NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase ''or a statement defined in rule 801(d)(2)(c), (d) and (e)'' is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility].

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1997 AMENDMENT

The amendment is technical. No substantive change is intended.

GAP Report. Restylization changes in the rule were eliminated.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Added Apr. 11, 1997, eff. Dec. 1, 1997.)

NOTES OF ADVISORY COMMITTEE ON RULES

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

GAP Report on Rule 807. Restylization changes were eliminated.

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 witnesses with specimens which have been authenticated.

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

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

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

(7) Public records or reports.—Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

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

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

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

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1943.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

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

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

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

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

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

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

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

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

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

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

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code §1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick §192; California Evidence Code §1420. Language patterns may indicate authenticity or its opposite. *Magnuson v. State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

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

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*,

or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v. Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska v. Crutchfield*, 147 Okl. 4. 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co. v. Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick §193; 7 Wigmore §2155; Annot., 71 A.L.R. 5, 105 id. 326.

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

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

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

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

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

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

Rule 902. Self-authentication

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

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

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

(3) Foreign public documents.—A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

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

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

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

(7) Trade inscriptions and the like.—Inscriptions, signs, tags, or labels purporting to have