: Hearsay,* 20 HOUS. L. REV. 477, 525 (1983).

tion. Fraud and forgery are unlikely to be perpetrated so patiently to bear fruit so many years after a document's creation. Fair appearance and proper location, therefore, are sufficient additional circumstances to justify admissibility of an ancient document.[73] Of course, these conditions only establish prima facie genuineness; the opponent remains free to attack the genuineness of the item or the accuracy of its contents or both.[74]

K. *Rule 901(b)(9): Process or System*

Rule 901(b)(9) is one of the broadest illustrations in the Rule. The Advisory Committee's Note to the Federal Rule cites X-rays and computer printouts as examples of evidence that may be authenticated under this provision. Obviously, many other kinds of evidence may fit the category of "results" of "a process or system."[75] Equally obviously, an evidentiary foundation for a particular "result" must include, as this provision prescribes, a description of the process or system showing that it is accurate. Given the logic of that requirement, it is not surprising that prior law in Texas and elsewhere was consistent with the Rule's formulation. For example, Texas courts had encountered, in addition to X-rays[76] and computer printouts,[77] tape recordings,[78] spectrographic analyses,[79] breath[80]

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73. *See* 1A R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL §§ 1372-1376 (Texas Practice 3d ed. 1980); 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2137, at 722 (Chadbourn rev. ed. 1978).

74. *See* Macdonell v. De Los Fuentes, 26 S.W. 792, 797 (Tex. Civ. App. 1894, writ ref'd) (age of document may be sufficient proof of execution to allow admission but its credibility remains question for jury). *But see* Kellogg v. Southwestern Lumber Co., 44 S.W.2d 742, 748 (Tex. Civ. App.—Beaumont 1931, writ ref'd) (court may presume genuineness of ancient document if no suspicious circumstances and may instruct verdict).

75. TEX. R. EVID. 901(b)(9).

76. *See* Community Chapel Funeral Home v. Allen, 499 S.W.2d 215, 216 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (x-rays admissible if competent witness can identify evidence and show it to be proper portrayal of injury); Hartman v. Maryland Casualty Co., 417 S.W.2d 640, 642 (Tex. Civ. App.—Waco 1967, no writ) (x-rays not admitted where proponent failed to show who made them, how made, or if accurate).

77. *See* Railroad Comm'n v. Southern Pac. Co., 468 S.W.2d 125, 129 (Tex. Civ. App.—Austin), *writ ref'd n.r.e. per curiam,* 471 S.W.2d 39 (Tex. 1971) (computer records admissible upon showing of reliability of system, regularity of entry, and knowledge of source of information).

78. *See* Edwards v. State, 551 S.W.2d 731, 733 (Tex. Crim. App. 1977) (lists seven criteria for admission of tape recordings); Cummings v. Jess Edwards, Inc., 445 S.W.2d 767, 773 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.) (upholding exclusion of recording on facts presented as within discretion of trial court).

and blood[81] tests for alcohol, ultrasonic tests,[82] and gyroscopic directional surveys.[83] In each case, the basic requirements for authentication amounted to those of the present Rule: a description of the process or system adequate to permit the trier of fact to understand and evaluate its accuracy, followed by a showing of its accurate application in the particular instance that produced the proffered evidence.

The comprehensiveness and elaborateness of the requisite description of a given process or system will vary according to the complexity of the system, of course, and also according to its familiarity to lay persons and to courts. Novel systems, and novel applications of familiar systems, will require more complete explanations than will routine applications of processes or systems that have become a common part of modern life. Indeed, as one commentator on the Federal Rules of Evidence has observed:

> It is probably fair to say that in most instances evidence of the results of a process or system is simply admitted without evidence ever being introduced either as to the capability of the process or system properly employed to produce an accurate result, or as to the actual employment and operation of the process or system in the matter at hand. This is almost always the case, for example, where a physician testifies to the results of a test such as an electroencephalogram.[84]

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79. *See* Hernandez v. State, 530 S.W.2d 563, 566-67 (Tex. Crim. App. 1975) (spectrographic analysis admissible when based on comparison with other data "available in the appropriate literature and the spectra obtained from known reference samples of the drug").

80. *See* French v. State, 484 S.W.2d 716, 719 (Tex. Crim. App. 1972). For the results of a breath test to be admissible the state must show:

> 1) the use of properly compounded chemicals; 2) the existence of periodic supervision over the machine and operation by one who understands the scientific theory of the machine; 3) proof of the result of the test by a witness or witnesses qualified to translate and interpret such result so as to eliminate hearsay.

See id. at 719; *see also* TEX. REV. CIV. STAT. ANN. art. 6701L-5 (Vernon Supp. 1984).

81. *See* Westchester Fire Ins. v. Wendeborn, 559 S.W.2d 108, 109 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (pathologists testified that deceased's blood-alcohol level showed intoxication).

82. *See* Chemical Leaman Tank Lines v. Trinity Indus., 478 S.W.2d 114, 116 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (whether proper predicate for ultrasonic test has been laid is in discretion of trial court).

83. *See* Harrington v. State, 385 S.W.2d 411, 423-24 (Tex. Civ. App.—Austin 1964) (evidence admissible where witness explained operation of instrument and proper surveying techniques; trial court's decision sustained unless abuse of discretion), *rev'd on other grounds,* 407 S.W.2d 467 (Tex. 1966), *cert. denied,* 386 U.S. 944 (1967).

84. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 9.01.9, at 969 (1981).

Two explanations may be offered to account for this permissiveness, or rather to ratify it under the new Rules. First, the Advisory Committee's Note to Rule 901(b)(9) states: "Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system."[85] Second, under Rule 703, an expert witness may base an opinion upon facts or data even though they are not in a form that would be admissible in evidence.[86] Both of these features should be taken into account when attempting to apply Rule 901(b)(9).

L. *Rule 901(b)(10): Methods Provided by Statute or Rule*

Rule 901(b)(10) incorporates by reference any method of identification or authentication that is prescribed in any statute or any rule promulgated by the Texas Supreme Court under its statutory authority. Many Texas civil statutes that dealt with authentication were repealed in connection with the adoption of the Texas Rules of Evidence. Some, however, were not repealed, such as the provision on breath tests for intoxication.[87] Statutes such as this survive the adoption of the Rules of Evidence and continue to operate through Rule 901(b)(10). Likewise, any authentication rules that might be enacted by the legislature in the future, or adopted by the supreme court under statutory rulemaking power, will automatically be accommodated through this incorporation provision.

M. *Rule 902: Self-Authentication*

Rule 902 accords special treatment—at least with regard to authentication—to several kinds of writings. These writings are said to be self-authenticating, that is, admissible without any "[e]xtrinsic evidence of authenticity."[88] The idea is not new; prior to the Federal and Texas Rules of Evidence, statutes existed in every jurisdic-

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85. FED. R. EVID. 901(b)(9) advisory committee note.

86. *See* TEX. R. EVID. 703. The Rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id. See generally Sutton, *Article VII: Opinions and Expert Witnesses,* 20 HOUS. L. REV. 445, 462-68 (1983) (analyzes Rule in relation to prior Texas law).

87. *See* TEX. REV. CIV. STAT. ANN. art. 6701L-5 (Vernon Supp. 1984).

88. TEX. R. EVID. 902.

tion,[89] including Texas,[90] giving such preferred treatment to certain types of documents.[91] The principal reason usually advanced for dispensing with the requirement of extrinsic evidence of genuineness is the comparative unlikelihood that a particular document of the type would not be authentic.[92]

The consequence of treating a document as self-authenticating, as described by McCormick, is that "one of these may be tendered to the court and, even without the shepherding angel of an authenticating witness, will be accepted in evidence for what it purports to be."[93] Its genuiness may still be challenged and attacked by evidence. If the opposing evidence is sufficient to support a finding that the document is not authentic, the trier of fact will be permitted to make such a finding.[94] The sole effect of Rule 902 is to make the appearance of the document, by itself, sufficient to constitute a prima facie case of its authenticity; that prima facie case, like any other, is subject to rebuttal.

Rule 902 only governs the authentication issue. A document that is self-authenticating may nevertheless be inadmissible for other reasons, such as the best evidence rule,[95] the hearsay rule,[96] or a privilege.[97] Additionally, self-authentication does not mean that a

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89. *See* FED. R. EVID. 902 advisory committee note; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 699 (3d ed. 1984); Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence,* 16 WAYNE L. REV. 195, 209 (1969).

90. *See* Black, *The Texas Rules of Evidence—A Proposed Codification,* 31 SW. L.J. 969, 1011-12 (1977) (collecting Texas statutes).

91. The documents that have most commonly received this preferred treatment include acknowledged instruments, such as conveyances, certified public records, publicly printed documents, and documents bearing official seals. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 696 (3d ed. 1984); Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence,* 16 WAYNE L. REV. 195, 210 (1969).

92. *See* FED. R. EVID. 902 advisory committee note; United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982) ("Rule 902 recognizes that the possibility of fraud, forgery and misattribution of certain documents is so slight that the general requirement of authentication by extrinsic evidence . . . is dispensed with."), *cert. denied,* 459 U.S. 874 (1982); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 902.0 (1981); 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 528, at 161 (1981).

93. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 700 (3d ed. 1984).

94. *See* FED. R. EVID. 902 advisory committee note. Tartt and Wolff misleadingly describe the effect of the Rule to be that "the document is conclusively deemed genuine, for admissibility purposes." Tartt & Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 577 (1983).

95. *See* TEX. R. EVID. art. X.

96. *See id.* art. VIII.

97. *See id.* art. V.

writing may be introduced without any foundation. It is still necessary to establish the relevancy of the document.[98] Therefore, while Rule 902 may mean that a document may be offered without "the shepherding angel of an authenticating witness,"[99] that does not necessarily mean that the document may be introduced by counsel unaccompanied by any oral testimony. Normally, some oral testimony will accompany the introduction of such a document, to supply a context necessary to establish its relevancy.

N. *Rule 902(1): Domestic Public Documents Under Seal*

Under this provision, any document that appears to have been issued by any American public entity, bearing what appears to be the official seal of the issuing entity and an official signature, is prima facie authentic. As applied to Texas public documents that bear a seal, this provision yields approximately the same treatment as prior law.[100] As applied to out-of-state documents, the new Rule is more lenient than the former law, which required that the "attestation" of the document "shall be accompanied with a certificate that the attesting officer has the legal custody of such writing."[101] No such certificate is required under Rule 902(1); it suffices that the document bears a purported seal and a purported official signature.

It should be noted that this Rule only applies to original documents executed by public entities or officials. Copies of public records are governed by Rules 902(4) and 1005.

O. *Rule 902(2): Domestic Public Documents Not Under Seal*

Rule 902(2) denies self-authentication to public documents not bearing a seal, on account of "the greater ease of effecting a forgery."[102] If the officer executing the document has no seal, the docu-

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98. *See id.* 402. The Rule provides: "All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is inadmissible." *Id.* 402.

99. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 700 (3d ed. 1984).

100. *See* TEX. REV. CIV. STAT. ANN. art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983); *see also id.* arts. 3719, 3720, 3722, 3724, 3725, 3731 (Vernon 1926) (repealed as to civil actions, effective Sept. 1, 1983).

101. *Id.* art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

102. FED. R. EVID. 902(2) advisory committee note.

ment can be rendered self-authenticating only by certification by an appropriate officer who has and attaches a seal.

This procedure is similar to the certification procedure for out-of-state documents that was prescribed in the former Texas official records statute.[103] Since no such certification was required under the old statute for Texas documents that were "attested by" the appropriate officer, regardless of whether that officer had and attached a seal, the effect of Rules 902(1) and (2) appears, to this extent, to be more restrictive than the prior law. That is, now even a Texas official document must bear a seal to be self-authenticating. If the officer who executed it has no seal, then it must either be authenticated testimonially under Rule 901, or it must be certified by some other appropriate official who has a seal.

P. *Rule 902(3): Foreign Public Documents*

Rule 902(3) greatly liberalizes the treatment of foreign public documents in Texas courts. It is based upon the corresponding federal evidence rule, which in turn was derived from former Federal Rule of Civil Procedure 44(a)(2).[104]

A comparison of the new Rule with the former Texas official records statute as applied to foreign documents reveals several important points. First, article 3731a required that the document be attested by its legal custodian, and some Texas cases refused to admit foreign records because there was no showing that the person who had attested them had legal custody.[105] But, in many countries the concept of legal custody is unknown, and it is practically impossible to find a person who may be said to have legal custody of a particular record or document.[106] Therefore, elimination in the new

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103. *See* TEX. REV. CIV. STAT. ANN. art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

104. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(3)[01], at 902-15 to -17 (1983) (federal evidence rule adopts the "liberalizing trend" of Rule 44(a)(2) of the Federal Rules of Civil Procedure).

105. *See* Cooley v. Cooley, 503 S.W.2d 604, 606 (Tex. Civ. App.—Eastland 1973, no writ) (Iranian records not admissible because no showing that anyone had legal custody); Moody v. Moody, 465 S.W.2d 836, 837 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) (no showing of legal custody by any foreign official), *cert. denied,* 405 U.S. 990 (1972).

106. *See* Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1062 (1961) ("the concept of a custodian of official records may be unknown to the applicable foreign law").

Rule of the requirement of legal custody reflects a more realistic and practical approach to foreign documents.

The former statute required that the attestation of a foreign document by its legal custodian be accompanied by a certificate that the attesting officer had legal custody of the document. Such a certificate was required to have been made by a consul or similar official of the foreign government or by an American foreign service representative in that country.[107] The new Rule permits what are called "chain certificates."[108] The official who makes the final certification need not be able to verify the authority of the original attesting foreign officer and the genuineness of his execution; he need only certify the prior certification of any foreign official in a chain of certificates that relate to the execution and attestation. This is a desirable alternative in many cases because the authority, position, and incumbency of the original foreign official may be unknown to the American official providing the final certification.[109]

Article 3731a also required pretrial notice by any party seeking to introduce a public record, domestic or foreign.[110] No such impediment is found in Rule 902.

The last sentence of Texas Rule 902(3) does not appear in the federal version. Its purpose is to call attention to an alternative form of authentication of documents originating in countries which have executed a treaty with the United States providing for simplified proof of one another's documents. Specifically, the sentence was inspired by the Convention Abolishing the Requirement of Legalization for Foreign Public Documents,[111] which was adopted at the Ninth Session of the Hague Conference on Private International Law in 1960 and which became effective in the United States in

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107. *See* TEX. REV. CIV. STAT. ANN. art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

108. *See* Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1067-68 (1961) (discussing advantages of chain certification).

109. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(3)[01], at 902-16 (1983); Smit, *International Aspects of Federal Civil Procedure,* 61 COLUM. L. REV. 1031, 1063 (1961).

110. *See* TEX. REV. CIV. STAT. ANN. art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

111. *See* S. REP. NO. 17, 96th Cong., 1st Sess. (1979); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(3)[02], at 902-18 (1983).

1981 pursuant to ratification by the Senate in 1979.[112] Under the supremacy clause, of course, this convention would be binding on Texas courts even if the Texas Rules of Evidence ignored it. The Texas drafters chose to include the reference in Rule 902(3) in the hope that it would promote the use of this convenient agreement.

Under the Convention, public documents from signatory countries are rendered self-authenticating in the courts of other countries if they bear a certificate called an apostille. An apostille simply states that the document is authentic, signed in an official capacity, and that any stamp or seal is genuine.[113] Each signatory country designates to the Hague Convention which of its officials shall be competent to issue the apostille. If the foreign document emanates from a participating country and bears the apostille, the effect of the Convention is to render unnecessary the final certification that Rule 902(3) would otherwise require.

Lastly, Rule 902(3) provides that final certification may be dispensed with, and a document "treated as presumptively authentic"—or even "evidenced by an attested summary with or without final certification"—upon a showing of good cause, if all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy. This exemption has been liberally applied by the federal courts.[114] It may be used whether or not the document comes from a country that participates in the Hague Convention.

Q. *Rule 902(4): Certified Copies of Public Records*

Rule 902(4) follows the common law[115] and previous Texas stat-

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112. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(3)[02], at 902-18 (1983).

113. *See id.* at 902-18.

114. *See, e.g.,* United States v. Rodriguez Serrate, 534 F.2d 7, 10 (1st Cir. 1976) (although proponent of evidence did not strictly comply with Rule, court admitted document as proponent showed good cause and opponent was given opportunity to determine document's accuracy); United States v. Leal, 509 F.2d 122, 126 (9th Cir. 1975) (document admitted where government could not comply with Rule because foreign official refused to follow any authentication procedures other than his country's); *In re* Sterling Navigation Co., 444 F. Supp. 1043, 1047 (S.D.N.Y. 1977) (Rule not complied with, but opponent did not deny authenticity).

115. *See* FED. R. EVID. 902(4) advisory committee note; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 700 (3d ed. 1984).

utes[116] in permitting a public record to be evidenced by a copy certified as correct by the custodian or other qualified public officer. The certification must comply with the requirements of the appropriate provision of this Rule for original public documents, either paragraph (1), (2), or (3).[117] Certified copies have traditionally been permitted to prove public records because of reluctance to remove originals from their proper custody and because of the inconvenience of requiring testimony of the custodian in order to authenticate either an original or a copy.[118]

Rule 1005 also authorizes proof of the contents of public records by a copy rather than by the original.[119] Where the proffered document presents a hearsay problem, Rule 803(8),[120] or some other exception,[121] may apply.

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116. *See* TEX. REV. CIV. STAT. ANN. arts. 3718-3722, 3724-3731, (Vernon 1926); *Id.* art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983); 1A R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL §§ 1287-1291 (Texas Practice 3d ed. 1980); Black, *The Texas Rules of Evidence—A Proposed Codification,* 31 SW. L.J. 969, 1011 (1977).

117. *See* TEX. R. EVID. 902(4). For examples of applications of FED. R. EVID. 902(4), see United States v. Stone, 604 F.2d 922, 925 (5th Cir. 1979) (in order to show that check had been deposited in mail, government introduced progress sheet used by Treasury Department; held, all that is necessary under 902(4) is that legal custodian's affidavit note his position of authority and that copy is correct); United States v. Pent-R-Books, Inc., 538 F.2d 519, 527-28 (2d Cir. 1976) (admitting postal administrative records where certified by postal official rather than custodian; all that is required is authorized person), *cert. denied,* 430 U.S. 906 (1977).

118. *Cf.* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 532, at 192-93 (1981) (purpose is to avoid inconvenience of removing records from official custody).

119. Rule 1005, Public Records, 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 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 the exercise of reasonable diligence, then other evidence of the contents may be given.

TEX. R. EVID. 1005. For an analysis of Rule 1005, see Hippard, *Article X: Contents of Writings, Recordings, and Photographs,* 20 HOUS. L. REV. 595, 613-16 (1983).

120. TEX. R. EVID. 803(8) (hearsay exception for public records and reports); *see also* Wellborn, *Article VIII: Hearsay,* 20 HOUS. L. REV. 477, 521-22 (1983) (general discussion of hearsay exception for public records and reports).

121. *See* TEX. R. EVID. 803(9) (records of vital statistics); *id.* 803(10) (absence of public record or entry); *id.* 803(12) (marriage, baptismal, and similar certificates); *id.* 803(14) (records of documents affecting an interest in property); *id.* 803(22) (judgment of previous conviction); *id.* 803(23) (judgment as to personal, family, or general history, or boundaries). *See generally* Wellborn, *Article VIII: Hearsay,* 20 HOUS. L. REV. 477, 522-24, 528-30 (1983) (discusses the various exceptions to the hearsay rule).

R. *Rule 902(5): Official Publications*

Rule 902(5) clarifies a broad self-authentication rule for governmental publications that had apparently already been established in Texas under statutes. An old Texas statute prescribed admissibility of statute books.[122] The former official records statute broadly recognized "official publication" as an alternative to attestation.[123] It was interpreted to justify admission of a pamphlet purportedly published by a federal agency without further authentication.[124] That decision would appear to be coextensive with the new Rule. The justification generally advanced for this broad doctrine is that it is unusual for an official publication to contain major errors, and the authenticity of such official publications is easily determined.[125]

S. *Rule 902(6): Newspapers and Periodicals*

Rule 902(6) is a new doctrine, not based on prior common law authority, either in the federal courts[126] or in Texas.[127] It does, however, have ample support in common sense.[128]

One problem remains unresolved. Rule 902(6) only dispenses with proof of the genuineness of the specimen publication. It does not address other possible attribution problems, such as the source

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122. *See* TEX. REV. CIV. STAT. ANN. art. 3718 (Vernon 1926) (repealed as to civil matters, effective Sept. 1, 1983); 1A R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 1292, at 491 (Texas Practice 3d ed. 1980).

123. *See* TEX. REV. CIV. STAT. ANN. art. 3731a, § 4 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

124. *See* Transport Ins. Co. v. Liggins, 625 S.W.2d 780, 784 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (publication of U.S. Dep't of Human Resources was official publication admissible without certification or attestation by legal custodian); *see also* Missouri Pac. R.R. v. Duncan, 353 S.W.2d 315, 319 (Tex. Civ. App.—Austin 1962, no writ) (U.S. Dep't of Agriculture market reports admissible on issue of prices of certain goods).

125. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 533, at 207 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(5)[01], at 902-30 (1983).

126. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 528, at 161 (1983).

127. *See* Black, *The Texas Rules of Evidence—A Proposed Codification,* 31 SW. L.J. 969, 1011 n.241 (1977); Tartt & Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 585 (1983).

128. *See, e.g.,* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 228, at 701 (3d ed. 1984) (self-authentication as to newspapers logical and long overdue); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(6)[01], at 902-31 (1983) (unlikely that forgery could be successfully perpetrated, particularly in libel case, where opponent in position to prove forgery by producing true copy); Wendorf, *Should Texas Adopt the Federal Rules of Evidence?,* 28 BAYLOR L. REV. 248, 279 (1976) (self-authentication of newspapers and periodicals worthwhile because of wide use and little chance of falsification).

of a notice or advertisement contained in the publication. The common law at the time of the Federal Rule did not treat the presence of an item in a publication as prima facie evidence of its attributed origin.[129] The Advisory Committee's Note to the Federal Rule indicates no design to change that part of the common law. It states: "Establishing the authenticity of the publication may, of course, leave open questions of authority and responsibility for items therein contained."[130] Some authorities have argued, nonetheless, that a presumption of authorship or instigation should attach in such cases.[131] This seems to be an open question upon which, perhaps, no fixed rule can be urged. There may be a difference, for example, between a commercial advertisement for which the publication has received a fee and a letter or notice which is published without charge.[132] It may be best to leave it to the discretion of the trial judge to determine, according to the circumstances of the particular case, whether or not to require extrinsic evidence that an attributed portion of a published newspaper or periodical did, in fact, emanate from the named source.

T. *Rule 902(7): Trade Inscriptions and the Like*

Writings falling into this category present a very good case for self-authentication. Trade names and the like are customarily accepted in commerce as accurate indicia of ownership or origin of the product to which they are attached.[133] The likelihood of false attribution is diminished by the considerable legal protection afforded

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129. *See* Mancari v. Frank P. Smith, Inc., 114 F.2d 834, 836 (D.C. Cir. 1940) ("mere presence in printed material of the name of a particular person constitutes no substantial evidence that that person caused such material to be written or published"); Collins v. State, 75 Tex. Crim. 534, 536, 171 S.W. 729, 731 (1914) (advertisement in newspaper associating defendant with infirmary not admissible unless showing of authorization by defendant or showing of connection between defendant and infirmary); *see also* 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2150, at 748 (Chadbourn rev. ed. 1978) (no judicial authority for relying on attribution alone as sufficient evidence of authorship).

130. FED. R. EVID. 902(6) advisory committee note.

131. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 902.6, at 981 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(6)[01], at 902-31 (1983); Tartt & Wolff, *Article IX: Authentication and Identification,* 20 HOUS. L. REV. 551, 585 (1983).

132. *Cf.* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(6)[01], at 902-32(1983) ("Publishers look to the named advertisers for their pay, and it is not the custom of the business world to give another free advertising.").

133. *See* 5 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 535, at 237 (1981); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(7)[01], at 902-32 to -33 (1983).

trademarks and trade names.[134] In cases of genuine dispute, the putative manufacturer, seller, or proprietor is in a much better position than anyone else to produce evidence concerning genuineness.[135]

Despite these considerations, prior law was not consistent. Some cases accorded presumptive authenticity to such items as labels, trademarks, and brand names;[136] others refused to do so, sometimes with unseemly results.[137] In Texas, there was authority for self-authentication of brands on livestock[138] and company insignia on vehicles,[139] but no general doctrine like the present rule.[140]

Rule 902(7) obviates extrinsic proof of the origin of an item, insofar as it is indicated on the label or inscription. Where matters of origin beyond those indicated by the label or inscription are material, Rule 902(7) does not help, and extrinsic proof may be necessary. A Texas case decided prior to adoption of the Rules, *Coca-Cola Bottling Co. v. Fillmore,*[141] illustrates this point. Plaintiff obtained a judgment in the trial court upon evidence that he purchased a bottle of Coca-Cola from a machine at a service station in Levelland and discovered a dead cockroach in it after drinking half its contents. The court of civil appeals reversed the judgment because

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134. *See* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(7)[01], at 902-33 (1983).

135. *See* Brown, *Authentication and Contents of Writings,* 1969 LAW & SOC. ORD. 611, 629.

136. *See, e.g.,* Doyle v. Continental Baking Co., 160 N.E. 325, 326 (Mass. 1928) (loaf of bread); Curtiss Candy Co. v. Johnson, 141 So. 762, 764 (Miss. 1932) (candy bar); Weiner v. Mager & Throne, Inc., 3 N.Y.S.2d 918, 920 (Mun. Ct. 1938) (loaf of bread).

137. *See* Murphy v. Campbell Soup Co., 62 F.2d 564, 565 (1st Cir. 1933) (name on can not alone sufficient to connect defendant with item); Keegan v. Green Giant Co., 110 A.2d 599, 601 (Me. 1954) (plaintiff injured by metal in can of peas; label by itself insufficient, must have extrinsic evidence connecting defendant to can).

138. *See* Chowning v. State, 41 Tex. Crim. 81, 83, 51 S.W. 946, 949 (1899) (recognizing registered brand as proof of ownership); McKenzie v. State, 32 Tex. Crim 568, 576-77, 25 S.W. 426, 427 (1894) (brands recorded with county clerk prove ownership while unrecorded brands do not show control or management); Massey v. State, 31 Tex. Crim. 91, 92, 19 S.W. 908, 909 (1892) (to be effective, statute requires that record of brand indicate where it will be placed on animal); *see also* TEX. AGRIC. CODE ANN. § 144.107 (Vernon 1982) ("registered tattoo mark is prima facie evidence of the ownership of the tattooed livestock").

139. *See* Kirk v. Harrington, 255 S.W.2d 557, 563 (Tex. Civ. App.—Fort Worth 1953, no writ) (name and address on side of truck raises presumption of ownership); Strickland Transp. Co. v. Atkins, 223 S.W.2d 675, 678 (Tex. Civ. App.—Dallas 1949, no writ) (name or insignia appearing on truck will raise rebuttable presumption).

140. *See* Black, *The Texas Rules of Evidence—A Proposed Codification,* 31 SW. L.J. 969, 1011 (1977) (no express Texas authority for rule like Federal Rule 902(7)).

141. 453 S.W.2d 239 (Tex. Civ. App.—Amarillo 1970, no writ).

there was no evidence that the bottle of Coca-Cola purchased by plaintiff had been bottled in Lubbock. As indicated in the opinion, plaintiff needed to present some evidence that the machine in Levelland had been filled with bottles sold by the particular defendant.[142] Under the new Rules the result should be the same. The bottle, in *Fillmore*, bore no indication that it came from the Lubbock bottler,[143] so that relationship, obviously necessary to plaintiff's case, would have to be supplied by extrinsic evidence.

U. *Rule 902(8): Acknowledged Documents*

Rule 902(8) follows prior Texas law in treating properly acknowledged documents as self-authenticating.[144] Normally, the acknowledgment will be taken before a notary public, although certain other officers in Texas are authorized by statute to take acknowledgments.[145] Statutes in Texas which supply the proper forms of acknowledgments[146] have not been repealed or altered by the adoption of these Rules.

V. *Rule 902(9): Commercial Paper and Related Documents*

As used in this provision, the phrase "general commercial law," for practical purposes, means the Uniform Commercial Code.[147] The effect of Rule 902(9) is to refer to certain provisions of the Texas U.C.C. that create presumptive authenticity for various commercial instruments, or parts thereof, in some circumstances. There are three sections of the Code that have such purposes.

Section 1.202, "Prima Facie Evidence by Third Party Documents," provides:

> A document in due form purporting to be a bill of lading, policy or

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142. *See id.* at 241.

143. *See id.* at 241. The bottom of the bottle was inscribed "Greenville, Texas," presumably to designate where the bottle was made, not where it was filled.

144. *See* Jousan v. Presidio Corp., 590 S.W.2d 524, 525 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Mack Fin. Corp. v. Decker, 461 S.W.2d 228, 230 (Tex. Civ. App.—Dallas 1970, no writ); Cowan v. Mason, 428 S.W.2d 96, 103 (Tex. Civ. App.—Amarillo 1968, no writ); TEX. REV. CIV. STAT. ANN. art. 3723 (Vernon 1926) (repealed as to civil actions, effective Sept. 1, 1983).

145. *See* TEX. REV. CIV. STAT. ANN. art. 6602 (Vernon 1969).

146. *See id.* arts. 6603, 6604, 6607, 6607a (Vernon 1969 & Supp. 1984).

147. *See* FED. R. EVID. 902(9) advisory committee note; H.R. REP. NO. 650, 93d Cong., 1st Sess. 17 (1973); 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902(9)[01], at 902-36 (1983).

> certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.[148]

The official commentary to the section explains that it is a restatement of a common law rule grounded in trustworthiness[149] and that its applicability is limited to documents authorized by the agreement or contract, in litigation arising out of the contract.[150] It applies only to documents issued by third parties and does not cover a document, such as a bill of lading, issued by one of the principals.[151]

Section 3.307(a) of the Code deals with proof of signatures on negotiable instruments. It provides that unless specifically denied in the pleadings, each signature on an instrument is admitted; if controverted, signatures are presumed to be genuine—in other words, self-authenticating—"except where the action is to enforce the obligation of a purported signer who has died or become incompetent."[152] This section of the U.C.C. is supplemented in Texas by Rules 93(7) and (8) of the Texas Rules of Civil Procedure, which require that denials in pleadings of the genuineness of signatures on instruments sued upon be sworn.[153]

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148. TEX. BUS. & COM. CODE ANN. § 1.202 (Tex. UCC) (Vernon 1968).

149. *See id.* comment 1.

150. *See id.* comment 2.

151. *See* Atchison, T. & S.F. Ry. v. Lone Star Steel Co., 498 S.W.2d 512, 514 (Tex. Civ. App.—Texarkana 1973, no writ).

152. TEX. BUS. & COM. CODE ANN. § 3.307(a)(2) (Tex. UCC) (Vernon 1968).

153. *See* TEX. R. CIV. P. 93, which provides, in pertinent part:

> A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.
>
> . . .
>
> (7) Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.
>
> (8) A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

Finally, section 3.510 of the Texas U.C.C. provides that protests, bank stamps or tickets indicating dishonor, and bank records showing dishonor are self-authenticating.[154] In other words, a party who must prove the fact of dishonor may do so by presenting any of these without extrinsic evidence.

W. *Rule 902(10): Business Records Accompanied by Affidavit*

Texas Rule 902(10) is the only provision in Article IX that has no counterpart in the Federal Rules. It is derived from portions of the former Texas business records statute.[155] Its purpose, like that of its statutory predecessor, is to provide a convenient method for laying a foundation for business records, a method that does not require calling the custodian as a witness at trial. In effect, it creates a method for proof of private records comparable to the proof of public records under Rule 902(4). The private custodian's affidavit under this Rule corresponds to the public custodian's certification under Rule 902(4).

The requirements of this provision are fourfold: (1) the records and the accompanying affidavit must be filed with the court clerk at least fourteen days prior to the commencement of the trial; (2) "prompt" notice of this filing must be served on all parties; (3) the records must be made available for inspection and copying; and (4) the affidavit must conform to the substance of the model in the Rule and Rules 803(6) and (7).

Although Rule 902(10) is based upon former article 3737e, sections 5-8, it is considerably simpler than those provisions. The statute treated medical records and X-rays differently from other business records, imposing special requirements upon X-rays in particular.[156] The new Rule treats X-rays and other medical records like other records, so long as they comply with the basic requirements of Rules 803(6) and (7).

Id.

154. *See* TEX. BUS. & COM. CODE ANN. § 3.510 (Tex. UCC) (Vernon 1968).

155. *See* TEX. REV. CIV. STAT. ANN. art. 3737e, §§ 5-8 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

156. *See id.* § 6 (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

X. *Rule 902(11): Presumptions Under Statutes or Other Rules*

This incorporation-by-reference provision is the equivalent of Federal Rule 902(10) adapted to the state setting. It parallels Rule 901(b)(10), which incorporates methods of authentication other than self-authentication. Commentary on Rule 901(b)(10) applies to this Rule.[157]

An example of a statutory self-authentication provision that is made applicable under Rule 902(11) is section 59 of the Probate Code. It prescribes a form of affidavit which, if properly executed by the testator and witnesses, will render a will "self-proved."[158]

Y. *Rule 903: Subscribing Witness' Testimony Unnecessary*

At common law, if an instrument was attested by subscribing witnesses, it could not be authenticated without producing at least one of the attestors or showing them all to be unavailable.[159] This inconvenient doctrine was limited in Texas, in 1933, by a statute equivalent to the present Rule.[160] Under both the statute and Rule 903, production of or accounting for attesting witnesses is only required if the writing is required by law to be attested. Very few writings are now required to be attested. In Texas, the most important of these is a will that is not entirely in the handwriting of the testator. Under the Probate Code, even such an attested will may be authenticated without production of the subscribing witnesses if it is accompanied by affidavits of the testator and witnesses as prescribed in the Code.[161]

IV. CONCLUSION

The purpose of this article has been to provide a practical survey of Article IX of the Texas Rules of Evidence against the background of the prior case law and statutes that it replaces, and to help practicing lawyers and judges who are familiar with the prior law to adjust to the new law with a minimum of inconvenience. This task

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157. *See supra* text accompanying note 87.

158. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980); *infra* text accompanying note 161.

159. *See* C. MCCORMICK, EVIDENCE IN TRIALS AT COMMON LAW § 220, at 668 (3d ed. 1984).

160. *See* TEX. REV. CIV. STAT. ANN. art. 3734a (Vernon Supp. 1984) (repealed as to civil actions, effective Sept. 1, 1983).

161. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980).

has been made easier by the fact that this portion of the Rules effects few significant changes in Texas law. It is in the nature of restatement rather than reform. In this, its drafters may be criticized or praised. Representatives of all segments of the Texas civil bar and bench participated in the process that engendered the Texas Rules of Evidence. Nowhere in that process was any provision of Article IX the subject of serious controversy or struggle. Since Article IX is a version of the status quo ante in its subject area, that status quo has been endorsed, in effect, by those most familiar with it and most affected by it.

In 1984, based on recommendations of a standing committee of the State Bar, the Texas Supreme Court amended a number of the Texas Rules of Evidence.[162] None of the Rules in Article IX were amended. It is likely that these Rules will remain unchanged and uncontroversial for some time.

162. *See* Tex. Sup. Ct. Order June 25, 1984, effective Nov. 1, 1984. This order may be found in 47 TEX. B.J. 933 (1984).

APPENDIX

TEXAS RULES OF EVIDENCE

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

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 witness with specimens which have been found by the court to be genuine.

(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 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 twenty years or more at the time it is offered.

(9) *Process of 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 statute or by other rule 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 his 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 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. A final certification may be made by a secretary of 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. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(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 statute or other 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) *Business records accompanied by affidavit.*

a. Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, and provided the other parties to said cause

are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule 21a, Texas Rules of Civil Procedure, fourteen (14) days prior to commencement of trial in said cause.

b. Form of affidavit. A form of the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No. _____

John Doe (Name of Plaintiff)
v.
John Roe (Name of Defendant)

IN THE _____ COURT IN AND FOR _____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 19__.

_____

Notary Public in and for _____ County, Texas.

(11) *Presumptions under statutes or other rules.* Any signature, document, or other matter declared by statute or by other rules prescribed by the Supreme Court pursuant to statutory authority to be prima facie genuine or authentic.

Comment. Paragraph (10) is based on portions of the affidavit authentication provisions of TEX. REV. CIV. STAT. ANN. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-rays, hospital records, or any other kind of regularly kept medical record.

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.