

AUTHENTICATION

Once upon a time (in the 19th century), evidentiary authentication was a difficult issue. The admission of documents, writings and real evidence was carefully monitored to reduce the possibility that the fact finder would receive false evidence. Once the forms of actions were supplanted by notice pleading and trial by ambush was replaced with extensive pre-trial discovery, authentication became a relatively unimportant issue. We are today living at the end of that era. Soon, authentication will once again become a more difficult issue, for reasons I will state below. These different eras exist large because of technological changes. In the 19th century, two forces were at work to make the authentication of documents crucial. First was the distrust of live testimony (as evidenced by the rules on competency of witnesses), and the trust in authenticated documents, both views which had existed for a lengthy time. Second was the unavailability of such things as the photograph (invented in 1839 and popularized by Matthew Brady in his Civil War photographs), typewriters (invented in the 1870s), or onion skin paper interleaved with carbon pages (used to make carbon copies, from which we get the abbreviation “cc”). At this time, authentication of documents was a time-consuming and very important task.

The development and popularization of the photograph should not be underestimated in changing legal views regarding authentication. The belief by ordinary people that the photographer captured reality made it easier for courts to authenticate photographs and later, motion pictures. The development of the typewriter, which eliminated the need for scribes, who copied documents by hand, and the later developments of the Federal Rules of Civil Procedure (1938) and the Xerox machine also made the authentication of documents a much simpler project. Today, however, as seen in movies such as *Forrest Gump* or *Babe*, our technology allows us to “forge” reality much more easily than in the past. For example, it is very easy on a relatively new personal computer to take a photograph and alter it as you see fit. These technological changes may make cause the Court to reassess the very liberal authentication rules (and illustrations) now in existence in FRE 901.

Although the future may be very different, we presently live in a regime that makes authentication relatively easy. A document or thing is deemed authentic if its proponent offers “evidence sufficient to support a finding that the matter in question is what the proponent claims.” FRE 901(a). The initial judgment that the document or thing “is what the proponent claims” is made by the court under FRE 104(a) using a sufficiency standard (which is not as stringent as the preponderance of the evidence standard). Counsel opposing the admission of the authenticated document may still argue that the document or thing is not authentic, and the jury is free to accept or reject the authenticity of the thing or document. In proving that this document, writing or “thing” is authentic, the proponent is engaged in “laying a foundation.” Laying a foundation is nothing more than showing the relevance of the testimony or object to one or more issues in the case. Once a minimal foundation is made that the “matter in question is what the proponent claims,” the court is nearly always going to admit the document or thing, concluding that any objection “goes to weight, not admissibility.”

In FRE 901(b), the Advisory Committee set forth ten illustrations of ways to authenticate

a document or object in conformance with Rule 901(a). Those illustrations are not exhaustive. They include the most basic way to authenticate, “testimony that a matter is what it is claimed to be,” ways to authenticate handwriting (through a lay witness with knowledge, or an expert using a genuine comparison), how to identify a voice, how to authenticate a telephone conversation, and the like.

One important issue is chain-of-custody. When a person is arrested, and drugs are seized from that person’s possession, the government has the burden of proving that the drugs seized from the person and the drugs offered as evidence in court are the same drugs. The government does so through a showing of the chain of custody. That is, the officer seizing the drugs will testify that she held them until signing them into the custody room (often placing them in a container and marking it), and then another officer will testify to sending the drugs to the lab for testing, and the testifying chemist will testify to the handling and sending back of the drugs to the custody room. Then the arresting officer may retrieve the drugs and bring them to court to testify. In the past, any break in the chain of custody was sufficient to bar its admissibility. Today that objection goes to weight, not admissibility. However, in a criminal case, the court reserves the right to bar admission of the object on the grounds that the break in the chain is so great that it is unfair to admit the evidence. This is not, as you might expect, going to work in most cases.

FRE 902 declares a number of documents are self-authenticating. That is, there is no need for any extrinsic evidence (like testimony) to prove that the thing is what it says it is. Most of these documents are public records, although newspapers, trade signs, acknowledged documents and commercial paper (long live the UCC!) are also included.

DEMONSTRATIVE EVIDENCE

Demonstrative evidence does not have to be evidence at all. Demonstrative evidence may consist of photos of the site of the accident, or of a “day-in-the-life” film, both of which are evidence, but may also consist of things that simply assist the jury in demonstrating an evidentiary point, like charts explaining future medicals, or loss of wages, or charts detailing the verdict form or elements of the case. In this latter sense, demonstrative evidence can be called illustrative evidence, for it exists to illustrate the evidence already produced, and doesn’t generate any additional evidence. The idea of demonstrative evidence is captured in the old adage, “A picture is worth a thousand words.”

One current trend in demonstrative evidence is computer-generated animations, which are likely to become more and more popular as lawyers attempt to communicate more effectively with jurors raised on television, who have learned visually more than in any other way.