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RECENT CHANGES TO FEDERAL RULES OF EVIDENCE: WILL THEY MAKE IT EASIER TO AUTHENTICATE ESI?

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While there was great fanfare for the changes to the Federal Rules of Civil Procedure in 2006 and 2015 and the changes to Rule 502 of the Federal Rules of Evidence ("Fed. R. Evid." or "Rule(s)") in 2011, there has been little attention paid to the December 1, 2017, changes to Fed. R. Evid. 803(16) as well as Rule 902(13) and (14), which are intended to positively influence how parties manage electronically stored information (ESI). The changes to Rule 803(16) address authentication of digital information that has been stored for more than 20 years, eliminating the concern that factual assertions made in massive volumes of ESI will be admissible for the truth contained in the documents simply because of their age. The concurrent addition of new subsections (13) and (14) to Rule 902 provide for streamlined authentication of ESI, and potentially eliminate the need to call a witness at trial to authenticate the evidence. In addition, more changes to the Fed. R. Evid. are coming. The Advisory Committee on the Rules of Evidence is considering proposed changes to Rule 807.

I. THE ESI EVIDENCE ADMISSIBILITY CHART

Notwithstanding these helpful additions to the litigator's toolkit, many challenges remain for attorneys handling evidence from the rapidly-evolving landscape of data sources such as bitcoin, blockchain, smart contracts, social media, Internet of Things (IoT), mobile devices, and cloud computing services.

Moreover, the ever-expanding use of social media like Facebook, LinkedIn, and Instagram, as well as social messaging applications like WhatsApp, Viber, and Messenger present significant challenges for lawyers trying to authenticate digital evidence using the traditional rules of evidence. The ESI Evidence Admissibility Chart ("Chart") offers discovery lawyers and trial attorneys a quick reference guide for handling diverse sources of ESI evidence. From Rule 104 to Rule 803(6) to Rule 901 and Rule 902, the Chart provides a step-by-step approach for authenticating digital information and successfully getting that information admitted into evidence. The 2018 edition of the Chart, which has been updated to reflect the changes to Rules 803 and 902, is provided in Appendix A (*Admissibility of Electronic Evidence*).

II. FED. R. EVID. 803(16)—MODIFICATION OF THE ANCIENT DOCUMENTS EXCEPTION TO THE HEARSAY RULE

When it was enacted, Rule 803 was intended to address exceptions to the hearsay rule that were premised on the theory that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."[1] Under former Rule 803(16), commonly referred to as the "ancient document" exception to the hearsay rule, a document that would normally be excluded as hearsay is nonetheless admissible and may be introduced at trial or summary judgment for the truth of its content if the document was created more than 20 years earlier and the proponent of the document can prove the document is authentic under Rule 902. Historically, an "ancient document" theoretically

1. FED. R. EVID. 803(16), Notes of Advisory Committee on Proposed Rules (1972).

could be deemed more trustworthy because "age affords assurance that the writing antedates the present controversy."[2] Under that rationale, something mystical happens to a document when it turns 20 years old; it acquires a hearsay-defeating level of trustworthiness that it did not have one day earlier. The reality is that, based on anecdotal evidence, this exception was rarely used; and, when it was used, it was for hardcopy documents.[3] The recent concern leading to the amendment was that Rule 803(16) could someday apply to the ever-expanding volume of digital information that currently exceeds four zettabytes (four trillion gigabytes) of data.[4] Given the increasing reliance on computers and the creation of significant amounts of digital information in the mid- to late-1990s (launch dates for big data generators: Yahoo (1994), Amazon (1995), eBay (1995), Google and PayPal (1998)) and early 2000s,[5] some jurists and commentators were concerned about a tsunami of ESI turning 20 years old in the near future[6] and the real risk that substantial

2. *Id*.

3. Professor Daniel J. Capra found that Rule 803(16) was used to admit documents in fewer than 100 reported cases since the Federal Rules of Evidence were enacted. *See* Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J. L. & TECH. 1, 12 (2015). The Advisory Committee also noted that "[a] party will often offer hardcopy that is derived from ESI." May 7, 2016 Report of the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Standing Committee Agenda Book at 73 (June 6–7, 2016), http://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf (Hereinafter May 2016 Advisory Committee Report).

4. Daniel J. Capra, *supra* note 3, at 13 & n.46.

5. Gil Press, *A Very Short History of Big Data*, FORBES (May 9, 2013), https://www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data/#2608231b65a1.

6. Daniel J. Capra, *supra* note 3, at 3–4.

amounts of unreliable ESI would be subject to near-automatic admissibility under the existing exception.

Indeed, the looming problem with Rule 803(16) remained under the radar until 2015 when Professor Daniel Capra of Fordham Law School, who serves as the reporter to the Judicial Conference Advisory Committee on Evidence Rules ("Advisory Committee"), highlighted the problem in his article, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*.[7] As Professor Capra pointed out:

> The question, then, is whether the explosion of electronic information has separated ESI from the original justifications for the hearsay exception for ancient documents. As stated above, the primary justification for the ancient documents exception is necessity, which comes down to the premise that it is likely that all reliable evidence (such as business records) has been destroyed within the twenty-year time period, and thus we have to make do with more dubious evidence. This necessity assumption is substantially undermined by the growth of ESI. Because ESI is prevalent and easily preserved, whatever reliable evidence existed at the time of a twenty-year-old event *probably* still exists. Indeed, the probability that most or all ESI records (emails, text messages, receipts, scanned documents, etc.) will be available is certainly higher than the probability that hardcopy documents or eyewitnesses will still be available

7. Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before People Find Out About It*, 17 YALE J. L. & TECH. 1.

> and useful several decades after a contested event. There is no reason to admit *unreliable* ESI on necessity grounds if it is quite likely that there will be *reliable* ESI that is admissible under other hearsay exceptions.[8]

The Advisory Committee considered four proposals for addressing the problem: (1) abrogation of Rule 803(16); (2) limiting the exception to hardcopy; (3) adding the necessity requirement from the residual exception (Rule 807); and (4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. In concluding that Rule 803(16) had to be abrogated, the Advisory Committee noted that the problems presented by the ancient documents exception could not be fixed by tinkering with it—the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception (Rule 807) and the business records exception (Rule 803(6)). In particular:

> [t]here was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual

8. *Id.* at 15 (citations omitted).

> exception, thus raising questions about how to distinguish those exceptions.[9]

As the Advisory Committee also concluded, hearsay that is in fact reliable will very likely be admissible under other reliability-based exceptions.[10]

However, the public reaction to that approach was largely negative. Many of the comments complained that without Rule 803(16), "important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; cases involving environmental cleanups; and title disputes."[11]

In light of the public sentiment, the Advisory Committee went back to the drawing board and ultimately decided to limit the "ancient documents" exception to documents prepared before 1998 because that would not affect any of the specific cases raised in the public comments because those cases involved records prepared well before 1998. The Advisory Committee also recognized "that any cutoff date will have a degree of arbitrariness, but . . . the ancient documents exception itself set an arbitrary time period for its applicability."[12]

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9. April 17, 2015 Meeting Minutes of the Advisory Committee on Evidence Rules, Standing Committee Agenda Book at 492 (May 28–29, 2015), http://www.uscourts.gov/sites/default/files/2015-05-standing-agenda-book_1.pdf.

10. May 2016 Advisory Committee Report, *supra* note 3, at 46.

11. *Id.*

12. *Id.* at 47.

As a result, under new Rule 803(16), *documents (hard copy and ESI) that were prepared prior to January 1, 1998, and whose authenticity has been established will qualify as a hearsay exception, regardless of whether the preparer or declarant is available as a witness*.

III. FED. R. EVID. 902(13) AND (14)—NEW OPTIONS FOR AUTHENTICATING ESI

When the proponents of evidence want to offer a document into evidence either at the summary judgment stage or at trial in a civil case or criminal case, there are some evidentiary steps they have to climb before the judge or jury can consider the information. First, it has to be relevant: Does the evidence logically relate to what is at issue in the case? Second, it has to be authentic: Is the evidence what it purports to be? For example, if someone took a forensic image of a hard drive from a laptop computer as part of discovery in a case and, a year later, they wanted to introduce that forensic image into evidence, the proponent must be able to show that the forensic image that the proponent wants to show the jury is what it purports to be—namely, a document in the identical condition as it was when the image of the hard drive was made a year earlier that has not been altered, doctored or manipulated.

Rule 902 identifies evidence that is "self-authenticating," i.e., information that can be admitted at trial without being authenticated by a witness. Self-authenticating evidence is admissible without extrinsic evidence of authenticity "sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension."[13] Most of the items listed in Rule 902 are self-authenticating on their face, thus requiring no extrinsic evidence

13. FED. R. EVID. 902, Notes of Advisory Committee on Proposed Rules (1972). *See also In re* Miller, No. 10–25453, 2012 WL 6041639, at *7 (Bankr. D.

of authenticity for the document to be admitted. Other items, such as those listed in Rule 902(11) and Rule 902(12) (for records of regularly conducted activity, domestic and foreign, respectively), are self-authenticating *only* to the extent the party seeking to introduce them into evidence certifies their authenticity and provides notice to the opposing party to give them a fair opportunity to challenge the certification. In conjunction with the amendment of Rule 803(6) in 2000, the enactment of Rule 902(11) that same year streamlined the process by which business records could be admitted into evidence under the business records exception to the hearsay rule.[14]

The Advisory Committee in 2017 supplemented Rule 902 by adding two subsections permitting similar certifications to authenticate electronic evidence. The amendments should eliminate the need for a live witness to testify as to the authenticity

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Colo. Dec. 4, 2012) ("Rule 902 strikes a balance in favor of self-authentication for certain enumerated evidence because the likelihood of fabricating such evidence is slight versus the time and expense which would be required for authentication through extrinsic evidence. When a self-authenticating document is offered under Rule 902, the proponent is relieved of the requirement to lay foundation or present testimony through a witness. In other words, if a document is self-authenticating, the general authentication requirement of Rule 901 is deemed satisfied." (citation omitted)); Leo v. Long Island R. Co., 307 F.R.D. 314, 325 (S.D.N.Y. 2015) (in rejecting the applicability of Rule 902 to videotapes, the court explained that "the drafters of the Federal Rules of Evidence anticipated that, in specified circumstances, certain types of exhibits may be so evidently that which the proponent claims them to be that they may be deemed authentic without extrinsic evidence."); United Asset Coverage, Inc. v. Avaya Inc., 409 F. Supp. 2d 1008, 1052 (N.D. Ill. 2006) (describing new Rule 902(11) as "[o]ne of the most useful (though perhaps least noticed) accomplishments" of the Committee during that court's tenure, and lamenting that "[t]oo few lawyers have caught up with that valuable amendment").

14. *See generally* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 552 (D. Md. 2007).

of ESI, thereby streamlining the process at trial. New subsection 13 addresses certifying information generated by an electronic process or system, and new subsection 14, which is narrower than Rule 902(13), addresses certifying data copied from an electronic device, storage medium, or file.[15] The new subsections to Rule 902 are:

> **(13) Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must also meet the notice requirements of Rule 902(11).
>
> **(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

As with the provisions on business records in Rules 902(11) and 902(12), the Advisory Committee noted that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary because the adversary either stipulates to authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. Under the amendments to Rule 902, the parties are now able to determine in advance of trial whether a real challenge to authenticity will be made.

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15. May 2016 Advisory Committee Report, *supra* note 3, at 54–57 (discussing proposed new subsections (13) and (14)).

It is important to note that Rule 902(11) relates "only to the procedural requirements" of authentication.[16] Likewise, new Rules 902(13) and 902(14) are designed to do "nothing more than authenticate" ESI.[17] Therefore, the proponent of the evidence sought to be admitted still must prove the requirements of Rule 803(6) after clearing the authenticity hurdle. Put more simply, the new rules are intended merely to simplify the process of proving that ESI sought to be admitted constitute true and accurate copies of electronic information maintained in the ordinary course of business by the proponent or a third party. What is important to note from Rule 902(13) and (14) is that the references to Rule 902(11) and (12) are simply to the form of the declaration—the affidavit you want to introduce must have the same formality and style as the certifications referred to in Rule 902(11) and (12). Rule 902(13) and (14) are not saying that the certification for subsections (13) and (14) has to include the substantive certification of Rule 902(11), which is tied to Rule 803(6)(A)(B)(C) elements for the business record exception.

New subsections 13 and 14, like Rule 902(11) and (12), permit a foundation witness or "qualified person" to establish the authenticity of information by way of certification.[18] Subsection

16. May 2016 Advisory Committee Report, *supra* note 3, at 55.

17. April 29, 2016 Meeting Minutes of the Advisory Committee on Evidence Rules, Advisory Committee Agenda Book at 25 (Oct. 21, 2016), http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf.

18. Pursuant to Rule 901(11) and (12), a "qualified person" is a custodian or other individual who has the ability to establish the authenticity of the ESI as if that person would have testified at trial such as under Fed. R. Evid. 901(b)(1) [Testimony of a Witness with Knowledge] or 901(b)(4) [Distinctive Characteristics and the Like]. The threshold question for a court to determine the authenticity of a document is not whether the evidence is necessarily what the proponent says it is, but rather whether the evidence is sufficient

13 provides for self-authentication of machine-generated information—such as system metadata—upon the submission of a certification prepared by a qualified person. Subsection 14 provides for authentication of data copied from an electronic device, medium, or file—such as an email or Excel spreadsheet that was stored on a computer—through digital identification. The Advisory Committee noted, in most instances, digital identification involves authentication of data copied from electronic devices by comparing the "hash value" of the proffered copy to that of the original document. A hash value is a unique alphanumeric sequence of characters that an algorithm determines based upon the digital contents of the device.[19] The hash value serves as the digital fingerprint that a qualified person uses to compare the numeric value of the proffered item with the numeric value of the original item. If the hash values for the original and copy are identical, the information can be proffered, and the court can rely on them as authentic copies. The Advisory Committee also noted that "the rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology."[20]

The new Rules 902(13) and 902(14) have the same effect as other Rule 902 provisions of shifting to the opponent the burden of going forward, but not the burden of proof, on authenticity disputes regarding the electronic evidence at issue. Shifting the burden of questioning the authenticity of such records to the opponent who has a fair opportunity to challenge both the certification and the records streamlines the process by which these

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that a jury ultimately might be able to so determine. *See* U.S. v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

19. May 7, 2016, Advisory Committee Report, *supra* note 3, at 56.

20. *Id.*

items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or summary judgment. The proponent of the evidence bears the burden of establishing a prima facie case that the ESI is what it purports to be and establishing authenticity if challenged, but need not go through the expense and inconvenience of using a witness to establish authenticity in the first instance. The opponent, of course, is able to object to the admissibility of the evidence on any other applicable ground.

Rule 902(13) is designed to permit the proponent to show that the evidence in question is authentic by attaching an affidavit under oath by the person or people with the technical or specialized knowledge of how the system or process works certifying that the evidence is reliable and accurate. Rule 902(14) allows for a certification—an affidavit or declaration by someone who has first-hand, personal knowledge (or expertise, if qualified as provided by Rule 702)—that would explain the process by which that person took a forensic copy of the evidence such as a hard drive of a laptop, hashed it, and then compared the hash value of the forensic copy with the hash value of the original hard drive. If the original hash value and the hash value of the forensic copy are the same, then the information in the copy is identical to the information in the original.

For example, if an individual takes a picture with his smart phone, embedded within the electronic metadata of that photograph are Global Position System (GPS) coordinates of the location where that photograph was taken. In a criminal case, where the prosecution must prove that the defendant was in a specific location by virtue of photographs taken from that defendant's cell phone, the metadata from that electronic photograph that shows the GPS coordinates is evidence of where the smartphone and, by extension, where the person was located when the picture was taken. Now, the prosecutor can put that information in

an affidavit and offer the affidavit to the defendant with the request to voice any objection regarding authenticity. If the defendant objects, the prosecutor must actually prove the authenticity and will need to bring one or more witnesses—persons with the scientific, technical, or specialized knowledge—to the trial to testify under oath how the system and processes produce reliable results. If the defendant does not object, the prosecutor has established authenticity and no authenticating witness would be needed at trial. Unless the affiant qualifies as an expert under Rule 702, she must provide information based on direct personal knowledge. The affiant's testimony cannot be based on what someone else told the affiant. Moreover, if the proponent has a system or process that requires explanation by multiple persons in order to be complete, affidavits are needed from each of those persons.

In a situation where the proponent wants to authenticate a process that predates any current employee at the organization, the proponent will need an expert to provide an affidavit. That expert must be able to testify that they have knowledge, training, experience, education, or skill which constitutes scientific, technical, or other specialized knowledge—and, based upon that, they can state how the process operates. Experts may base their opinions on information derived from other sources so long as the sources are reliable.[21]

21. Under Fed. R. Evid. 702, if the jury lacks the subject matter knowledge in an area involving scientific, technical, or other specialized knowledge, the proponent can have a subject matter expert base their opinion on information which is provided to them by others as long as the source of information they rely upon is generally recognized as reliable by other people with that degree of specialty or expertise.

Fed. R. Evid. 902(13) and (14) Certifications

The Rule 902 certification is intended to take the place of the testimony traditionally required to establish the authenticity of the ESI sought to be admitted; therefore, it should follow the same pattern as the testimony it is intended to replace. The certification should start by establishing the background, education, training, and expertise of the affiant in order to establish that she is a "qualified person" as required by Rule 902(11) and (12). Although Rule 902(13) and (14) do not refer to Rule 702, careful lawyers would be wise to ensure that the affiant providing the certificate meets the requirements of an expert witness under Rule 702 if the underlying facts to be authenticated involve scientific, technical, or specialized knowledge, as the underlying facts often do. The added benefit of showing that the affiant meets these Rule 702 requirements is that the affiant may base her certification on information beyond her personal knowledge, provided it is reliable, as described in Rule 703. The certification should then describe the affiant's role in the case, i.e., that she was retained by the party as a computer forensics expert in order to assist the party and its counsel in the identification, preservation, collection, and production of ESI. The certification should describe in detail the evidence in question and establish its authenticity consistent with the formality requirements of Rule 901(11) and (12). The certification need not meet the requirements of Rule 803(6)(A–C), unless the proponent also seeks to qualify the evidence as a business record. Rather, the certification must provide the information required by Rule 902(13) and (14), as discussed below.

If the certificate seeks to authenticate evidence under Rule 902(13), the affiant should describe in detail the "electronic process or system" that was used to generate the information in question. For example, if the information in question is a series

of monthly sales reports, the affiant should describe: (i) the system from which the reports were generated; (ii) the process by which the data that was used to generate the statements was gathered, processed, and stored; and (iii) the process by which the statements or reports sought to be admitted were generated and produced for the litigation. The Rule 902(13) certificate should establish that the information sought to be admitted has not been altered from the form in which it was maintained in the ordinary course of business. While the process of preparing a certification under Rule 902 is seemingly straightforward, the affiant must be careful to describe the "electronic process or system" with enough specificity to satisfy the court and the opponent of the authenticity of the evidence sought to be admitted, and to avoid a hearing during which the opponent of the evidence may cross-examine the affiant.

If the certificate seeks to authenticate evidence under Rule 902(14), the affiant also should describe in detail the electronic information that was copied from its original location and now offered into evidence, as well as the steps taken by the affiant at the time of duplication (including recording the date, time, surrounding circumstances, and hardware and software tools as well as versions utilized). For example, if the information sought to be admitted is a series of Excel and PowerPoint files that were stored on the departmental file share for the client's accounting department, the affiant should list the files in question and include the hash value of each of the files as they existed on the file share as well as the hash value for the copy of each of the files sought to be admitted in order to establish that the files sought to be admitted are authentic copies of the files as they were maintained in the ordinary course of business. The identical hash values will attest that the information sought to be admitted into evidence is a true and correct copy of the information as it existed in its original state.

As final practice pointers, the proponent should keep in mind that the certifications required by Rules 902(13) and Rule 902(14) must be substantive and not boilerplate. As a rule of thumb, they should be as detailed and specific as they would have to be if the witness was testifying in court to authenticate the digital evidence. And, because neither Rule 902(13) or Rule 902(14) provide a deadline by which the party receiving the certification must indicate its objection to the use of the certificate to authenticate the evidence, the cautious lawyer will seek a stipulation as to when the opponent will assert an objection, or ask the court to set a deadline, so that, if an objection is made, the proponent has sufficient time to arrange to bring in a live witness or witnesses.

Sample certifications under Rules 902(13) and 902(14) are provided in Appendices B and C, respectively.

IV. FED. R. EVID. 807—PROPOSED AMENDMENT TO RESIDUAL EXCEPTION TO THE HEARSAY RULE

In 2016 and 2017, the Advisory Committee considered whether to propose an amendment to Rule 807, the residual exception to the hearsay rule, and specifically whether to expand the exception to allow the admission of reliable hearsay even absent "exceptional circumstances." On October 21, 2016, the Advisory Committee met at Pepperdine University School of Law in Los Angeles[22] and held a symposium to review, among other things, possible amendments to Rule 807, including a working draft of an amendment that had been prepared in advance.

22. March 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States, Standing Committee Agenda Book at 72–73 (June 12–13, 2017), http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf.

After the symposium, the Advisory Committee decided against expansion of the residual exception, but concluded that several problems with the current Rule 807 could be addressed by rule amendment.[23] In April 2017, the Advisory Committee proposed and the Standing Committee approved an amendment to Rule 807 for publication in August 2017.[24] The amendment eliminates the "equivalence" standard in the existing rule in favor of a more direct focus on circumstantial guarantees of trustworthiness for proffered statements, taking into account the presence or absence of corroboration. In addition, the proposed amendment eliminates the "materiality" and "interests of justice" requirements as duplicative, while retaining the "more probative" requirement in the existing rule.

The proposed amendment to Rule 807 was published for public comment, with the comment period officially closing on February 15, 2018.[25] At its April 2018 meeting, the Advisory Committee approved a proposed amendment to Rule 807 and submitted it to the Standing Committee for final approval. The current text of Rule 807 is restated in Section A, below, followed by: the main issues that the Advisory Committee identified with

23. September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States, Standing Committee Agenda Book at 99–100 (Jan. 4, 2018), http://www.uscourts.gov/sites/default/files/2018-01-standing-agenda-book.pdf. The proposed amendment addresses several issues with the current notice requirements that are not discussed here.

24. Draft Minutes of the June 12–13, 2017 Meeting of the Committee on Rules of Practice and Procedure, Standing Committee Agenda Book at 52–53 (Jan. 4, 2018), http://www.uscourts.gov/sites/default/files/2018-01-standing-agenda-book.pdf.

25. October 26, 2017 Meeting Minutes of the Advisory Committee on Evidence Rules, Advisory Committee Agenda Book at 15 (April 26–27, 2018), http://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf.

current Rule 807 (Section B); comments regarding proposed changes published by the Advisory Committee following their October 2017 meeting (Section C); and the proposed amended Rule 807 including the proposed Committee Note (Section D).

A. Current Rule 807:

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

B. Issues[26] with Current Rule 807 as Identified by The Advisory Committee:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is difficult to apply because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.
- The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any purpose.
- Is the requirement that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" necessary?

C. Comments Regarding the Proposed Changes to Rule 807 Published by the Advisory Committee Following Their October 2017 Meeting:

> The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted—without regard to expansion of the residual exception. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling

26. May 7, 2017 Report of the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Standing Committee Agenda Book at 736–737 (June 12–13, 2017), http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf.

within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review—Rule 804(b)(6) forfeiture—is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy. This is especially so because a review of the case law indicates that the "equivalence" standard has not fulfilled the intent of the drafters to limit the discretion of the trial court. Given the wide spectrum of reliability found in the hearsay exceptions, it is not difficult to find a statement reliable by comparing it to a weak exception, or to find it unreliable by comparing it to a strong one.

Trustworthiness can best be defined in the Rule as requiring an evaluation of both 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable. Adding a requirement that the court consider corroboration is an improvement to the rule independent of any decision to expand the residual exception.

> The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" and consistent with the "purpose of the rules" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403—and that avoidance was well-reasoned, because the term "material" is so fuzzy. The courts have essentially held that "material" means "relevant"—and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102.
>
> The requirement in the residual exception that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. This will preserve the principle that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest—there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.[27]

27. April 21, 2017 Meeting Minutes of the Advisory Committee on Evidence Rules; Advisory Committee Agenda Book at 13–14 (Oct. 26–27. 2017), http://www.uscourts.gov/sites/default/files/a3_0.pdf.

D. Proposed Amended Rule 807 and Committee Note:

Rule 807. Residual Exception[28]

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~ admissible under a hearsay exception in Rule 803 or 804:

> **(1)** the statement ~~has equivalent circumstantial~~ is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> ~~**(2)** it is offered as evidence of a material fact;~~
>
> **(3~~2~~)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~
>
> ~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or

---

28. May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Standing Committee Agenda Book at 409–410 (June 12, 2018), http://www.uscourts.gov/sites/default/files/2018-06_standing_agenda_book_final.pdf. New material is underlined; matter to be omitted is lined through.

hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note[29]

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility re-

29. May 14, 2018 Report of the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Standing Committee Agenda Book at 410–414 (June 12, 2018), http://www.uscourts.gov/sites/default/files/2018-06_standing_agenda_book_final.pdf.

quirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay "not specifically covered" by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay "not admissible under" those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a "near-miss" of one of the Rule 803 or 804 exceptions. If the court employs a "near-miss" analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

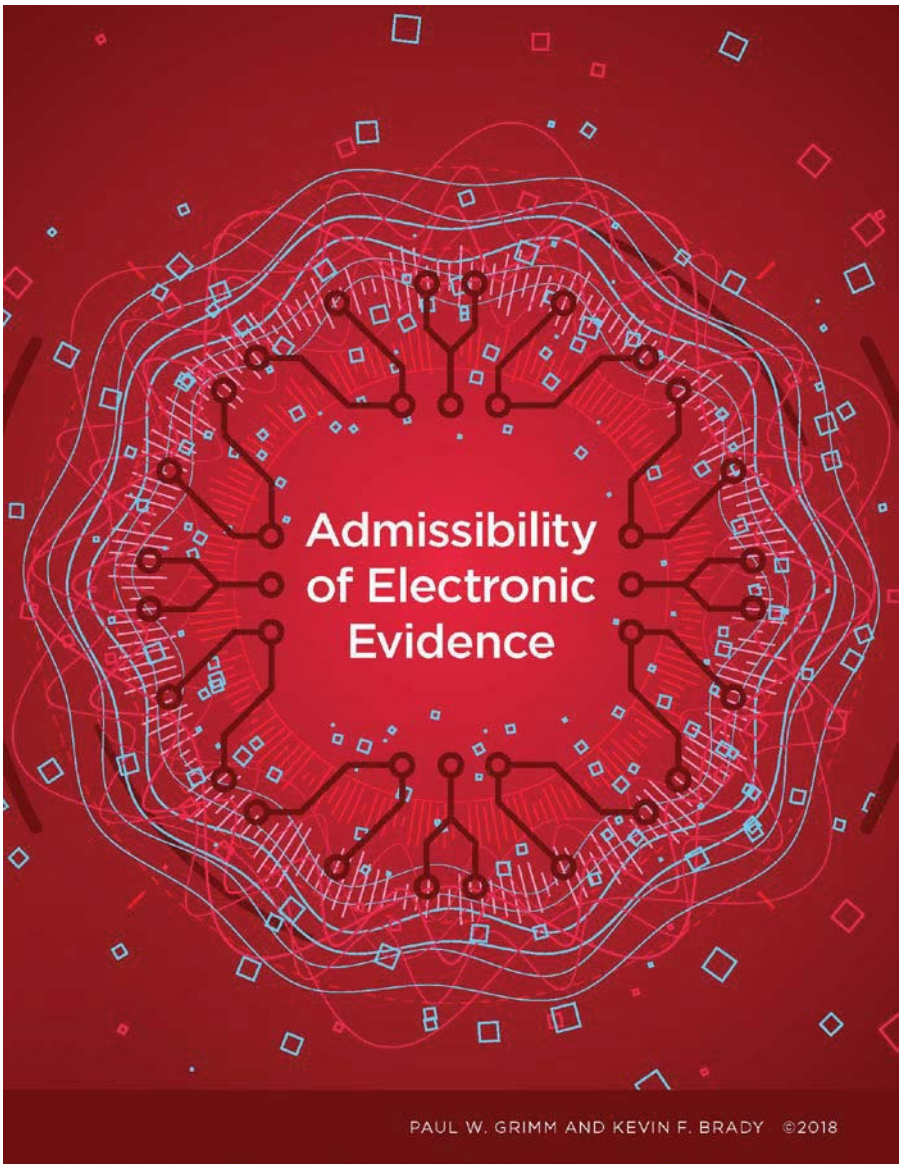
- First, the amendment requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence).
- Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.
- Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read the rule as it was written. Experience under the residual exception has shown that a

good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

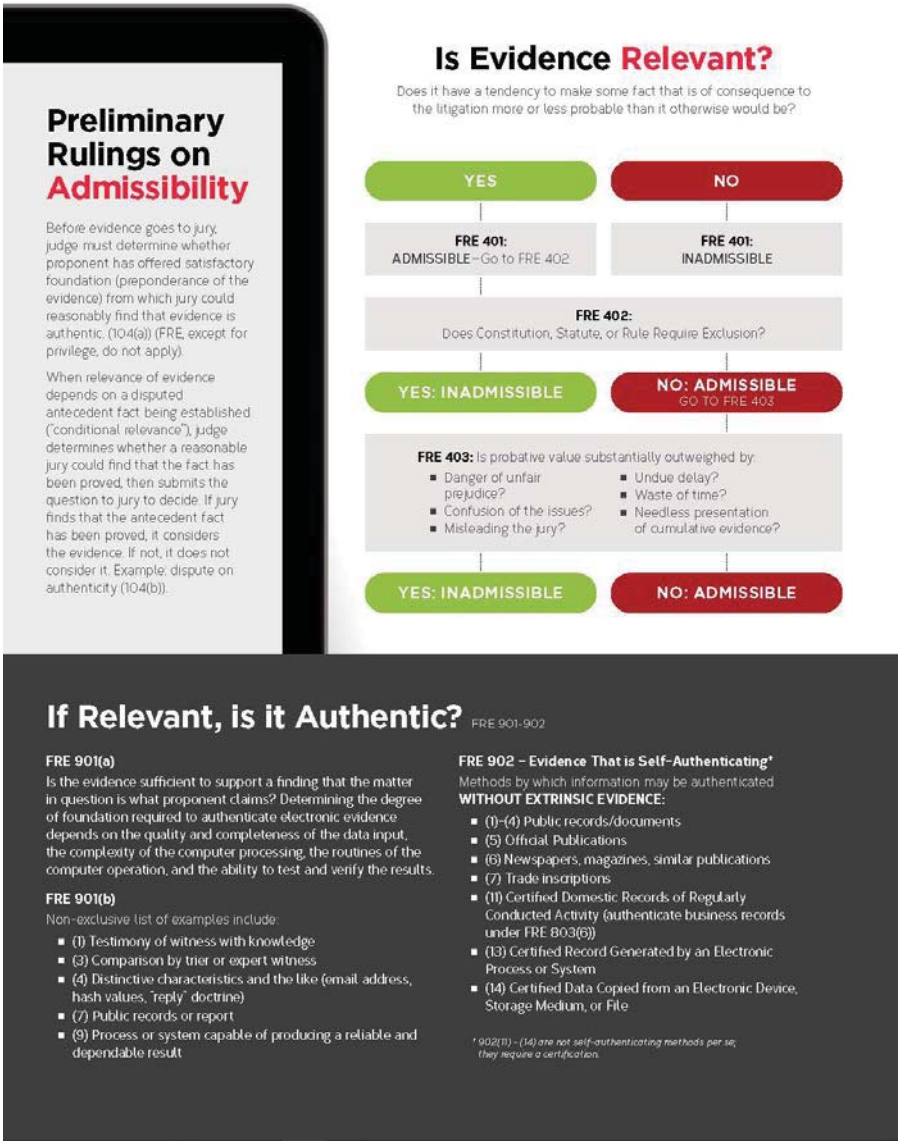
- The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

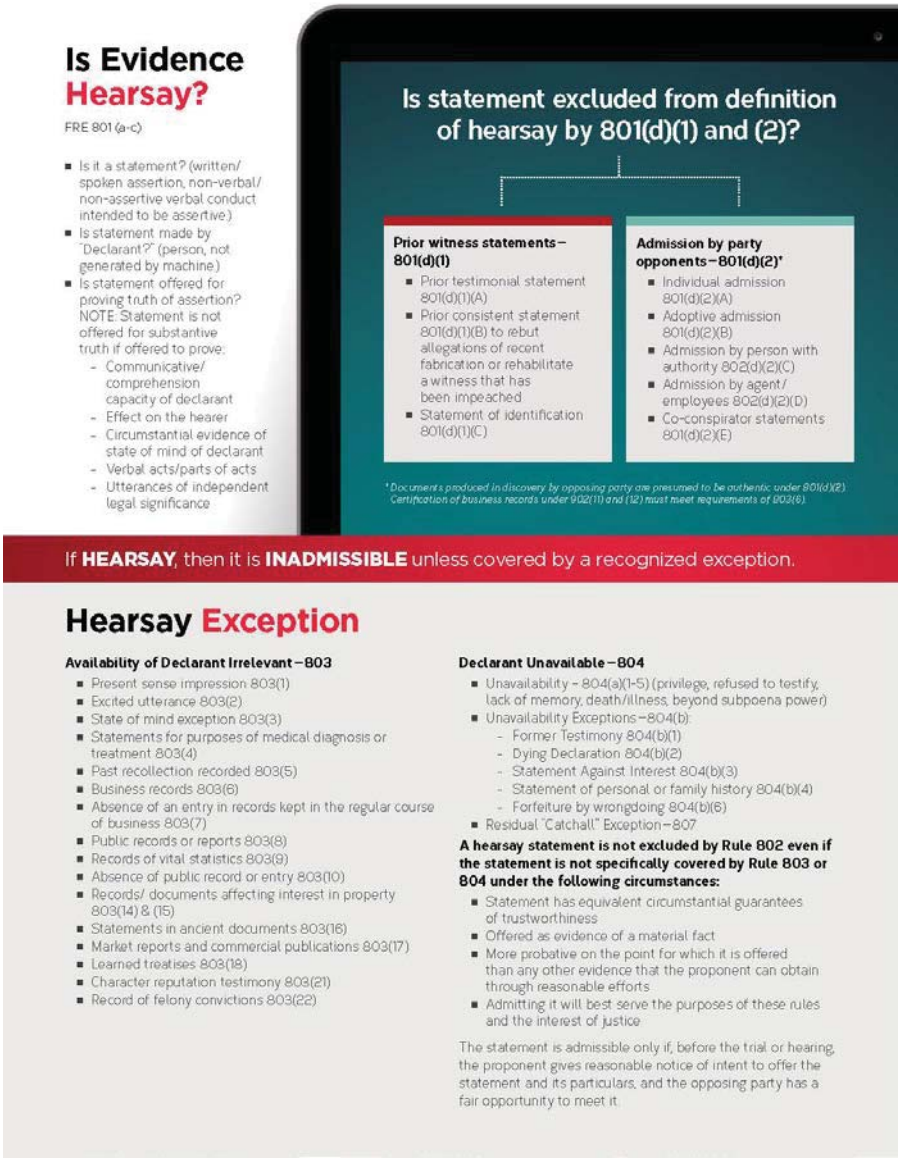
APPENDIX A:
ESI EVIDENCE ADMISSIBILITY CHART

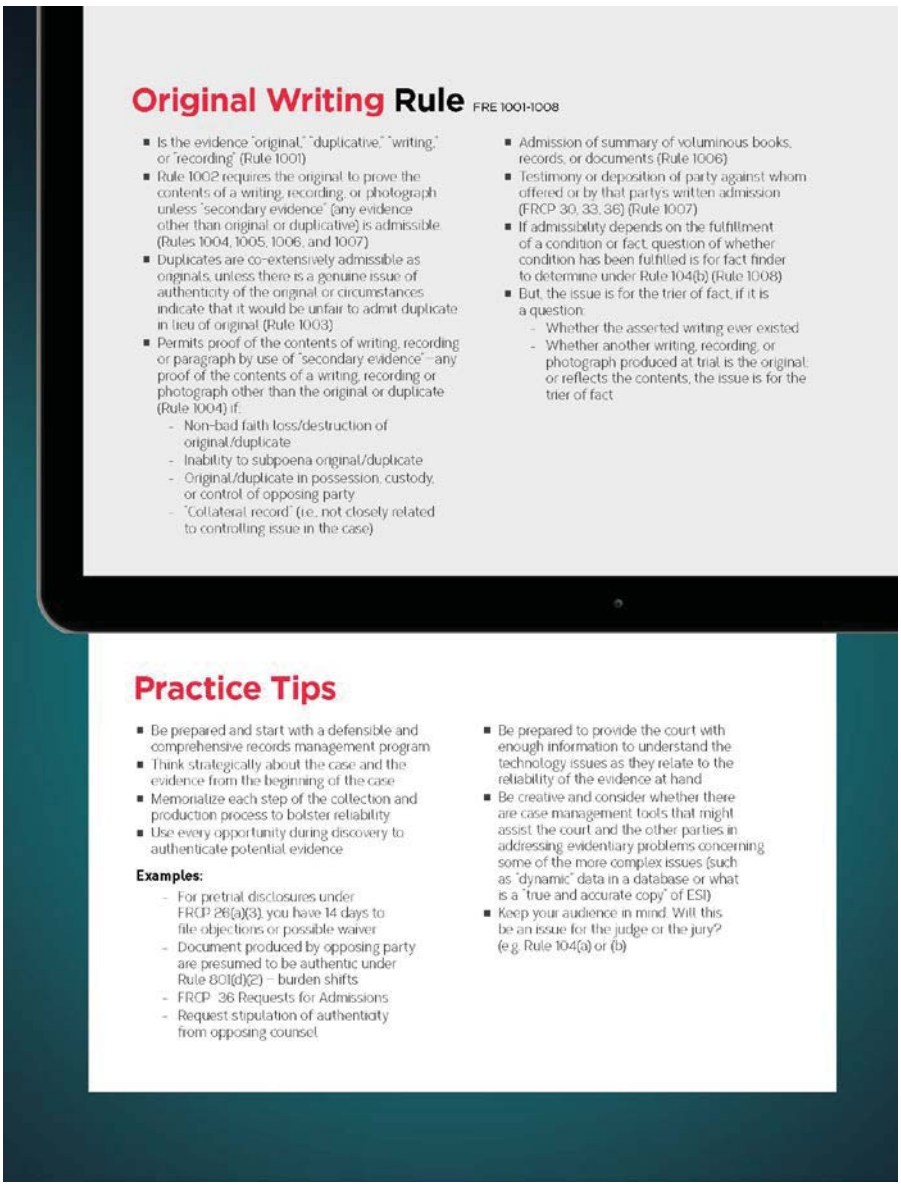
Admissibility of Electronic Evidence has been reprinted with permission from the Honorable Paul W. Grimm and Kevin F. Brady. To download an enlarged version, *see* https://bit.ly/2NFWlp0.




Potential Authentication Methods
Email, Text Messages, and Instant Messages
Witness with personal knowledge (901(b)(1))
Expert testimony or comparison with authenticated examples (901(b)(3))
Distinctive characteristics including circumstantial evidence (901(b)(4))
System or process capable of proving a reliable and dependable result (901(b)(9))
Trade inscriptions (902(7))
Certified copies of business record (902(11))
Certified records generated by an electronic process or system (902(13))
Certified data copied from an electronic device, storage medium, or file (902(14))
Chat Room Postings, Blogs, Wikis, and Other Social Media Conversations
Witness with personal knowledge (901(b)(1))
Expert testimony or comparison with authenticated examples (901(b)(3))
Distinctive characteristics including circumstantial evidence (901(b)(4))
System or process capable of proving a reliable and dependable result (901(b)(9))
Official publications (902(5))
Newspapers and periodicals (902(6))
Certified records generated by an electronic process or system (902(13))
Certified data copied from an electronic device, storage medium, or file (902(14))
Digitally Stored Data and Internet of Things
Witness with personal knowledge (901(b)(1))
Expert testimony or comparison with authenticated examples (901(b)(3))
Distinctive characteristics including circumstantial evidence (901(b)(4))
System or process capable of proving a reliable and dependable result (901(b)(9))
Certified records generated by an electronic process or system (902(13))
Certified data copied from an electronic device, storage medium, or file (902(14))
Computer Processes, Animations, Virtual Reality, and Simulations
Witness with personal knowledge (901(b)(1))
Expert testimony or comparison with authenticated examples (901(b)(3))
System or process capable of proving a reliable and dependable result (901(b)(9))
Certified records generated by an electronic process or system (902(13))
Digital Photographs
Witness with personal knowledge (901(b)(1))
System or process capable of providing reliable and dependable result (901(b)(9))
Official publications (902(5))
Certified records generated by an electronic process or system (902(13))
Certified data copied from an electronic device, storage medium, or file (902(14))
Social Media Sites (Facebook, LinkedIn, Twitter, Instagram, and Snapchat)
Witness with personal knowledge (901(b)(1))
Expert testimony or comparison with authenticated examples (901(b)(3))
Distinctive characteristics including circumstantial evidence (901(b)(4))
Public records (901(b)(7))
System or process capable of proving a reliable and dependable result (901(b)(9))
Official publications (902(5))
Certified records generated by an electronic process or system (902(13))
Certified data copied from an electronic device, storage medium, or file (902(14))
Know Which Approach Your Jurisdiction Follows
Maryland Approach to Rules 104 and 901:
A higher standard for authentication for social media evidence. In this approach, the burden is on the admitting party to show that the social media evidence was not falsified or created by another user through either:
Testimony of the creator of the website page or the post
Search of the internet history or hard drive of the purported creator's computer
Information obtained directly from social media site
See, Griffin v. State, 19 A. 3d 415, 423 (Md. 2011).
Texas Approach to Rules 104 and 901:
A lower standard for authentication of social media evidence. In this approach, the burden is on the admitting party to show evidence sufficient to support a finding by a reasonable juror that the social media evidence is what its proponent claims it to be through either:
Direct testimony of a witness with personal knowledge
Expert testimony or comparison with authenticated evidence
Circumstantial evidence
See, Tienda v. State, 358 S.W. 3d 633 (Tex. Crim. App. 2012)


Preliminary Rulings on Admissibility
Before evidence goes to jury, judge must determine whether proponent has offered satisfactory foundation (preponderance of the evidence) from which jury could reasonably find that evidence is authentic. (104(a)) (FRE, except for privilege, do not apply).
When relevance of evidence depends on a disputed antecedent fact being established ("conditional relevance"), judge determines whether a reasonable jury could find that the fact has been proved, then submits the question to jury to decide. If jury finds that the antecedent fact has been proved, it considers the evidence. If not, it does not consider it. Example: dispute on authenticity (104(b)).
Is Evidence Relevant?
Does it have a tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be?
YES
NO
FRE 401: ADMISSIBLE – Go to FRE 402
FRE 401: INADMISSIBLE
FRE 402: Does Constitution, Statute, or Rule Require Exclusion?
YES: INADMISSIBLE
NO: ADMISSIBLE GO TO FRE 403
FRE 403: Is probative value substantially outweighed by:
Danger of unfair prejudice?
Confusion of the issues?
Misleading the jury?
Undue delay?
Waste of time?
Needless presentation of cumulative evidence?
YES: INADMISSIBLE
NO: ADMISSIBLE
If Relevant, is it Authentic? FRE 901-902
FRE 901(a)
Is the evidence sufficient to support a finding that the matter in question is what proponent claims? Determining the degree of foundation required to authenticate electronic evidence depends on the quality and completeness of the data input, the complexity of the computer processing, the routines of the computer operation, and the ability to test and verify the results.
FRE 901(b)
Non-exclusive list of examples include:
(1) Testimony of witness with knowledge
(3) Comparison by trier or expert witness
(4) Distinctive characteristics and the like (email address, hash values, "reply" doctrine)
(7) Public records or report
(9) Process or system capable of producing a reliable and dependable result
FRE 902 – Evidence That is Self-Authenticating*
Methods by which information may be authenticated WITHOUT EXTRINSIC EVIDENCE:
(1)-(4) Public records/documents
(5) Official Publications
(6) Newspapers, magazines, similar publications
(7) Trade inscriptions
(11) Certified Domestic Records of Regularly Conducted Activity (authenticate business records under FRE 803(6))
(13) Certified Record Generated by an Electronic Process or System
(14) Certified Data Copied from an Electronic Device, Storage Medium, or File
* 902(11) - (14) are not self-authenticating methods per se; they require a certification.


Is Evidence Hearsay?
FRE 801 (a-c)
Is it a statement? (written/ spoken assertion, non-verbal/ non-assertive verbal conduct intended to be assertive)
Is statement made by "Declarant?" (person, not generated by machine)
Is statement offered for proving truth of assertion? NOTE: Statement is not offered for substantive truth if offered to prove:
Communicative/ comprehension capacity of declarant
Effect on the hearer
Circumstantial evidence of state of mind of declarant
Verbal acts/parts of acts
Utterances of independent legal significance
Is statement excluded from definition of hearsay by 801(d)(1) and (2)?
Prior witness statements – 801(d)(1)
Prior testimonial statement 801(d)(1)(A)
Prior consistent statement 801(d)(1)(B) to rebut allegations of recent fabrication or rehabilitate a witness that has been impeached
Statement of identification 801(d)(1)(C)
Admission by party opponents – 801(d)(2)*
Individual admission 801(d)(2)(A)
Adoptive admission 801(d)(2)(B)
Admission by person with authority 802(d)(2)(C)
Admission by agent/ employees 802(d)(2)(D)
Co-conspirator statements 801(d)(2)(E)
* Documents produced in discovery by opposing party are presumed to be authentic under 801(d)(2). Certification of business records under 902(11) and (12) must meet requirements of 803(6).
If HEARSAY, then it is INADMISSIBLE unless covered by a recognized exception.
Hearsay Exception
Availability of Declarant Irrelevant – 803
Present sense impression 803(1)
Excited utterance 803(2)
State of mind exception 803(3)
Statements for purposes of medical diagnosis or treatment 803(4)
Past recollection recorded 803(5)
Business records 803(6)
Absence of an entry in records kept in the regular course of business 803(7)
Public records or reports 803(8)
Records of vital statistics 803(9)
Absence of public record or entry 803(10)
Records/ documents affecting interest in property 803(14) & (15)
Statements in ancient documents 803(16)
Market reports and commercial publications 803(17)
Learned treatises 803(18)
Character reputation testimony 803(21)
Record of felony convictions 803(22)
Declarant Unavailable – 804
Unavailability – 804(a)(1-5) (privilege, refused to testify, lack of memory, death/illness, beyond subpoena power)
Unavailability Exceptions – 804(b):
Former Testimony 804(b)(1)
Dying Declaration 804(b)(2)
Statement Against Interest 804(b)(3)
Statement of personal or family history 804(b)(4)
Forfeiture by wrongdoing 804(b)(6)
Residual "Catchall" Exception – 807
A hearsay statement is not excluded by Rule 802 even if the statement is not specifically covered by Rule 803 or 804 under the following circumstances:
Statement has equivalent circumstantial guarantees of trustworthiness
Offered as evidence of a material fact
More probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts
Admitting it will best serve the purposes of these rules and the interest of justice
The statement is admissible only if, before the trial or hearing, the proponent gives reasonable notice of intent to offer the statement and its particulars, and the opposing party has a fair opportunity to meet it.


Original Writing Rule FRE 1001-1008
Is the evidence "original," "duplicative," "writing," or "recording" (Rule 1001)
Rule 1002 requires the original to prove the contents of a writing, recording, or photograph unless "secondary evidence" (any evidence other than original or duplicative) is admissible. (Rules 1004, 1005, 1006, and 1007)
Duplicates are co-extensively admissible as originals, unless there is a genuine issue of authenticity of the original or circumstances indicate that it would be unfair to admit duplicate in lieu of original (Rule 1003)
Permits proof of the contents of writing, recording or paragraph by use of "secondary evidence" – any proof of the contents of a writing, recording or photograph other than the original or duplicate (Rule 1004) if:
Non-bad faith loss/destruction of original/duplicate
Inability to subpoena original/duplicate
Original/duplicate in possession, custody, or control of opposing party
"Collateral record" (i.e., not closely related to controlling issue in the case)
Admission of summary of voluminous books, records, or documents (Rule 1006)
Testimony or deposition of party against whom offered or by that party's written admission (FRCP 30, 33, 36) (Rule 1007)
If admissibility depends on the fulfillment of a condition or fact, question of whether condition has been fulfilled is for fact finder to determine under Rule 104(b) (Rule 1008)
But, the issue is for the trier of fact, if it is a question:
Whether the asserted writing ever existed
Whether another writing, recording, or photograph produced at trial is the original; or reflects the contents, the issue is for the trier of fact
Practice Tips
Be prepared and start with a defensible and comprehensive records management program
Think strategically about the case and the evidence from the beginning of the case
Memorialize each step of the collection and production process to bolster reliability
Use every opportunity during discovery to authenticate potential evidence
Examples:
For pretrial disclosures under FRCP 26(a)(3), you have 14 days to file objections or possible waiver
Document produced by opposing party are presumed to be authentic under Rule 801(d)(2) – burden shifts
FRCP 36 Requests for Admissions
Request stipulation of authenticity from opposing counsel
Be prepared to provide the court with enough information to understand the technology issues as they relate to the reliability of the evidence at hand
Be creative and consider whether there are case management tools that might assist the court and the other parties in addressing evidentiary problems concerning some of the more complex issues (such as "dynamic" data in a database or what is a "true and accurate copy" of ESI)
Keep your audience in mind. Will this be an issue for the judge or the jury? (e.g. Rule 104(a) or (b))


Electronic copies of the chart are available at no charge. To obtain a copy or for more information,
contact Kevin Brady, Redgrave LLP, at kbrady@redgravellp.com.

APPENDIX B:
CERTIFICATION OF AUTHENTICITY UNDER FEDERAL RULE OF EVIDENCE 902(13)

I, _____, being duly sworn, hereby certify that:

1. I have been requested by [organization] to provide an [affidavit/certification] under Federal Rule of Evidence 902(13) that the [information/records/data] described below were generated by an electronic process/system that produces an accurate result consistent with the requirements of Federal Rules of Evidence 902(11) [or 902(12)] and 803(6)(A-C) [only if also seeking to qualify the records as business records in addition to authenticating them].
2. I am an adult, over the age of 21 years, and I am competent to testify. [Note: If the affiant would qualify to give opinion testimony on a topic of scientific, technical, or specialized knowledge under Federal Rule of Evidence 702, insert a description of his/her qualifications, as noted in No. 3, below. If not, establish that the information used to certify the evidence is based on the affiant's personal knowledge.]
3. Describe: educational background and relevant work experience including current job description, professional training, and membership in professional organizations.
4. Describe prior certification experience.
5. Identify and describe prior testimony.
6. I am currently a [title], [organization].
7. Describe knowledge and experience in information systems in general and in particular the "electronic process or system" that was used to generate the information in question or system at issue. [Note: Person signing affidavit or certification must have personal knowledge of the facts and systems [hardware and software] that are at issue and they

must describe the "electronic process or system" with enough specificity to satisfy the court and the opponent that the evidence sought to be admitted is authentic.]

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

_____

Name of Affiant/Declarant

[For Affidavits - Insert Notary Public Notarization Here]

APPENDIX C:
CERTIFICATION OF AUTHENTICITY UNDER FEDERAL RULE OF EVIDENCE 902(14)

I, _____, being duly sworn, hereby certify that:

1. I have been requested by [organization] to provide an [affidavit/certification] under Federal Rule of Evidence 902(14) that the [records/data] described below were generated by an electronic process/system that produces an accurate result consistent with the requirements of Federal Rules of Evidence 902(11) [or 902(12)] and 803(6) (A-C) [only if also seeking to qualify the records as business records in addition to authenticating them].
2. I am an adult, over the age of 21 years, and I am competent to testify. [Note: If the affiant would qualify to give opinion testimony on a topic of scientific, technical, or specialized knowledge under Federal Rule of Evidence 702, insert a description of his/her qualifications, as noted in No. 3, below. If not, establish that the information used to certify the evidence is based on the affiant's personal knowledge.]
3. Describe: educational background, relevant work experience, professional training, and membership in professional organizations.
4. Describe prior certification experience.
5. I am currently a [title], [organization].
6. Describe knowledge and experience in information systems in general and the particular system at issue.
7. I performed the following [X]. Attached as Exhibit "A" is a list of items that I examined. Describe in detail the electronic information that was copied from its original location and the steps the affiant took (including date, time, circumstances, hardware and software tools as well as

versions utilized) regarding the information to be offered into evidence. [Note: To prove that the information to be admitted into evidence is a true and correct copy of the original information, it is important to list the files or data in question and show the hash value of each on the original source and then the hash value of the file or data sought to be admitted into evidence. If the hash values are identical, that is proof that the information sought to be admitted into evidence is a true and correct copy of the information as it originally existed.]

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

_____

Name of Affiant/Declarant

[For Affidavits - Insert Notary Public Notarization Here]