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1. *Synopsis to CHAPTER 9 : ARTICLE IX. TENNESSEE LAW OF EVIDENCE—AUTHENTICATION*
   Client/Matter: -None-
2. *§ 9.01 Rule 901. Requirement of Authentication or Identification*
   Client/Matter: -None-
3. *§ 9.02 Rule 902. Self-Authentication*
   Client/Matter: -None-
4. *§ 9.03 Rule 903. Subscribing Witnesses' Testimony*
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CHAPTER 9 ARTICLE IX. TENNESSEE LAW OF EVIDENCE—AUTHENTICATION

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§ 9.01 Rule 901. Requirement of Authentication or Identification

[1] Text of Rule

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 the court to support a finding by the trier of fact 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) Non-expert Opinion on Handwriting.Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier of Fact or Expert Witness.Comparison by 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 a 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 the 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, if authentic, it would likely be, and (C) has been in existence thirty 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 the Tennessee Legislature or by other rules prescribed by the Tennessee Supreme Court.

Advisory Commission Comment:

Section (a) makes the trial judge arbiter of authentication issues, as does the common law.

Subsection (b)(3) lets the trier of fact or an expert compare exemplars and questioned documents. The proposed draft corrects the mistake in *Franklin v. Franklin, 90 Tenn. 44, 16 S.W. 557 (1891)*, where the Supreme Court construed *T.C.A. § 24-7-108* to disallow expert comparison of a disputed document with the purported forger's exemplar. *See Amburn v. State, 553 S.W.2d 922 (Tenn. Crim. App. 1977)*, criticizing *Franklin*.

Subsection (b)(4) simply makes common sense. Without drawing the boundaries of practical possibilities, the rule allows proof to the court of a myriad of distinctive characteristics that may convince the judge that a questioned document is authentic enough to let the jury consider it.

Subsection (b)(9) treats authentication of computer documents. All that the lawyer need do is introduce evidence satisfying the court that the computer system produces accurate information.

[2] Overview of Authentication

[a] In General

Demonstrative, physical and sometimes oral evidence is only admissible if it is authenticated or identified. The test is simple and obvious: there must be sufficient foundation presented so that the trier of fact could find that the evidence is what its proponent claims it to be.[1]

Conditional Relevance. Authentication is actually a facet of conditional relevance discussed in Rule 104(b).[2] The procedures used for Rule 104(b) are also to be used for authentication issues.[3] Under Rule 104(b) the judge makes a preliminary determination whether there is evidence "sufficient to support a finding of the fulfillment" of whatever condition is necessary to make the item relevant. The judge looks at the evidence presented by the proponent of the proof and decides whether the jury, if presented with that evidence, could reasonably find that the proffered item is what it is claimed to be. One treatise characterizes this as a liberal standard that favors admitting evidence and essentially turns most authenticity questions into jury issues.[4]

After the judge decides that an item has been authenticated, the trier of fact then makes the ultimate decision of whether the item is actually what it purports to be. For example, assume that the issue is the admissibility of a check, purportedly signed by the defendant. The check can be authenticated by introduction of sufficient proof to support a jury finding that the check was actually signed by the defendant. The evidence concerning the signature need only present a prima facie case that the signature on the check was the defendant's. The jury is then free to disregard the check if it finds that the check was not signed by the defendant.

In *Haury & Smith Realty v. Piccadilly Partners*,[5] the issue was whether or not a contract was executed by the defendants. Plaintiff's employee attempted to authenticate the contract but had no personal knowledge

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[1] *Tenn. R. Evid.. 901*.

[2] *See above § 1.04[3]*.

[3] FED. *R. EVID. 901* Advisory Committee's Note.

[4] STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 5 FEDERAL RULES OF EVIDENCE MANUAL 901-6 (9th ed. 2006).

[5] *802 S.W.2d 612 (Tenn. Ct. App. 1990)*.

of the execution of the contract or of the signatures on it. The court found that the contract was not properly authenticated, and observed:

> A writing standing alone is not evidence; it must be accompanied by competent proof of some sort from which the jury can infer that it is authentic and that it was executed or written by the party by whom it purports to be written or executed.[6]

Judicial Discretion. The trial judge is the arbiter of identification and authentication issues.[7] Once the court determines that the requirement and other relevant rules have been met, counsel may then offer the matter into evidence. The trial court's decision on authentication will not be disturbed absent an abuse of discretion.[8] Where evidence in a criminal trial is not properly authenticated and is erroneously admitted, the appellate court will apply harmless-error analysis to determine whether the admission constitutes reversible error.[8.1]

Judicial Admission, Stipulation. An item of evidence may be—and often is—authenticated by a judicial admission or stipulation of the parties. Some judges aggressively encourage such actions to eliminate the need for witnesses to authenticate documents or other evidence when the authenticity of the evidence is not actually contested.

[b] Authentication Contrasted with Admissibility

Authentication—establishing that an item is what it is claimed to be—is one essential step toward admissibility of the item. However, as the philosophers would say, it is a necessary step but not a sufficient step. The remaining rules of evidence and all other applicable laws must also be satisfied before the item is admissible into evidence.

For example, assume a criminal accused made a written confession which the prosecution wants to introduce into evidence. While the prosecutor may be able to authenticate the document as that written by the accused at the police station on January 3rd, the document will only be admitted if it also satisfies the hearsay rule and the applicable constitutional guarantees, such as the *Fifth*, *Sixth*, and *Fourteenth Amendments*.

[c] Authentication Contrasted with Weight and Credibility

If an item is properly authenticated and other evidence rules are satisfied, the item will be presented to the jury. The jury, then, is free to give it as much or little weight as the jury thinks appropriate.[8.2] Returning to

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[6] *Id. at 614*.

[7] *Tenn. R. Evid. 901*, Advisory Commission Comment. *See, e.g.*, *Martin v. Martin, 755 S.W.2d 793 (Tenn. App. 1988)*; *Mize v. Skeen, 63 Tenn. App. 37, 46, 468 S.W.2d 733, 737 (1971)*; *Tullahoma Concrete Pipe Co. v. Gillespie Constr. Co., 56 Tenn. App. 208, 221, 405 S.W.2d 657, 663 (1966)*.

[8] *See, e.g.*, *United States v. Perlmuter, 693 F.2d 1290, 1292 (9th Cir. 1982)* (based on Federal Rules of Evidence, which are virtually identical to corresponding provisions in the Tennessee Rules of Evidence); *State v. Mickens, 123 S.W.3d 355 (Tenn. Crim. App. 2003)* (trial judge is arbiter of authentication issues; judge's discretion will not be disturbed absent clear mistake). *See also*, *State v. Barnett, 2019 Tenn. Crim. App. LEXIS 142 (Crim. App. 2019)* (both Rule 901 and the common law designate the trial court as the "arbiter of authentication issues," and, accordingly, that court's ruling will not be disturbed absent a showing that the court clearly abused its discretion).

[8.1] *See, e.g., State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018)* (trial court by comitted reversible errory by erroneously admitting temporary vehicle registration tag; tag was not admissible under *Tenn. R. Evid. 901* or *902*, and error was not harmless).

[8.2] *See, e.g., State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016)* (when trial court ruled that the evidence had met the threshold requirement of reasonable assurance, the defendant was entitled to, and did, present a vigorous

the confession described above, once the jury is presented with the document it can do anything from finding the confession virtually dispositive of guilt to disregarding the document as a forgery. This means, of course, that a party losing an authentication challenge may still attack the evidence on other grounds, such as hearsay, and may try to convince the jury to give the item little or no weight.[9]

[d] Overview of Rules 901 and 902

Rules 901 and 902 contain principles for authenticating or identifying many kinds of evidence. Rule 901(a) provides the general standard: evidence is authenticated or identified if there is "evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Rule 901(b) contains 10 illustrations of methods to satisfy this standard. Rule 902 lists 11 categories of evidence that are self-authenticating. Extrinsic evidence of authenticity is not required to authenticate documents and other evidence contained in Tennessee Rule 902's 11 classes of self-authenticating items.

[e] Written or Documentary Evidence

There are basically three categories of evidence that are addressed by Rule 901. The first is written or documentary evidence. Few trials do not involve an attempt to introduce a writing of some sort. Rule 901 requires that the document be authenticated unless it fits within one of the Rule 902 categories for self-authentication.[10]

[f] Real Evidence

Rule 901 also embraces another type of evidence that is tangible and is frequently referred to as "real evidence." Often this evidence must be properly identified. Typical examples include the murder weapon or clothing found at the scene of the crime or on a suspect. A photograph or videotape taken during the actual event in question also constitutes real evidence.

[g] Illustrative Evidence

A third type of evidence covered by Rule 901 might more accurately be described as "illustrative evidence." A broad range of examples is included in this category, such as photographs depicting a certain item or person or the scene of an event; charts, maps, and diagrams; and models and demonstrations. This evidence assists the trier of fact in comprehending other evidence, rather than actually proving the events in question.

The following sections address the specific provisions of Rule 901 generally; additional applications as related to tangible evidence are found in Chapter 4.[11]

[3] Testimony of Witness with Knowledge

Rule 901(b) lists ten examples illustrative of types of authentication or identification that meet the standard of Rule 901(a): the evidence is what its proponent claims it to be.

Rule 901(b)(1), describing the most obvious and most frequently used of the ten illustrations, provides that an item may be identified or authenticated by the testimony of a witness with personal knowledge that the

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cross-examination, testing the propriety of the chain of custody and the credibility and competence of the witnesses who supported the admission of the evidence; thus, the weight to be given the proof properly became a question for the jury).

[9] *See, e.g.*, *United States v. Trogdon, 575 F.3d 762 (8th Cir. 2009)* (recordings admissible though partially inaudible; jury could ascertain their gist and give them proper weight).

[10] *See below § 9.02[2]. See, e.g., In re Charles K., 2016 Tenn. App. LEXIS 344 (Tenn. Ct. App. 2016)* (order of adjudication was erroneously introduced through the mother after she denied knowledge of the document; the order was also not self-authenticating because it failed to meet the rule requirements of Rule 902).

[11] *See above §§ 4.01[20]–[26]*.

matter is what it is claimed to be.[11.1] There are few limitations on the types of evidence that can be authenticated by this rule.

This provision applies to the common event of identifying a document or an object. If the item is unique and easily identifiable, a witness can lay the necessary foundation to authenticate or identify it by demonstrating the requisite personal knowledge about the item. For example, a witness might testify that a particular weapon is her grandfather's pearl-handled, antique pistol that she has seen numerous times or that a particular monogrammed bracelet containing her initials belongs to her. Also, a technician who made a tape recording ordinarily may authenticate it.[12] If the object is not unique, such as confiscated narcotics, the chain of custody may have to be demonstrated by testimony proving continuous possession of the item with no substantial change in its condition.[13]

[a] Handwriting or Signature

Handwriting[13.1] or a signature on a document can also be authenticated pursuant to Rule 901(b)(1) by a witness who personally observed the signing or writing of the document. It is not necessary that the observing witness have had any prior familiarity with the writer's handwriting, but only that he or she saw this handwriting being made on this document.[14]

[b] Photograph

Similarly, a photograph may be authenticated by someone who witnessed the event or scene in the photograph and testifies that the photograph is a true and accurate portrayal of that scene or event.[15]

[11.1] *See, e.g.*, *Lexon Ins. Co. v. Windhaven Shores, Inc., 601 S.W.3d 332, 2019 Tenn. App. LEXIS 420 (Tenn. Ct. App. Aug. 27, 2019)* (employee authenticated indemnity agreement by testifying on personal knowledge that appellants executed the agreement; employee's declaration was sufficient for the trial court to infer that the agreement was authentic and that it was in fact signed by appellants; *State v. Barnett, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. 2019)* (notebook recovered from defendant's vehicle was properly authenticated because a trooper testified that the notebook presented at trial was what it purported to be, i.e., that it was the same reddish-brown notebook he seized during his search of defendant's truck); *State v. Jackson, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 870 (Tenn. Crim. App. 2018)* (detective who personally examined defendant's phone was able to authenticate photos depicting images on the phone, where he testified that the photos accurately and fairly depicted the messages and call log he saw on the phone during his examination of it); *State v. Thirkill, 2016 Tenn. Crim. App. LEXIS 231 (Tenn. Crim. App. 2016)* (one example of authentication provided by Rule 901 is testimony from a witness with knowledge "that a matter is what it is claimed to be." *Tenn. R. Evid. 901(b)(1)*; accordingly, testimony from a witness that a video recording of a crime fairly and accurately portrays the offense as it occurred is sufficient to authenticate the video). By contrast, *see* *Holt v. Kirk, ___S.W.3d___, 2019 Tenn. App. LEXIS 205 (Tenn. Ct. App. Apr. 30, 2019)* (trial court properly excluded an uncertified copy of plaintiff's criminal verdict form because defendant did not present a knowledgeable witness to testify about the authenticity of the document and it lacked sufficient indicia of reliability).

[12] *United States v. Barone, 913 F.2d 46 (2d Cir. 1990)*.

[13] *State v. Beech, 744 S.W.2d 585 (Tenn. Crim. App. 1987)*. Chain of custody is discussed below in *§ 9.01[13]*.

[13.1] *See, e.g.*, *State v. Rimmer, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019)* (although the witness testified that he recognized the front of a towing slip and acknoweldged his handwriting on it, he was unable to identify the handwriting on the back of a 2nd document, which defendant claimed was the back side of the slip; accordingly, the 2nd document was not properly authenticated and properly excluded under Rule 901).

[14] *See, e.g.*, *United States v. Long, 857 F.2d 436 (8th Cir. 1988)* (witness authenticated document by identifying it as the one she saw defendant sign).

[15] *See generally above § 4.01[21]*. *See, e.g.*, *State v. Williams, 913 S.W.2d 462, 465 (Tenn. 1996)* (convenience store robbery victim authenticated surveillance camera's photos of robbery by testifying that he personally activated the surveillance camera when the robbery began and that the photographs it took fairly and accurately portrayed the scene of the robbery); *United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007)* (photographs of drug sale location excluded because the person authenticating them

[c] Videos and Motion Pictures

Videos and motion pictures are authenticated the same way as photographs. It must be a true and accurate depiction of the events being recorded.[16]

[d] Tape and Digital Recordings

Tape and digital recordings are authenticated by showing that they are an accurate reproduction of the matter recorded. A common method is to call a witness who participated in the conversation or who monitored it on a listening device.[17] Another approach is to have a person who was a custodian of the recording, including a 911 call, testify about the equipment and the processes used to retrieve and store the data.[18]

[e] Diagrams, Charts, and Models

Diagrams charts and models are subject to the same authentication rules: it must be established that they are a fair representation of the reality they express. A good authenticating witness may be someone personally familiar with the area or data depicted in the diagram, chart or model who testifies that the item is an accurate representation of whatever it depicts.

The item may be authenticated even if it is not a perfect representation. For example, a diagram was admitted even though it was not to scale.[19]

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testified that the photos did not accurately represent what he recalled seeing). *See also*, *State v. Thomas, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 169 (Tenn. Crim. App. 2019)* (although complainant could not say with certainty that defendant was the person who responded to a Facebook message she sent to his girfriend, complainant's testimony provided sufficient evidence to authenticate the printout of the text message exchange introduced at trial by the prosecutor); *State v. Jackson, 2018 Tenn. Crim. App. LEXIS 870 (Tenn. Crim. App. 2018)* (screenshot of images on defendant's cell phone were properly authenticated where detective testified that the photos depicted the same text messages and phone calls that the officer noted when he personally examined the phone); *State v. Wilson, 2015 Tenn. Crim. App. LEXIS 991 (Tenn. Crim. App. 2015)* (trial court did not abuse its discretion by admitting into evidence an autopsy photograph of the left side of the victim's face where it was relevant to prove the identity of the deceased victim, the victim's sister identified the victim in the photograph, it did not show any of the victim's injuries, and was not particularly gruesome, and the victim's face was unaltered due to the autopsy); *State v. Long, 2017 Tenn. Crim. App. LEXIS 368 (Tenn. Crim. App. 2017)* (agent reviewed the photograph and confirmed that, besides defendant's posture changing slightly, it was a true and accurate depiction of what he saw when the door to defendant's apartment opened, and defendant's argument that the photo was improperly authenticated lacked merit); *State v. Lane, 2017 Tenn. Crim. App. LEXIS 303 (Tenn. Crim. App. 2017)* (photographs of text message conversation were properly authenticated by detective).

[16] *See generally above* § 401[22]. *See, e.g.*, *State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993)* (color video of crime scene). *State v. Long, 2017 Tenn. Crim. App. LEXIS 368 (Tenn. Crim. App. 2017)* (where witness testified that the time stamp on the apartment complex videotaping system had "always been off" by an hour and four minutes, that video was a true and accurate description of what happened, and that he saw defendant at the apartment complex on the night of the incident, defendant's claim that video was improperly authenticated lacked merit). *See also* *State v. Ervin, ___S.W.3d___, 2020 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Feb. 12, 2020)* (surveillance video from an apartment complex was adequately authenticated; the detective testified that he had training on how to obtain an accurate time/date stamp from a video, and he followed his training in obtaining the surveillance video; additionally, a courtesy officer at the complex confirmed the detective's authentication of the video and both the detective and the officer identified defendant as the suspect on the video); *State v. Spivey, ___S.W.3d___, 2020 Tenn. Crim. App. LEXIS 74 (Tenn. Crim. App. Feb. 7, 2020)* (detective's testimony was sufficient to authenticate a YouTube video and photograph, since the detective testified that he knew what defendant looked like and, after performing an internet search, he found a YouTube video featuring defendant, who was wearing a distinctive watch that appeared to be the same as the watch the perpetrator was wearing in the security video of the robbery; the detective also testified that the police downloaded a copy of the YouTube video and made a still photograph from the video).

[17] *See generally above* *§ 4.01[23]*. *See, e.g.*, ***State v. Coker, 746 S.W. 2d 167, 172 (Tenn. 1987)***.

[18] *See, e.g.*, *State v. Hinton, 42 S.W.3d 113, 127 (Tenn. Crim. App. 2000)*.

[f] Copy of Document

When it must be established that a particular document is a copy of another document, the fact that the item is an accurate copy can be proven by testimony that the witness examined both the copy and the original and the purported copy is an accurate reproduction of the original.[20]

[g] Transcript of Conversation or Internet Chat

A transcript of a telephone or internet conversation may be authenticated by testimony that it is accurate. A participant to the conversation is a typical witness,[21] but authentication can also be established through the testimony of other witnesses who are sufficiently familiar with the facts and circumstances surrounding the conversation or message posts.[21.1] Determining whether social media evidence has been authenticated requires a fact-specific analysis.[21.2]

[4] Non-expert Opinion on Handwriting

How can a lawyer authenticate that a handwritten or signed letter or other document or signature was authored by a particular person? Rule 901(b)(2) provides that a handwritten or signed document may be authenticated as bearing the genuine handwriting of the alleged writer by testimony of a witness who did not actually observe the signing and is not an expert in the field of handwriting, but who has substantial familiarity with the typical handwriting of the purported writer. This familiarity cannot have been obtained for the purpose of the litigation.[22]

In essence, this method of authentication recognizes the obvious fact that a person often becomes sufficiently familiar with another's handwriting to be able to identify accurately that handwriting. Isn't it true that many of us would feel comfortable identifying the handwriting of our mother or our spouse or our business partner? Rule 901(b)(2) authorizes courts to follow the incontrovertible truth of this principle.

Thus, the provision permits a non-expert to deviate from the general rule barring lay opinion testimony if sufficient pre-litigation familiarity with the handwriting is shown.[23] This familiarity could have been acquired in

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[19] *Cole v. State, 512 S.W.2d 598, 602 (Tenn. Crim. App. 1974)*.

[20] *See, e.g.*, ***United States v. Estrada-Eliverio, 583 F.3d 669 (9th Cir. 2009)*** (immigration document).

[21] *See, e.g.*, *United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009)* (online chat with police undercover agent who participated in the online chat and authenticated the transcript as accurate); *In re Karissa, 2017 Tenn. App. LEXIS 134 (Tenn. Ct. App. 2017)* (testimony of the mother's acquaintance credible and sufficient to establish that the text messages were what they were claimed to be); *State v. Lane, 2017 Tenn. Crim. App. LEXIS 303 (Tenn. Crim. App. 2017)* (photographs of text message conversation were properly authenticated by detective). *See also*, *State v. Thomas, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 169 (Tenn. Crim. App. 2019)* (although the complainant could not say with certainty that defendant was the person who responded to a Facebook message she had, her testimony that she accessed the messages in the prosecutor's office and watched as the prosecutor printed the messages was sufficient to authenticate them).

[21.1] *See, e.g.*, *State v. Linzy, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 737 (Tenn. Crim. App. 2017)* (State introduced sufficient circumstantial evidence to authenticate defendant's Facebook and Twitter accounts; the State called witnesses who were familiar with the defendant and the events of the day on which the messages and photos were posted, and the investigating officer testified regarding the subpoena he requested for the Twitter records); *State v. Burns, 2015 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 2015)* (sufficient circumstantial evidence to authenticate Facebook chats and email).

[21.2] *State v. Linzy, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 737 (Tenn. Crim. App. 2017)*.

[22] *Tenn. R. Evid. 901(b)(2)*. *See, e.g.*, *State v. Chestnut, 643 S.W.2d 343 (Tenn. Crim. App. 1982)*.

[23] *See, e.g.*, *State v. Chance, 778 S.W.2d 457, 461 (Tenn. Crim. App. 1989)* (non-expert permitted to identify handwriting of alleged forger; witness had worked for many years with the alleged forger, who was a principal of the school where the witness was a teacher, and the witness was extremely familiar with the handwriting of the alleged forger); *State v. Chestnut, 643 S.W.2d*

several ways, such as by observing the individual write or sign other documents or by examining documents written by the individual, so long as the familiarity was not acquired for purposes of testifying at trial.[24] In essence, the lay witness is treated as a quasi-expert in the field of identifying the handwriting of the particular person whose handwriting is in question.

The lay witness's role is limited to either identifying or failing to identify a particular document as being the genuine handwriting of the purported writer. Unlike an expert, he or she cannot make comparisons to genuine samples of the person's writing, nor obtain additional familiarity with the writing for the purpose of testifying in the litigation.[25]

[5] Comparison by Trier of Fact or Expert Witness

Under Rule 901(b)(3), a writing or object may be identified or authenticated as what its proponent claims it to be by evidence of a comparison of the item in question to a genuine, authenticated example. The comparison may be made by an expert or by the trier of fact without the assistance of an expert.[25.1] If an expert is used, he or she must possess the necessary qualifications.[26] It should be noted that Rule 901(b)(3) does not approve a comparison by a lay witness.

Tennessee has long recognized this concept with regard to handwriting.[27] Thus, so long as the judge finds the presented sample to be authentic handwriting, an expert, the jury, or, in a bench-tried case, the judge may compare that sample with the questioned document. In *Amburn v. State*,[28] the Tennessee Court of Criminal Appeals held that a handwriting expert could testify, as the result of comparing a disputed sample with known specimens, not only that a document was a forgery, but also as to the identity of the forger.[29]

In addition to handwriting, Rule 901(b)(3) permits comparisons of such items as fingerprints, ballistics, blood, fiber samples, typewriting, tread marks, and shoe prints.[30] This is commonly done in criminal cases through ballistics or forensic experts. An expert will testify that a bullet found in a homicide victim matches a bullet from

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343 (Tenn. Crim. App. 1982). *See above § 7.01[2]* regarding admissibility of lay opinion testimony generally. *Cf.* *State v. Harris, 839 S.W.2d 54, 71 (Tenn. 1992)* (court properly excluded non-expert's testimony regarding handwriting identification where witness did not demonstrate sufficient familiarity with defendant's handwriting).

[24] *See, e.g.*, *United States v. Samet, 466 F.3d 251 (2d Cir. 2006)* (postal inspector who became familiar with defendant's handwriting because of three-year investigation was permitted to authenticate that handwriting, though was not a handwriting expert; familiarity deemed not acquired for purpose of litigation).

[25] *See* MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE 715–716 (6th ed. 2006); *Tenn. Code Ann. § 24-7-108* (1980), repealed by 1991 Tenn. Pub. Acts 273.

[25.1] *Long v. Ledford, 2016 Tenn. App. LEXIS 735 (Tenn. Ct. App. 2016)* (no error where trial court specifically found that promissory note introduced into evidence was signed by appellants, based upon appellants' signatures on other documents; fact-finders may compare signatures on different documents to determine whether there is "such similarity that one can easily infer that both were written by the same author") *quoting* *State v. Dedmon, 1996 Tenn. Crim. App. LEXIS 560, 4 (Tenn. Crim. App. 1996)*.

[26] *See above §§ 7.02[4]–[9]*.

[27] *See, e.g.*, *Tenn. Code Ann. § 24-7-108* (1980), repealed by 1991 Tenn. Pub. Acts 273. *See also* *Long v. Ledford, 2016 Tenn. App. LEXIS 735 (Tenn. Ct. App. 2016)* (fact-finders may compare signatures on different documents to determine whether there is "such similarity that one can easily infer that both were written by the same author") *quoting* *State v. Dedmon, 1996 Tenn. Crim. App. LEXIS 560, 4 (Tenn. Crim. App. 1996)*.

[28] *553 S.W.2d 922 (Tenn. Crim. App. 1977)*.

[29] *Id. at 926*. As the Advisory Commission Comment notes, Rule 901(b)(3) alters the rule of *Franklin v. Franklin, 90 Tenn. 44, 16 S.W. 557 (1891)*, which did not permit an expert to compare a disputed document with an authenticated exemplar.

[30] *See, e.g.*, MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE 719 (6th ed. 2006).

the defendant's weapon obtained when the weapon was fired in the laboratory. Even without an expert witness, however, Rule 901(b)(3) allows the trier of fact to make its own comparison between a disputed item and a known sample.

For example, Rule 901(b)(3) permits an authentic specimen of the defendant's fingerprints to be introduced into evidence, along with fingerprints authenticated as having been found on the murder weapon. The trier of fact then compares the two sets of fingerprints to determine whether they are the same. Such nonexpert proof lacks the added impact that would have resulted by the opinion testimony of an expert witness. However, if the similarities are obvious, the trier of fact can conclude that the fingerprints on the murder weapon are those of the defendant.

[6] Distinctive Characteristics and the Like

[a] In General

Evidence can be authenticated or identified by distinctive characteristics and other circumstances that provide sufficient proof that it is what its proponent claims it to be. For example, under Rule 901(b)(4), "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" will suffice to authenticate evidence.[30.1]

It should be stressed that this illustrative method of authentication permits the court to consider both the item and the surrounding circumstances in assessing whether the item is what it is represented to be. This principle is illustrated by a slightly altered version of a popular aphorism: if a witness testifies that a particular animal walks like a duck, quacks like a duck, swims like a duck, and looks like a duck, the animal can be authenticated under Rule 901(b)(4) as a duck. The jury would then decide whether this particular beast really is a duck.

A more realistic illustration is a document or item of evidence containing characteristics or information known only to a particular individual. In a federal case, the defendant was charged with knowingly making false statements in obtaining federally insured mortgages.[31] The prosecution's evidence included three letters, allegedly written by the defendant, containing false statements. Under Rule 901(b)(4), the court authenticated these letters, relying on several facts: the letters were written on the defendant's company's letterhead and contained the initials of the company's executive secretary, each letter pertained to one of the specific transactions at issue in the case, and testimony established that the company policy was to have each such letter personally approved by one of the defendants.

In another federal case, the plaintiff sailor's sea records were authenticated by proof that their contents indicated they were the plaintiff's records, each copy of the record was signed and dated by the plaintiff, each appeared to be an official merchant marine document, the plaintiff produced the document in

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[30.1] *State v. Burns, 2015 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 2015)* (there was more than sufficient circumstantial evidence to authenticate social media website chats and an email containing a photo of a penis under Rule 904(b)(4), where defendant admitted that the social media account used to send the chats belonged to him, the email account belonged to him, and the photo of the penis was found on defendant's cell phone; in reaching its decision, the court discussed various cases addressing authentication of social media evidence from other jurisdictions, which the court found instructive).

[31] *United States v. Hoag, 823 F.2d 1123 (7th Cir. 1987)*. *See also United States v. McGlory, 968 F.2d 309 (3d Cir. 1992)* (notes were found in a trash bag with other papers of defendant in defendant's trash, were on paper torn from defendant's notebook, handwriting expert testified handwriting on notes was similar to defendant's, and notes contained information like that in defendant's telephone address books); *United States v. Watkins, 591 F.3d 780 (5th Cir. 2009)* (rental application authenticated as that of the defendant by witness who established that it bore defendant's name, date of birth, address, and signature); *United States v. Fraser, 448 F.3d 833 (6th Cir. 2006)* (authenticating book as written by defendant; witness testified that the defendant referred to this particular book on his website, defendant's picture was on the cover, and his name was listed in the book as its author).

response to a discovery request for his sea records, and the documents contained information not widely known.[32]

Items produced during discovery or submitted to a court may be deemed authenticated as appropriate for the circumstances. For example, a document on the letterhead of the party producing it in discovery was deemed authenticated as an item from that party.[33] Similarly, a document submitted to a court by a party and purporting to be from that party is authenticated as being from that party.[34]

[b] Reply Doctrine

Another example of this form of authentication is the reply doctrine. If it is demonstrated that a letter (the first letter) has been written by one individual and addressed to another, and the document in question (the second letter) is a letter received within a reasonable period of time that either specifically refers to the first letter or clearly indicates knowledge of its contents, the second document is deemed, by circumstantial evidence, to be from the addressee of the first letter.[35]

[7] Voice Identification

Non-Expert. Rule 901(b)(5) regarding voice identification parallels in part Rule 901(b)(2) dealing with handwriting. In each, a non-expert who can demonstrate sufficient familiarity with the subject matter of disputed evidence is permitted to give opinion testimony identifying the evidence as being what it is purported to be.[36] However, while the lay witness identifying handwriting pursuant to Rule 901(b)(2) is specifically precluded from testifying based on familiarity "acquired for purposes of the litigation," the non-expert witness identifying a voice under Rule 901(b)(5) is under no such restriction. He or she may base the voice identification on a familiarity gained solely to enable the witness to make an in-court identification. Expertise in the area of voice identification is not required for such authentication.

Familiarity with Voice. In the case of voice identification, regardless of whether the voice was heard firsthand or was heard through a telephone,[36.1] answering machine, or other recording or electronic transmission, if the witness has, at the time of testifying, adequate familiarity with the speaker's voice, he or she may opine whether the disputed testimony is the alleged speaker's voice, Rule 901(b)(5).

Familiarity can be gained in a relatively short period of time,[37] and as the result of conversations occurring before or after the conversation that was identified.[38] The person identifying the voice may not even have

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[32] *McQueeney v. Wilmington Trust Company, 779 F.2d 916 (3d Cir. 1985)*.

[33] *Law Co., v. Mohawk Constr. & Supply Co., 577 F.3d 1164, 1170 (10th Cir. 2009)* (during discovery party provided letter on own letterhead).

[34] *In re McLain, 516 F.3d 301, 307–308 (5th Cir. 2008)* (ledger attached to motion for summary judgment).

[35] *See, e.g.*, *United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985)*, *cert. denied*, ***475 U.S. 1110 (1986)*** (telexes were authenticated because they were responsive to a letter which was admissible); *National Acc. Soc'y v. Spiro, 78 F. 774 (6th Cir.)*, *cert. denied*, ***168 U.S. 708 (1897)***; MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE 723 (6th ed. 2006); MCCORMICK ON EVIDENCE 394 (6th ed. 2006).

[36] *See, e.g.*, *Stroup v. State, 552 S.W.2d 418 (Tenn. Crim. App.)*, *cert. denied*, ***434 U.S. 955 (1977)*** (identification of party to telephone call).

[36.1] *See, e.g.*, *State v. Richardson, S.W.3d , 2018 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 2018)* (recording of 911 call was authenticated by the male victim, since he had knowledge of both the contents of the recording and the sounds of his own voice).

[37] *See, e.g.*, *United States v. Jones, 600 F.3d 847 (7th Cir. 2010)* (familiarity with defendant's voice obtained by overhearing a conversation between the defendant and defense counsel in a courtroom); *United States v. Vega, 860 F.2d 779 (7th Cir. 1988)* (police officer gained familiarity with defendant's voice after two-hour conversation with defendant).

understood the conversation.[39] Moreover, identification of the source of a telephone call can sometimes be made even if the exact identity of the caller is unknown. In a federal bid-rigging case, for example, testimony was permitted about an anonymous caller who was clearly associated with one of two companies involved in the bid-rigging.[40]

Voice v. Content. It is worthwhile to note that identification of a voice under Rule 901(b)(5) is not the same as admitting the content of the speaker's statement. Not infrequently a voice in a telephone call may be identified or authenticated as that of, say, a person named Julia Winston, but the content of Winston's statement is inadmissible hearsay. In such cases the doctrine of relevance may make even the voice identification irrelevant under Rule 401.

[8] Telephone Conversations

One method of authenticating a telephone conversation is by proof that a call was placed to an individual at his or her telephone number and that one claiming to be that individual answered the call or that other circumstances[41] exist to validate the testimony that a call to the individual took place, Rule 901(b)(6). When the number called was the number assigned to the individual by the telephone company, it can be inferred that the telephone directory listing is accurate and that the number reached was the number dialed.

A telephone call to a business can be authenticated, pursuant to Rule 901(b)(6), by proof that the call was made to a number assigned by the telephone company to that particular place of business and that the conversation itself involved business matters reasonably transacted over a telephone. Under such circumstances, the party reached is presumed to be authorized to speak on behalf of the business.[42]

These methods of authentication, which are described in Rule 901(b)(6), should ordinarily be used when a telephone conversation cannot be authenticated through other, more credible methods, such as identification of the speaker's voice pursuant to Rule 901(b)(5) or through the reply doctrine under Rule 901(b)(4).[43]

Since either of the latter methods is likely in most cases to provide a more convincing authentication, the mechanism set forth in Rule 901(b)(6) should generally be used as a last resort.

[9] Public Records or Reports

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[38] *See, e.g.*, United States v. Robinson, 707 F.2d 811, 814 (4th Cir. 1983); United States v. Brown, 510 F.3d 57 (1st Cir. 2007) (officers permitted to identify defendant's voice on cell phone; officers had listened to hundreds of hours of the defendant's conversations and had personally spoken with him).

[39] *See* United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007) (agent authenticated six audiotapes of phone calls; agent compared defendant's voice on one call where the caller identified himself and then compared this voice with voices heard on the other tapes; agent had also heard the defendant speak in court; fact that overheard conversations were in Spanish and agent spoke no Spanish did not invalidate voice identification).

[40] ***United States v. Dynalectric Co., 859 F.2d 1559, 1988-2 Trade Cas. (CCH) P68347 (11th Cir. 1988)***.

[41] *See, e.g.*, United States v. Miller, 771 F.2d 1219, 1985-2 Trade Cas. (CCH) P66775 (9th Cir. 1985) (telephone call authenticated partly on basis of reference made in another telephone conversation ten minutes later); United States v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979), *cert. denied*, ***445 U.S. 943 (1980)*** (telephone conversation authenticated because it was made to defendant's business number and included personal information such that it was unlikely anyone other than the defendant would have answered for the defendant); State v. Reynolds, 2017 Tenn. Crim. App. LEXIS 174 (Tenn. Crim. App. 2017) (lieutenant described the process for making jail telephone calls, and the recording reflected that the caller identified himself as defendant and that the calls were made by an individual with defendant's unique inmate number; thus, the trial court properly found that the recordings were sufficiently authenticated).

[42] *See* Southeastern Express Co. v. Bowers, Inc., 21 Tenn. App. 295, 109 S.W.2d 851 (1936).

[43] *See, e.g.*, Stroup v. State, 552 S.W.2d 418 (Tenn. Crim. App. 1977), *cert. denied*, ***434 U.S. 955 (1977)***; Canady v. State, 461 S.W.2d 53 (Tenn. Crim. App. 1970).

Rule 901(b)(7) provides that a writing can be authenticated as a public record or report if certain conditions are met. First, the writing must be recorded or filed in a public office. Second, the recording or filing of the writing must be authorized by law. Third, it must be demonstrated to the court's satisfaction that the proffered writing is in fact "from the public office where items of this nature are kept," Rule 901(b)(7). Thus, appropriate custody is the critical question. The writing can be an official record or report, can be in the form of a statement, or can consist of a data compilation in any form, including computer printouts.

It is not necessary that the original public record be produced; a trustworthy duplicate will suffice.[44] The rule contains no requirement that the writing be available for public inspection, but only that it be kept in a public office under authorization of law. Unless the writing is self-authenticating pursuant to Rule 902, testimony must be presented by an individual with personal knowledge that the particular writing or record meets the requirements of this rule.

[10] Ancient Documents or Data Compilation

Rule 901(b)(8) provides for the authentication of ancient documents, some of which are covered by the ancient document hearsay exception. Under *Rule 803(16) of the Tennessee Rules of Evidence*, ancient documents affecting an interest in property are covered by a hearsay exception.[45] Rule 901(b)(8) provides a method of authenticating the ancient document as well as ancient documents not covered by this hearsay provision.

Unlike the comparable federal rule which adopts a twenty-year standard,[46] Rule 901(b)(8), parroting Tennessee hearsay Rule 803(16), requires that a document have been in existence for at least 30 years at the time it is offered into evidence. Additionally, Rule 901(b)(8) provides that it must be shown that there are no suspicious circumstances surrounding the condition of the document, such as indicia of tampering or modification.[47] Finally, proof must be presented that the document was kept in a likely place.

The rationale for this provision arises from the difficulty in authenticating, by way of direct evidence, a writing that is many years old. Understandably, the passage of time lessens the possibility of authentication by some of the other methods provided in Rule 901. For example, the individual who signed a document and all witnesses to the signing could be dead or otherwise unavailable, resulting in the need to use circumstantial evidence for identification and authentication.[48]

This rule deals not only with ancient documents affecting an interest in property (and covered under a hearsay exception by Tennessee Evidence Rule 803(16)), but also with other documents and data compilations in any form. Consequently, books of accounts, bank records and other types of "ancient" written compilations of data can be authenticated under Rule 901(b)(8). A literal reading of the rule indicates that other types of data compilation, such as a thirty-year-old computer tape, are likewise covered if the other provisions of this illustration are met. Of course, hearsay and other considerations may bar the evidence, irrespective of the authentication rules.

[11] Process or System

Evidence that is the result of a process or system can be authenticated by the presentation of proof describing the process or system utilized and by demonstrating that the result produced is an accurate one, Rule 901(b)(9). In some instances this method of authentication is applicable but not necessary.[48.1] For example, this

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[44] *See generally below § 10.03[2]*.

[45] *See above § 8.21*.

[46] FED. *R. EVID. 901(B)(8)*.

[47] A federal case interpreted the identical federal factor as referring not to whether the accuracy of the *content* of the document is suspicious, but rather to whether there is suspicion about whether the item is what it purports to be. *United States v. Mandycz, 447 F.3d 951 (6th Cir. 2006)* (Soviet interrogation records).

[48] MCCORMICK ON EVIDENCE 394–95 (6th ed. 2006).

provision could be utilized to demonstrate the authenticity of photographs, x-rays, tape recordings, or videotapes. Such processes are so commonplace that one rarely hears an objection to their admissibility on the basis that the process itself is unreliable. If, however, an issue exists regarding the accuracy of an x-ray, testimony regarding the process or system used might be necessary in order to authenticate the evidence.

With the significant technological advances of recent years, Rule 901(b)(9) may become increasingly more important. In a case involving a large amount of data, it might be necessary to compile and analyze the data through a computer program in order to present meaningful evidence to the jury. In such cases, a witness capable of explaining what information is fed into the computer, what type of computer software program is used, the purpose of the program, the basic functions of the program, and the accuracy of the result in the particular situation will suffice to authenticate the process used.[49] Another example is an automatic videotape or digital recording device used in banks. Rule 901(b)(9) would permit the recorded images to be authenticated upon sufficient proof of the reliability of the machine and the quality of its product.[50]

[12] Methods Provided by Statute or Rule

Rule 901(b)(10) clarifies that the provisions of the Tennessee Rules of Evidence, especially those contained in Rule 901 regarding authentication or identification, do not supersede any other methods of authentication or identification that are prescribed by Tennessee or federal statute or by Tennessee Supreme Court Rules. Specifically, this subsection indicates that the Tennessee Rules of Civil Procedure and Rules of Criminal Procedure remain in effect and may provide methods of authenticating evidence.

For example, *Rule 32.01 of the Rules of Civil Procedure* contains a number of provisions affecting authentication and admissibility of a deposition. Evidence Rule 901(b)(10) makes it clear that these provisions continue to be good law in Tennessee.

There are many other examples. These include a physician's report offered in worker's compensation cases.[51] Such reports are admissible if signed by the physician or, if an unsigned original of the medical report is used, accompanied by an affidavit from either the physician or the submitting attorney. Similarly, by statute, a certified computer printout of a defendant's official driving record maintained by the department of safety reflecting that a defendant has been convicted of driving while in possession of 5 grams or more of methamphetamine is *prima facie* evidence of the conviction when the defendant is subsequently on trial for the same offense.[52]

[13] Chain of Custody

[a] In General

The concept of "chain of custody" involves laying the appropriate foundation for introduction of real evidence. The general rule is that "[t]angible evidence may be properly introduced either when identified by a witness or by the presentation of an unbroken chain of custody."[53] The purpose of the chain of custody

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[48.1] *See* *State v. Farrar, 2008 Tenn. Crim. App. LEXIS 825 (Tenn. Crim. App. 2008)* (although Rule 901(b)(9) applies to computer documents, authentication under this sub-rule is not necessary where there are other means of authenticating the evidence; thus, where the state met the requirements of Rule 901(b)(5), providing authentication by voice identification, there was no need to further analyze whether a compact disc was properly authenticated under Rule 901(b)(9)).

[49] *See generally* MICHAEL H. GRAHAM, 4 HANDBOOK OF FEDERAL EVIDENCE 777–80 (6th ed. 2006).

[50] *Cf.* *United States v. Rembert, 863 F.2d 1023, 1026 (D.C. Cir. 1988)* (insufficient proof of process to satisfy Federal Rule 901(b)(9)).

[51] ***TENN. CODE ANN. § 50-6-235*** (2008).

[52] *Tenn. Code Ann. § 55-50-506* (2008).

rule is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence."[54] If the item in controversy is readily identifiable, such as having unique characteristics known to the identifying witness so that its identity is not reasonably questioned, the chain of custody is generally not an issue absent evidence that the item has been modified or adulterated.[55] The evidence can be authenticated under Rules 901(b)(1) and 901(b)(4).

[b] Need to Establish

If the item is not distinguishable or identifiable without labeling or assistance, such as contraband narcotics, or is so ordinary and common as to be unidentifiable, such as a penny with last year's date, the evidentiary groundwork for admission into evidence requires a tracing of the location and control or custody of the evidence during the relevant time period to demonstrate not only that this is the same evidence that was initially obtained, but also that its condition has not changed.[56] It is thus a principle of identification and integrity.[57]

Although a witness must be able to identify the evidence or establish an unbroken chain of custody, "absolute certainty" is not required.[57.1] Rather, Rule 901 requires "reasonable assurance" of the identity and integrity of the sample, and evidence should be admitted if the facts and circumstances relating to its handling reasonably establish its identity and integrity.[57.2] Where the facts and circumstances are insufficient to establish the identity and integrity of the evidence, its admission into evidence may constitute reversible error.[57.3]

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[53] State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987) (defendant's coat and hat). *See also* State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987) (confiscated marijuana).

[54] State v. Kilpatrick, 52 S.W.3d 81, 87 (Tenn. Crim. App. 2000) (*quoting* State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)). State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016); State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019) (the purpose of this requirement is to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence).

[55] *See, e.g.,* State v. Thomas, 158 S.W.3d 361, 396 (Tenn. 2005) (affirming opinion of Court of Criminal Appeals) (no need to show chain of custody for security camera videotape; witness testified that he viewed the video and that it accurately reflects what it purports to show; a witness also testified about technical aspects of the security camera).

[56] *See, e.g.*, State v. Johnson, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984) (sealed rape evidence kit submitted for forensic analysis satisfied chain of custody requirement); State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987) (confiscated marijuana labeled by officer and later identified by him established chain of custody); In re Envy J., 2016 Tenn. App. LEXIS 705 (Tenn. Ct. App. 2016) (mother's objection based on chain of custody was misplaced; the witnesses identified the drug screen result forms entered into evidence, the mother signed both forms in the presence of each witness, and the witnesses recorded the results shown on the drug test cups, and thus the trial court did not abuse its discretion in admitting the drug screen results in this termination case).

[57] *See* State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998).

[57.1] State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019).

[57.2] *Id*; State v. Haney, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2018) (facts and circumstances surrounding items of the victim's clothing during sexual battery trial reasonably established their identity and integrity). *See below* § 9.01[14][f], discussing "reasonableness" concept as it relates to chain of custody.

[57.3] *See, e.g.*, State v. Gibson, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. 2018), where the trial court erred by admitting the results of defendant's blood-alcohol test because the State failed to prove an adequate chain of custody of the blood sample, as it did not offer any evidence to show the location of and conditions in which the evidence was kept between the time the deputy delivered it to an unidentified person from the forensic department and the laboratory's receipt of it from the sheriff's department. The error was not harmless, since defendant's convictions for DUI *per se* and fourth-offense DUI based on a *per se* violation relied on the blood-alcohol test results as the essential proof of intoxication.

[c] Links in the Chain

The concept of a "chain" of custody recognizes that real evidence may be handled by more than one person between the time it is obtained and the time it is either introduced into evidence or subjected to scientific analysis.[58] Obviously, any of these persons might have the opportunity to tamper with, confuse, misplace, damage, substitute, lose and replace, or otherwise alter the evidence or to observe another doing so. Each person who has custody or control of the evidence during this time is a "link" in the chain of custody. Under a literal application of chain of custody, testimony from each link is needed to verify the authenticity of the evidence and to show that it is what it purports to be.[59] Each link in the chain would testify about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes in its condition during possession; and when, where and how it left the witness's possession.[60]

In *State v. Johnson*,[61] the court stated that establishment of the chain of custody is necessary "to prove the identity of a substance offered in evidence and its integrity, that is, that there was no substantial alteration in the article offered which would effect [sic] its validity as evidence."[62] Absent proof of the chain of custody, evidence should not be admitted into evidence[63] unless both identity and integrity can be demonstrated by other appropriate means. Thus, evidence is not necessarily precluded from admission if a party fails to call

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[58] *See, e.g.*, Ritter v. State, 462 S.W.2d 247, 249 (Tenn. Crim. App. 1970) (typically, several people handle blood specimen prior to its analysis).

[59] *See, e.g.*, Ritter v. State, 462 S.W.2d 247, 249 (Tenn. Crim. App. 1970) (all persons who handled blood sample taken and analyzed in drunk driving case should be ready to testify about its identity, custody and unchanged condition); State v. Johnson, 705 S.W.2d 681, 684 (Tenn. Crim. App. 1985) (chain of custody intact when marijuana kept under lock until trial and all who handled it testified and identified it); State v. Long, 800 S.W.2d 507 (Tenn. Crim. App. 1990) (chain of custody proven; witness A testified she bought marijuana from defendant and delivered it to witness B; witness B testified and identified the package as the marijuana he received from witness A; witness C testified that he received that package from witness B, who actually introduced the package into evidence); Cofer v. State, 2015 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 2015) (trial court did not err in admitting the coded note as the first correctional officer identified the evidence and established an unbroken chain of custody because the first correctional officer personally observed defendant slip a piece of paper into the hallway as codefendant was returning a breakfast tray; a second correctional officer immediately retrieved the note from codefendant and brought it back to central control; and the first correctional officer stated that the piece of paper and the second correctional officer remained visible to him at all times, and that he recognized the note because of its torn corner). *But see,* State v. Thirkill, 2016 Tenn. Crim. App. LEXIS 231 (Tenn. Crim. App. 2016) (technician sent to retrieve the footage did not testify at trial and, therefore, the chain of custody was not technically complete; however, any failure in the chain of custody was remedied by the witness's testimony, which confirmed that the video fairly and accurately depicted the robbery).

[60] State v. Cannon, 254 S.W.3d 287, 296 (Tenn. 2008). *See also* State v. Daniels, 2017 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. 2017) (defendant's challenge to the chain of custody was without merit, because the state introduced abundant evidence on the issue of how the body had been transported from the crime scene, and by whom).

[61] 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984).

[62] Id. at 881 (involving custody of rape collection kit from examination of victim at hospital to delivery to state crime lab).

[63] *See* Bolen v. State, 544 S.W.2d 918, 920 (Tenn. Crim. App. 1976) (garbage from defendant's dumpster not properly identified and chain of custody not established); United States v. Robinson, 367 F. Supp. 1108–09 (E.D. Tenn. 1973) (incomplete chain of custody of alleged unregistered firearm when left unmarked on top of reception room file cabinet for two days; gun thus inadmissible; possibility of misidentification not eliminated).

all of the witnesses who handled it.[63.1] Rather, Rule 901 is satisfied when the "beginning and ending links" of a chain of custody are testified to, with no evidence of tampering in between.[63.2]

[d] Civil Cases

Although the majority of reported cases involving chain of custody are criminal cases dealing with evidence used to convict the defendant, the principle is equally applicable in civil cases.[64] A classic application is the products liability case, in which the condition of the product is the critical issue. The defendant's product must first be identified as the product involved in the episode. Additionally, it must be shown that the defective condition of the product was the proximate cause of the plaintiff's injury. Such cases typically involve expert testimony that the product caused injury or other damage due to its faulty condition. It must further be demonstrated that the product was faulty not only at the time of analysis by the expert, but also at the time the product left the control of the manufacturer and at the time of the injury or damage, with no intervening adulteration. While proof of identity and integrity of the evidence is critical, an intact chain of custody is integral to the presentation of a successful case.

[e] Time Period

Regardless of whether the case is civil or criminal, the period of time during which custody must be shown runs from the time initially related to the cause of action, such as when evidence was confiscated or otherwise obtained, until the time of trial if the item is to be introduced into evidence.[65] If the evidence was subjected to scientific analysis or other expert examination, but will not be made a trial exhibit, the time period may run only until the analysis.[66] If only the expert's opinion and testing results are admitted into evidence, and not the item or sample itself, the disposition of the evidence after analysis is irrelevant.

[f] Application of Concept: Reasonableness

[63.1] *State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019)*. *See also*, *State v. Gibson, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. 2018)* (although the State is not required to present the testimony of every witness who handled the evidence, it is required to show the identity and integrity of the evidence as a predicate to its admissibility; trial court erred by admitting defendant's blood-alcohol test results into evidence).

[63.2] *State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019)* (defendant's cell phone and images it contained were properly admitted by trial court, despite the lack of testimony from one agent who handled it; the testimony of all of the other witnesses called by the State established an unbroken chain of custody between the time defendant's cell phone came into the possession of the authorities until its forensic examination). *See also* *State v. Parton, 2019 Tenn. Crim. App. LEXIS 395 (Tenn. Crim. App. July 8, 2019)* (Rule 901 was satisfied because an officer testified that defendant's blood was collected and sealed so that any tampering would be evident, and a special agent's testimony established that it was received by the Tennessee Bureau of Investigation inside the sealed kit, the tubes were labeled with defendant's name and birth date, and she did not note any irregularities when she received it).

[64] *See, e.g.*, *Ritter v. State, 462 S.W.2d 247, 249 (Tenn. Crim. App. 1970)*.

[65] *See, e.g.*, *State v. Goad, 692 S.W.2d 32 (Tenn. Crim. App. 1985)* (state showed chain of custody of bullets removed from victim until time of trial); *State v. Johnson, 705 S.W.2d 681 (Tenn. Crim. App. 1985)* (regarding custody of marijuana up until trial); *State v. Ferguson, 741 S.W.2d 125 (Tenn. Crim. App. 1987)* (custody of defendant's coat and hat until trial); *United States v. Robinson, 367 F. Supp. 1108 (E.D. Tenn. 1973)* (addresses chain of custody until trial of firearm sought to be made an exhibit).

[66] *See, e.g.*, *Ritter v. State, 462 S.W.2d 247 (Tenn. Crim. App. 1970)* (addresses chain of custody until blood sample was analyzed for alcohol content; only the test results were evidence, not the sample itself); *State v. McKinney, 605 S.W.2d 842 (Tenn. Crim. App. 1980)* (describes chain of custody of blood sample until analysis).

The courts apply a reasonableness standard in determining whether the chain of custody has been demonstrated. Often the chain of custody requirement is not applied literally. The proof needed to establish the chain of custody varies according to the type of evidence and other facts in the case.[67]

For example, when a badly burned corpse was examined by three different specialists (a county medical examiner, a pathologist, and a forensic anthropologist), one of whom sent a bone sample to yet a fourth specialist, the defendant alleged that the lack of explicit proof as to the exact procedure for shipping corpses in and out of the hospital broke the chain of custody. The court found it obvious that all specialists had examined the same remains and found that the chain of custody was established.[68]

Many cases analyze the degree of care taken to safeguard the evidence after it has been obtained. For example, proof that marijuana was kept under lock and key until submitted for analysis was held to be sufficient to establish the chain of custody.[69] Samples that are kept under seal, such as blood, are typically found to meet the chain of custody requirement if the seal is unbroken until the time of analysis or introduction into evidence.[70]

Flexibility. Generally, courts are somewhat flexible in determining that the chain of custody is sufficiently intact. Some decisions even note that gaps in the chain of custody affect the weight, not admissibility of

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[67] *See, e.g.*, United States v. Clonts, 966 F.2d 1366 (10th Cir. 1992); State v. Gossett, 2017 Tenn. Crim. App. LEXIS 232 (Tenn. Crim. App. 2017) (admitting two exhibits in defendant's drug trial was not an abuse of discretion, because every link in the chain of custody was shown from a confidential informant to an investigator to a deputy to a crime lab agent and back to the deputy, as to one exhibit, and, as to the other exhibit, from defendant's bedroom to the investigator to the deputy to the crime lab agent and back to the deputy); State v. Thirkill, 2016 Tenn. Crim. App. LEXIS 231 (Tenn. Crim. App. 2016) (any failure in the chain of custody was remedied by the witness's testimony, which confirmed that the video fairly and accurately depicted the robbery); State v. Daniels, 2017 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. 2017) (evidence sufficiently established how, and by whom, body had been moved from crime scene); State v. Gonzalez-Fonesca, 2016 Tenn. Crim. App. LEXIS 526 (Tenn. Crim. App. 2016) (testimony provided by the state was more than enough to reasonably establish the chain of custody for the drug evidence where a detective testified he personally looked at each it detective, the detective maintained an inventory of the evidence as it was collected, the second detective personally packaged and delivered all of the evidence to the evidence room, and three witnesses testified that the evidence was received and submitted for testing the TBI).

[68] State v. Goodman, 643 S.W.2d 375, 381 (Tenn. Crim. App. 1982).

[69] State v. Johnson, 705 S.W.2d 681 (Tenn. Crim. App. 1985). *Cf.* State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998) (facts probably showed that cocaine was under lock and key during time at issue).

[70] State v. McKinney, 605 S.W.2d 842, 845 (Tenn. Crim. App. 1980) (blood sample was properly drawn, identified and sealed; fact that analysis did not occur for several days does not alter admissibility); Ritter v. State, 462 S.W.2d 247, 249 (Tenn. Crim. App. 1970) (blood analysis results admissible even though other employees had access to it, absent evidence of tampering); Shell v. Law, 935 S.W.2d 402 (Tenn. Ct. App. 1996) (blood tests taken by standard procedure admissible; phlebotomist drew blood in hospital laboratory; blood sample was sealed and labeled, then taken to laboratory where it was tested by staff; nothing in record to cast suspicion on authenticity of sample; no need for phlebotomist to testify to establish chain of custody; circumstances of taking samples and testing blood affect weight, not admissibility); State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001) (extensive proof of chain of custody, though not perfect, was adequate to establish that the blood evidence was what it was claimed to be by the prosecution).

evidence.[71] For example, a minor discrepancy in the testimony regarding the chain of custody is not fatal to the admission of the evidence itself or an analysis of its contents.[72]

Although certainly advisable, it is not mandatory that every "link" in the chain of custody testify in order for the evidence or the results of its analysis to be admissible.[72.1] So long as sufficient proof is submitted to satisfy the court that appropriate safeguards were taken, substantial demonstration of the chain is sufficient.[73] To accomplish this, "the circumstances established must reasonably assure the identity of the

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[71] *United States v. Tatum, 548 F.3d 584 (7th Cir. 2008)* (sufficient evidence connecting drugs to defendant); *State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016)* (once the threshold of the admissibility has been met, any challenges to the chain of custody become considerations for the fact-finder).

[72] *See, e.g.*, *State v. Beech, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987)* (marijuana admissible even though trooper could not recall whether he mailed or hand-delivered it to crime lab); *State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App. 1985)* (defendant's clothing admissible even though testimony unclear regarding which officer put evidence in suitcase), *aff'd by* *Coury v. Livesay, 868 F.2d 842 (6th Cir. 1989)*; *State v. Johnson, 705 S.W.2d 681 (Tenn. Crim. App. 1985)* (marijuana kept under lock was admissible even though detective could not recall date of transport).

[72.1] *State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016)* (in setting up the chain of evidence, the prosecution is not required to elicit testimony from every custodian or every person who had an opportunity to come into contact with the evidence at issue; instead, the burden is on the prosecution to demonstrate that it is reasonably probable or reasonably certain that no tampering, alteration, or substitution has occurred); *State v. Martinez, 2017 Tenn. Crim. App. LEXIS 977 (Tenn. Crim. App. 2017)* (the State is not required to call all of the witnesses who handled the item).

[73] *State v. Goad, 692 S.W.2d 32, 36 (Tenn. Crim. App. 1985)* (absence of testimony of custodian of property room did not render bullets inadmissible); *State v. Johnson, 673 S.W.2d 877, 881* (Tenn. Crim. App. 1984) (rape evidence collection kit accepted as foundation for expert testimony without nurse's testimony due to sufficient unbroken chain of evidence); *State v. Baldwin, 867 S.W.2d 358 (Tenn. Crim. App. 1993)* (state not required to establish facts excluding every possibility of tampering; circumstances established must reasonably assure the identity of the evidence and its integrity); *Davis v. Shelby County Sheriff's Dep't, 278 S.W.3d 256, 267 (Tenn. 2009)* (identity of sample need not be proven beyond all possibility of doubt or that all possibility of tampering with it be excluded; one witness provided adequate information about how the specimen was obtained and handled).

evidence and its integrity."[74] The trial court is given broad discretion in determining whether the chain of custody rule has been satisfied.[75]

Perfection Not Required. Furthermore, it is not necessary that identification and unadulterated custody of the evidence be established beyond all possibility of doubt or tampering.[76] Instead, proof that the evidence

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[74] State v. Kilpatrick, 52 S.W.3d 81, 86 (Tenn. Crim. App. 2000). *See, e.g.*, State v. Cannon, 254 S.W.3d 287, 296 (Tenn. 2008); Cooper v. Eagle River Mem. Hosp., 270 F.3d 456 (7th Cir. 2001) (chain of custody acceptable for pathology slide containing tissue samples from plaintiff; reference number on the slide matched the specimen number in the plaintiff's pathology report and was no evidence sample came from source other than plaintiff); State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016) (while the state did not introduce testimony from every link in the chain of custody, the proof presented was sufficient to establish the identity and integrity of the evidence; the trial court did not abuse its discretion in determining that the proof sufficiently established the identity of the clothing and there was no substantial alteration to the evidence, thus preserving its integrity); State v. Thirkill, 2016 Tenn. Crim. App. LEXIS 231 (Tenn. Crim. App. 2016) (technician sent to retrieve the footage did not testify at trial and, therefore, the chain of custody was not technically complete; however, any failure in the chain of custody was remedied by the witness's testimony, which confirmed that the video fairly and accurately depicted the robbery); State v. Martinez, 2017 Tenn. Crim. App. LEXIS 977 (Tenn. Crim. App. 2017) (each link in the chain of custody should be sufficiently established, but the rule does not require that the identity of tangible evidence be proven beyond all possible doubt, nor should the State be required to establish facts which exclude every possibility of tampering; when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence); State v. Fleming, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 218 (Tenn. Crim. App. 2018) (State established a sufficient chain of custody, as the trooper testified that he saw the phlebotomist draw the blood from defendant and then sealed the blood himself into the kit bearing defendant's identification information; the fact that hospital staff might have also drawn blood from the passengers in defendant's vehicle, none of whom were in the same hospital room at the time, did not call into question the authenticity of defendant's blood evidence); State v. Basham, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 281 (Tenn. Crim. App. 2018) (defendant was not entitled to relief on defendant's chain of custody argument because the storage and transmission of the evidence collected from defendant's car following a traffic stop to the Tennessee Bureau of Investigation for forensic analysis-including the packaging and sealing of the evidence-established the identity and integrity of the evidence; various law enforcement officials who handled the evidence testified as to the procedures that were involved).

[75] State v. Baldwin, 867 S.W.2d 358 (Tenn. Crim. App. 1993); State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990); State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998) (trial court's determination on chain of custody will not be disturbed absent a clearly mistaken exercise of discretion); Davis v. Shelby County Sheriff's Dep't, 278 S.W.3d 256, 267 (Tenn. 2009) (trial judge has discretion to decide whether chain of custody is established and this determination will not be overturned on appeal in the absence of a clear mistaken exercise of that discretion); State v. Gossett, 2017 Tenn. Crim. App. LEXIS 232 (Tenn. Crim. App. 2017) (admitting two exhibits in defendant's drug trial was not an abuse of discretion, because every link in the chain of custody was shown from a confidential informant to an investigator to a deputy to a crime lab agent and back to the deputy, as to one exhibit, and, as to the other exhibit, from defendant's bedroom to the investigator to the deputy to the crime lab agent and back to the deputy); State v. Estrada, 2016 Tenn. Crim. App. LEXIS 896 (Tenn. Crim. App. 2016) (when trial court ruled that the evidence had met the threshold requirement of reasonable assurance, the defendant was entitled to, and did, present a vigorous cross-examination, testing the propriety of the chain and the credibility and competence of the witnesses who supported the admission of the evidence; thus, the weight to be given the proof properly became a question for the jury).

[76] *See generally* State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990) (identification of tangible evidence need not be certain; is sufficient if there is reasonable assurance of the identity of the evidence); State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989) (identity of tangible evidence need be demonstrated only with reasonable assurance; all possibility of tampering or doubt of identity need not be eliminated); State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998) (while the state is not required to establish facts that exclude every possibility of tampering, the circumstances established must reasonably assure the identity of the evidence and its integrity); State v. Kilpatrick, 52 S.W.3d 81, 86 (Tenn. Crim. App. 2000) (the chain of custody rule does not require absolute certainty of identification); Davis v. Shelby County Sheriff's Dep't, 278 S.W.3d 256, 267 (Tenn. 2009) (identity of sample need not be proven beyond all possibility of doubt or that all possibility of tampering with it be excluded); State v. Cannon, 254 S.W.3d 287, 296 (Tenn. 2008) (chain of custody does not require identity be proven beyond a reasonable doubt and state should not be required to establish facts excluding every possibility of tampering)*See also*, (where complainant could not say "with certainty" that defendant was the person who responded to a Facebook message she had sent, her testimony that she accessed the messages in the prosecutor's office and watched as the

was handled according to normal procedures and that there is no indicia of tampering with the evidence is generally adequate.[77] For example, the mere fact that the laboratory refrigerator in which the sample was stored between acquisition and analysis was accessible to lab employees does not break the chain, even though they do not testify. Similarly, the mere fact that some time passed between the obtaining of a sample and its analysis, absent any evidence of interim alteration, does not affect the chain of custody.[78]

Mail. If an item is mailed, such as a specimen mailed to a laboratory for analysis, testimony of postal workers is not required to prove the complete chain of custody.[79] To require otherwise would put an onerous burden on the proponent of the evidence because of the difficulty in identifying each postal employee who actually handled the item and the low probability that any postal employee actually remembers it. Although it is true that an item could be intentionally replaced or switched while in the mailing process, this would be difficult and is not a likely occurrence. A more probable difficulty with mailed items is damage during shipment. The recipient of the item is, however, a necessary link in the chain and can be cross-examined about the condition of the evidence upon receipt.

Illustration of Inadequate Chain of Custody. While generally courts find that the chain of custody is sufficient, in some cases crucial evidence is excluded because of inadequate proof of chain of custody. In *State v. Cannon*,[80] for example, the defendant was charged with rape of an elderly woman. Pantyhose taken from her hospital room contained the defendant's DNA and were the only link between the defendant and the crime. At trial, the prosecution attempted to provide a chain of custody to establish that the pantyhose belonged to the elderly rape victim who was unable to testify because of severe mental limitations. The prosecution's proof consisted of a nurse who testified that the pantyhose belonged to the victim because they were "there with her clothes" and no one else had been in the hospital room other than the victim. The nurse also spontaneously offered that the victim had told the nurse that the pantyhose belonged to the victim (a statement the court excluded as inadmissible hearsay). Other evidence was, at best, conflicting and unclear whether the pantyhose were the victim's. The Tennessee Supreme Court held that the pantyhose were inadmissible because of insufficient chain of custody linking them to the victim. The Court seemed to be influenced by the fact that the pantyhose were the only evidence that the defendant was involved in the rape, for which another person was initially arrested and identified by several witnesses.

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prosecutor printed the messages was sufficient to authenticate them under *Tenn. R. Evid. 901* since her testimony reasonably established that the printouts were what they purported to be); *State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019)* (Rule 901 is satisfied when the beginning and ending links of a chain of custody are presented with no evidence of tampering in between); *State v. Gathing, 2018 Tenn. Crim. App. LEXIS 42 (Tenn. Crim. App. 2018)* (the identity of tangible evidence need not be proven beyond all possibility of doubt, and the State is not required to establish facts excluding every possibility of tampering; if the State fails to call all witnesses who handled the evidence, such evidence is not necessarily inadmissible); *State v. Martinez, 2017 Tenn. Crim. App. LEXIS 977 (Tenn. Crim. App. 2017)* (chain of custody rule does not require establishing facts that exclude all possibility of tampering).

[77] *See, e.g.*, *Ritter v. State, 462 S.W.2d 247 (Tenn. Crim. App. 1970)* (blood tests); *State v. Ferguson, 741 S.W.2d 125 (Tenn. Crim. App. 1987)* (defendant's coat and hat); *State v. Davis, 141 S.W.3d 600, 630 (Tenn. 2004)* (adopting opinion of Tenn. Court of Criminal Appeals) (chain of custody requires state to reasonably establish the identity of evidence and its integrity; every witness who handled the bullet is not required to testify to establish lack of tampering; pathologist testified about procedures used routinely for recovering and preserving bullets from a body; chain of custody rule satisfied despite lack of testimony by anyone who actually processed the bullets in the pathologist's office).

[78] *See, e.g.*, *State v. McKinney, 605 S.W.2d 842 (Tenn. Crim. App. 1980)*.

[79] Captain Edward J. Imwinkelried, *The Identification of Original, Real Evidence*, 61 MIL. L. REV. 145, 157 (1973). Several Tennessee cases have held that the chain of custody was adequately demonstrated for items mailed, and no postal employee testimony was presented. *See, e.g.*, *Ritter v. State, 462 S.W.2d 247 (Tenn. Crim. App. 1970)*.

[80] *State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)*.

Harmless Error. When the chain of custody is not sufficiently established and evidence is improperly admitted in a criminal trial, the error may nonetheless be held harmless if other evidence is sufficient to support the conviction.[80.1] Where a defendant satisfies the high burden on appeal to establish that the erroneous admission was not harmless,[80.2] evidence admitted without a proper chain of custody constitutes reversible error.[80.3]

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[80.1] *See, e.g.*, State v. Coffee, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. 2017) (even though the trial court erred by admitting fingerprint evidence collected from the witness's car, because the chain of custody was incomplete as between the time the officer left the witness's car and the time a person received the envelope in the latent fingerprint division no proof was presented of what was done with the envelope, the error was harmless because the evidence was sufficient to support defendant's conviction).

[80.2] *See, e.g.*, State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018) (improperly admitted evidence is reviewed under a non-constitutional harmless error analysis, which places the burden on a defendant who is seeking to invalidate his or her conviction to demonstrate that the error more probably than not affected the judgment or would result in prejudice to the judicial process; substantial evidence of the defendant's guilt makes it difficult for the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial).

[80.3] *See, e.g.*, State v. Cannon, 254 S.W.3d 287, 2008 Tenn. LEXIS 278 (Tenn. 2008) (trial court committed reversible error by admitting victim's pantyhose without proper chain of custody, because DNA analysis derived from the semen found on the pantyhose was the only tangible evidence linking defendant to the victim), discussed supra.

§ 9.02 Rule 902. Self-Authentication

[1] Text of Rule

Rule 902 Self-Authentication

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

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

(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 the Tennessee Legislature or rule prescribed by the Tennessee Supreme Court.

(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 and periodicals.

(7) Trade Inscriptions and the Like.Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents.Commercial paper, including all signatures, and related documents to the extent provided by general commercial law.

(10) Presumptions Under Acts of Congress or the Legislature.Any signature, document, or other matter declared by Act of Congress or the Tennessee legislature to be presumptively or prima facie authentic.

(11) Certified Records of Regularly Conducted Activity.The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Advisory Commission Comment:

This rule lists documents that do not require authenticating evidence as a foundation to admissibility.

Part (9) refers to Tennessee's version of the Uniform Commercial Code, *T.C.A. §§ 47-1-101 et seq*. See in particular *T.C.A. § 47-3-307*, concerning signatures on commercial paper.

2001 Advisory Commission Comment:

Read in conjunction with Rule 803(6), new Rule 902(11) allows affidavits by custodians to establish the foundation for business records. The custodian need not attend trial as a witness.

2003 Advisory Commission Comment:

The business duty element of a foundation for the business records hearsay exception is inserted in Rule 902(11)(A) to conform to Rule 803(6).

[2] Self-Authentication: In General

Under Rule 902 certain types of evidence are deemed to be self-authenticating due to the inherent reliability of the evidence itself. The rule is substantially similar to the equivalent federal rule. Like the federal rule, Tennessee Rule 902 does not preclude the admission of proof that disputes the self-authenticating evidence, nor is it the equivalent of a stipulation, judicial notice, or a formal admission. Instead, Rule 902 simply lessens the authentication burden for eleven classes of evidence. A document or item covered by Rule 902 can usually be authenticated by reference to the evidence itself; no other proof is needed in most cases.

In determining whether evidence should be self-authenticating, the critical question is whether there are sufficient circumstances justifying authenticity that the typical foundation requirements can be omitted. If

evidence does not satisfy Rule 902 and is therefore not self-authenticating,[80.4] it can still be authenticated if it complies with Rule 901's general principle of establishing that the evidence is what it is purported to be.[81] Rule 902 discusses eleven types of evidence, each dealt with in the following sections.

[3] Domestic Public Documents Under Seal

Any document that bears the seal of the State of Tennessee or the United States or other state, territory, political subdivision, or public office or agency that also appears to bear an attesting or executing signature is self-authenticating under Rule 902(1). Examples include a Federal Deposit Insurance Corporation certificate,[82] state motor vehicle registration records,[83] and a state court judgment which bore the seal of the court and a signature of the custodian of the actual judgment.[84] A copy of this document may not satisfy this rule.[85]

[4] Domestic Public Documents Not Under Seal

A public document purportedly bearing the signature of a public officer or employee, acting in an official capacity, is self-authenticating under Rule 902(2) if a public official having a seal and public duties in that area certifies under seal that the signer has the official capacity to sign the document and that the signature is genuine. Even though the official who signed the document did not attach a seal to it, the fact that another officer did so and verified the signing officer's capacity and signature is sufficient indicia of reliability to justify admission of the document. The equivalent federal rule was held to self-authenticate a certified report indicating that federal government records did not reflect a certain firearms transaction.[86] The certification consisted of a document indicating that the author of the report was the proper custodian of the records and that the certifier was familiar with the handwriting of the author of the report.

[5] Foreign Public Documents

Under the very strict and technical requirements of Rule 902(3), foreign public documents are self-authenticating following a two-step process. First, the document must have been purportedly executed or attested by a person authorized to do so by the laws of the foreign country whose document is involved.[87]

[80.4] *See also*, State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018) (temporary vehicle registration tag not self-authenticating under Tenn. R. Evid. 902; trial court's erroneous admission held not harmless).

[81] Vatyan v. Mukasey, 508 F.3d 1179 (9th Cir. 2007). *See above* § 9.01[2].

[82] United States v. Wingard, 522 F.2d 796 (4th Cir. 1975), *cert. denied*, ***423 U.S. 1058 (1976)***.

[83] United States v. Trotter, 538 F.2d 217 (8th Cir.), *cert. denied*, ***429 U.S. 943 (1976)***. *See also,* State v. Collins, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 2018) (trial court did not err in admitting a temporary license tag for the victim's car because the temporary license tag could be considered a public record, and it was self-authenticating); State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698, n.6 (Tenn. Crim. App. 2018) (although vehicle registrations "would likely qualify as public records" under Tenn. R. Evid. 902(1), a temporary tag bearing a seal from the Tennessee Department of Revenue, but without a signature, "purporting to be an attestation or execution" is not a self-authenticating document); State v. Briggs, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 576 (Tenn. Crim. App. 2018) (trial court erred by admitting into evidence a paper, which the State of Tennessee asserted was a ledger that proved defendant owed the murder victim money, because the paper was not a self-authenticating document under Tenn. R. Evid. 902, and was not otherwise properly authenticated; no witness with knowledge testified as to the paper's contents and the State failed to present either a handwriting expert or layperson familiar with the victim's handwriting to testify that the victim was the author of the paper).

[84] Amfac Distrib. Corp. v. Harrelson, 842 F.2d 304 (11th Cir. 1988).

[85] *See, e.g.*, United States v. Hampton, 464 F.3d 687 (7th Cir. 2006) (certificate that bank was federally insured; copy of a copy of the certified document was admitted under another theory as a duplicate of the original under Rule 1003 in a situation where there was no genuine question about the authenticity of the original).

[86] United States v. Combs, 762 F.2d 1343 (9th Cir. 1985).

Second, there must be a "final certification" as to the genuineness of the signature and official position of several listed people.[88] In order to facilitate the process, Rule 902(3) specifically provides that the final certification may be made by various American and foreign diplomatic officials.[89]

This process is often cumbersome and may be impractical because of time, money, and language restraints. The last sentence of Rule 902(3) recognizes these difficulties and presents an alternative method of self-authentication for foreign public documents. If all parties have had a reasonable opportunity to investigate the accuracy and authenticity of the official foreign document at issue, for "good cause shown" the court may order that the document be treated "as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification." This process effectively eliminates the need to obtain a final certification. The document will be deemed to be authenticated with no proof other than the purported execution or attestation of the foreign official.

In *Black Sea & Baltic General Insurance Company v. S.S. Hellenic Destiny*,[90] the court used Federal Rule 902(3) to admit a Saudi Arabian customs certificate despite the lack of a "final certification." The party against whom the certificate was used had known about the certificate for "years" and had not produced proof challenging the authenticity of the certificate, and had declined an opportunity to investigate its authenticity. Moreover, a witness testified that the certificate was authentic.

[6] Certified Copies of Public Records

Certified copies of public records are probably the most commonly used self-authenticating documents. They provide an easy method for authenticating many records covered by Rule 803(8), the public records hearsay exception. Under Rule 902(4) two types of documents are self-authenticating if properly certified. First, Rule 902(4) defines as self-authenticating a copy of an official record or report, whether or not filed in a public office. For example, the virtually identical federal rule was interpreted to embrace a certified copy of a California Department of Corrections file.[91] The items were never "filed" in a public office.

Second, Rule 902(4) provides that a document that is authorized to be and is actually filed in a public office is deemed self-authenticating if certified as correct[92] by the custodian or other person authorized to issue a certification. A key concept is that the document was recorded or filed, not that the government entity actually

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[87] *See, e.g.*, United States v. Perlmuter, 693 F.2d 1290 (9th Cir. 1982) (insufficient proof that person who signed documents listing Israeli criminal convictions and providing fingerprint reproduction was authorized by Israeli law to execute or attest to these documents).

[88] No final certification is required under certain international conventions. *See, e.g.*, United States v. Pintado-Isiordia, 448 F.3d 1155 (9th Cir. 2006) (no final certification needed for Mexican birth record because of Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents).

[89] *See, e.g.*, United States v. Montemayor, 712 F.2d 104 (5th Cir. 1983) (Mexican birth certificates authenticated by American consular officers).

[90] 575 F. Supp. 685 (S.D.N.Y. 1983).

[91] United States v. Dancy, 861 F.2d 77, 79 (5th Cir. 1988).

[92] This certification means that the document is what it purports to be; it does not vouch for the accuracy of the facts in the document. *See* United States v. Doyle, 130 F.3d 523, 545 (2d Cir. 1997); In re Charles K., 2016 Tenn. App. LEXIS 344 (Tenn. Ct. App. 2016) (order of adjudication, which possessed the signature of the deputy clerk, the file-stamp of the Juvenile Court, and the signature of the Juvenile Court Magistrate, was not self-authenticating under Rule 902 because it was not certified).

authored it.[93] Notarization alone is not sufficient in itself to qualify an item as self-authenticating under Rule 902(4) because a notarized document does not necessarily have to be filed in a public office.[94]

For both categories of proof, the certification must comply with that prescribed in Rules 902(1), (2), or (3), or by federal or Tennessee[95] statute or Tennessee Supreme Court rule. A Tennessee statute obligates officers having custody of a public record or writing to provide a certified copy of it upon payment of a reasonable fee.[96]

Rule 902(4) permits a wide variety of items to be self-authenticated. Since it reaches both official records and reports as well as documents that are filed in a public office, the rule provides an inexpensive and fairly easy way to authenticate various public records. Under the virtually identical federal rule, the following items have been held to be self-authenticating under Rule 902(4): certified copy of prior criminal convictions,[97] of a criminal judgment and sentence,[98] and of a prisoner's prison file.[99]

[7] Official Publications

Books, pamphlets, and other publications purporting to be issued by a public authority[100] are self-authenticating under Rule 902(5). Under the identical federal rule[101] courts have held that this rule makes self-authenticating the Department of the Army's Field Manual[102] and a published report of the United States Department of Health and Human Services.[103]

It must be stressed that Rule 902(5) is only a rule of authentication; it does not make every item embraced within it admissible. The rule merely does away with the burden of bringing in the foundation testimony necessary to authenticate the evidence. Other hurdles to admissibility may still have to be overcome. For example, the publication may be inadmissible hearsay or subject to exclusion as too prejudicial under Rule 403.

[8] Newspapers and Periodicals

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[93] *See* *United States v. Doyle, 130 F.3d 523 (2d Cir. 1997)* (documents generated by private companies but filed with the Malta Customs Department are self-authenticating public documents).

[94] *See* *Acosta-Mestre v. Hilton Intern. of Puerto Rico, 156 F.3d 49, 57 (1st Cir. 1998)* (notarized document attached to 18 photographs does not make photographs self-authenticating under Federal Rule 902(4)).

[95] *See, e.g.*, *Tenn. Code Ann. §§ 24-6-101* (2000) (certified copy of final judgment or decree of court of record); 24-6-106 (2000) (relevant extracts of filed public documents permissible); 24-6-107 (2000) (certificate of public officer that he or she made diligent and ineffectual search for record); 48-247-107 (2002) (certified copy of document filed by Secretary of State); 24-7-121 (2000) (copy, whether printout, fax, internet, e-mail or otherwise, of record of child support payments from Tennessee Child Support Enforcement System).

[96] *Tenn. Code Ann. § 24-6-105* (2000).

[97] *See, e.g.*, *United States v. Kord, 836 F.2d 368 (7th Cir.)*, *cert. denied*, ***488 U.S. 824 (1988)*** (the document was certified by the Cook County Circuit Court Clerk, who was authorized to make such certifications).

[98] *United States v. Darveaux, 830 F.2d 124 (8th Cir. 1987)* (penitentiary record clerk permitted to certify prisoner's conviction record).

[99] *United States v. Dancy, 861 F.2d 77, 79 (5th Cir. 1988)*.

[100] Note that the term "public authority' " is not defined. It could embrace public authorities at every level of government in and outside the United States.

[101] FED. *R. EVID. 902(5)*.

[102] *United States v. Rainbow Family, 695 F. Supp. 314, 330 n.5 (E.D. Tex. 1988)*.

[103] *California Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1355 n.23 (C.D. Cal. 1983)*.

Rule 902(6) makes newspapers and periodicals self-authenticating, and no extrinsic evidence of authenticity is required for them or articles in them. For example, the identical federal rule has been used to self-authenticate a magazine article.[104] Again, however, it must be stressed that authenticity is but one step in the quest for admissibility. There are typically serious hearsay problems if a newspaper or magazine article is to be used in court to prove the truth of its contents.

[9] Trade Inscriptions and the Like

The common reliance by members of the public on trade inscriptions, such as brand names and logos on labels, tags, and signs, causes them to be sufficiently accurate to be self-authenticating under Rule 902(7) if purporting to have been affixed in the course of business and indicating ownership, control or origin.[104.1] The likelihood of forgery is so slight that self-authentication is appropriate.

When evidence is introduced suggesting that the self-authenticated label or sign is a forgery, the self-authenticated item should still be viewed as admissible if the other rules of evidence are satisfied by the document. For example, under the federal rule identical to the Tennessee provision, a hotel record on hotel stationery was held to be self-authenticated.[105] The Tennessee rule was applied to admit printed cash register receipts that bore the name and address of the issuing store.[106] The Tennessee Supreme Court held that the receipts were “inscriptions” and were self-authenticating under Rule 902(7).

[10] Acknowledged Documents

Acknowledged documents, which in Tennessee are generally those that have been notarized by a notary public or otherwise acknowledged in the presence of an appropriate official, are self-authenticating under Rule 902(8) because of the additional degree of reliability that accompanies the acknowledgment process.[107]

[11] Commercial Paper and Related Documents

Rule 902(9) tracks commercial law and provides for the self-authentication of commercial paper and related documents that are deemed self-authenticating under commercial law. As noted in the Advisory Commission Comment to Tennessee Rule 902, this section refers to *Tennessee Code Annotated § 47-1-101 et seq*., the Uniform Commercial Code. These statutes detail the evidentiary effects of various commercial documents, and Rule 902(9) recognizes the continuing validity of the commercial laws.

Four parts of the Uniform Commercial Code will be used in conjunction with Rule 902(9). *Tennessee Code Annotated § 47-1-307* self-authenticates various documents “in due form” authorized or required by contract.

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[104] *See* ***Snyder v. Whittaker Corp., 839 F.2d 1085, 1089 (5th Cir. 1988)*** (authentication of magazine article). *Cf.* *Nestle Co. v. Chester’s Mkt., Inc., 571 F. Supp. 763, 775 n.9 (D. Conn. 1983)* (finding media articles self-authenticating under Rule 902(2); a more precise citation would be to Rule 902(6)), *rev’d on other grounds*, *Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280 (2d Cir. 1985)*.

[104.1] *State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018)* (although a blank temporary tag is a self-authenticating document because it is a document used by the State of Tennessee in the course of business that bears information indicating the ownership or the origin of the temporary tag, once that temporary tag has been filled out and altered by the car dealership, it is no longer self-authenticating because the information written or typed into the blanks on a temporary tag, presumably by someone at the car dealership, are not statements of the State that would be authenticated by a trade inscription showing ownership by the State or origin from the State).

[105] *United States v. Hing Shair Chan, 680 F. Supp. 521 (E.D.N.Y. 1988)*; *see also* *Alexander v. CareSource, 576 F.3d 551 (6th Cir. 2009)* (job description on party’s letterhead is self-authenticating).

[106] *See, e.g.*, *State v. Reid, 91 S.W.3d 247 (Tenn. 2002)*.

[107] *See, e.g.*, *In the Matter of Bobby Boggs, Inc., 819 F.2d 574 (5th Cir. 1987)* (notarized construction performance and payment bonds may have been self-authenticating under Federal Rule 902(8)).

This includes a bill of lading, insurance policy, official inspector's certificate, and consular invoice. Section 47-3-308 makes a signature on a commercial instrument self-authenticating unless challenged.[108] The third commercial code provision, *Tennessee. Code Annotated § 47-3-505*, renders self-authenticating various notices of dishonor of commercial instruments. Finally, § 47-8-114 makes signatures on negotiable instruments presumptively authorized or genuine.

[12] Presumptions Under Acts of Congress or the Legislature

Rule 902(10) recognizes Tennessee and federal statutes that make any signature, document or other item "presumptively or *prima facie* authentic." Items covered by these statutes are deemed self-authenticated in a Tennessee court if the items satisfy the procedures outlined in the applicable Tennessee or federal law.[108.1] For example, under federal law, the signature on a tax return is presumed to be genuine.[109]

[13] Certified Copies of Business Records

Rule 902(11) of the Tennessee Rules of Evidence, like its federal counterpart,[110] simplifies the process of admitting business records. Consistent with a change in the business records hearsay exception, Rule 803(6), Rule 902(11) defines as self-authenticating a certified original or duplicate of a business record that is admissible under Rule 803(6). To qualify for self-authentication, the record must be accompanied by an affidavit by the record's custodian or other qualified person.[110.1] Rule 903(11) provides that the affidavit must "certify" that the record satisfies three requirements of Rule 803(6): it was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to

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[108] *See, e.g.*, *United States v. Varner, 13 F.3d 1503 (11th Cir. 1994)* (promissory notes are self-authenticating); *United States v. Carriger, 592 F.2d 312 (6th Cir. 1979)* (under Uniform Commercial Code § 3-307, signed promissory notes are self-authenticating and prima facie evidence of their validity and the holder's right to recover on them). *Cf. United States v. Little, 567 F.2d 346, 349 n.1 (8th Cir. 1977)*, *cert. denied*, ***435 U.S. 969 (1978)*** (corporate checks self-authenticating; alternative holding).

[108.1] *State v. Hicks, 2018 Tenn. Crim. App. LEXIS 698 (Tenn. Crim. App. 2018)* (no Act of Congress or the Tennessee Legislature proclaims a temporary vehicle registration tag to be "presumptively or prima facie authentic" and, therefore, a temporary tag is not self-authenticating under *Tenn. R. Evid. 902(1)*).

[109] *26 U.S.C. § 6064*.

[110] *See* FED. *R. EVID. 902(11)* (certified domestic business records), 902(12) (certified foreign business records).

[110.1] *Goodwin v. Hanebis, ___ S.W.3d ___, 2018 Tenn. App. LEXIS 510 (Tenn. Ct. App. 2018)*; (trial court did not abuse its discretion in a motor vehicle accident case by excluding the accident victim's prior medical records from a medical clinic, because the records were not accompanied by the required affidavit as required under Rule 902(11); however, the trial court erred in excluding the accident victim's prior medical records from a medical group and a medical center where the records were proffered with an affidavit from an authorized custodian of records); *State v. Carter, ___ S.W.3d ___, 2016 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2016)* (where sworn affidavit attested that store receipt, which did not include the name of the business, was a business record generated by a company employee to record the purchase of comic books, and that the record was kept in the course of a regularly conducted business activity; affidavit was sufficient to show that the receipt was a business record, inherent of trustworthiness, and the receipt was properly admitted under the business records exception); *Kelly v. Kelly, 2016 Tenn. App. LEXIS 779 (Tenn. Ct. App. 2016)* (radiology report failed to meet requirements for self-authentication where no affidavit was attached).

record or transmit those matters; was kept in the course of a regularly conducted activity; and was made by the regularly conducted activity as a regular practice.[110.2]

If a party wants to use this simplified method of authenticating a business record, Rule 902(11) requires written notice to all adverse parties. In order to allow those parties a fair opportunity to challenge the records and certification, Rule 902(11) requires that both be made available for inspection sufficiently in advance of their offer into evidence.[110.3]

If the Rule 902(11) self-authentication procedure is used, the custodian of the business records need not attend trial to lay the foundation for admission of the records. The certified record itself is deemed to be authenticated without additional proof. Of course, it must be remembered that this simplified process is only available if the business record is admissible under Rule 803(6), the business record hearsay rule.[110.4]

Medical Records. Pursuant to an important statute, medical records, including all written clinical records related to the treatment of an individual in an institution, can be self-authenticating:

> Medical records or reproductions of medical records, when duly certified by their custodian, physician, physical therapist, or chiropractor, need not be identified at the trial and may be used in any manner in which records identified at the trial by these persons could be used.[111]

Although this is not a novel concept, the provisions are curious. The statute requires that the records be accompanied by a signed statement, rather than an affidavit as mandated by Rule 902(11). The statement must confirm that the person providing the records has the authority to certify them, that the copy is a true and exact copy of the records described in the subpoena, and that the records were prepared by company personnel in the ordinary course of business.[112]

This statute is similar to the requirements of Rule 902(11), but varies in significant ways. First, no affidavit is required by the statute, but merely a 'statement' certifying the record. Second, there is no requirement in the statute that the record "was made at or near the time of the occurrence."[113] Third, there is no requirement in the

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[110.2] As an illustration of a proper certification of a business record under Rule 902(11), the following was approved to certify a bank record in *Simpkins v. Simpkins, 374 S.W.3d 413, 419 (Tenn. Ct. App. 2012)*:

> I, [name], do hereby certify under penalty of perjury that I am the custodian of records of XYZ Bank and that the attached documents are true and accurate copies of our business records, maintained, and/or prepared by our company.
>
> It is further certified that the records were made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters. The records were made and kept in the course of regularly conducted business activity and it is a regular practice of our company to make and keep such records.

See also *State v. Carter, 2016 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2016)* (sworn affidavit complied with Rule 902).

[110.3] *See, e.g.*, *State v. Miller, ___ S.W.3d ___, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020)* (trial court did not abuse its discretion by admitting the repair invoice as evidence, because the State provided adequate notice by emailing defense counsel a copy of the invoice and affidavit, and the defendant acknowledged receipt of the emailed invoice and affidavit and conceded that he could have inferred that the State intended to offer the invoice as evidence).

[110.4] *See, e.g.*, *Midland Funding, LLC v. Thuy Chau, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019)* (since a statute, *Tenn. Code Ann. § 47-22-302(c)*, defines creditors' records that satisfy certain conditions as "records of regularly conducted activity pursuant to Rule 803(6)", and the creditor's record was accompanied by a sufficient affidavit under Rule 902(11), the creditor's record met the requirements for self-authentication and was properly admitted into evidence).

[111] *Tenn. Code Ann. § 24-7-122* (Supp. 2010).

[112] *Id.* See also, *Goodwin v. Hanebis, 2018 Tenn. App. LEXIS 510 (Tenn. Ct. App. 2018)* (trial court erred in excluding medical records where they were proffered with an affidavit from an authorized custodian of records that fully complied with Rule 902(11); moreover, the error was not harmless since the jury was never able to see the victim's medical records from before the accident and consider the earlier diagnosis of her prior injuries, despite the records being compliant with *Tenn. Code Ann. § 24-7-122* and Rule 902(11)).

statute that the record be made by or from information submitted by a person with knowledge of the matter. Finally, this statute requires that a party desiring to use such records serve copies on the opposing party no later than 60 days prior to trial, accompanied by a notice that such records may be offered in evidence at trial.[114] It appears that the intent of the statute is to create a mechanism through which medical records can be obtained well in advance of trial, without the necessity of a deposition of a records custodian, and that the records will be deemed authentic and admissible at trial without further cumbersome procedural steps. The wording of the statute is somewhat ambiguous with regard to what medical records are covered.

The effect of *Tennessee Code Annotated § 24-7-122* is subject to serious conjecture because it varies from existing court rules. *Tennessee Rule of Evidence 902(11)* causes certified records of regularly conducted activity to be self-authenticating if various requirements are met, as described above. It is noteworthy that the legislature put different criteria in the medical records statute. This calls into question the constitutionality of the statute. The Tennessee Supreme Court has clarified in *State v. Mallard*[115] that the legislature may not override the Supreme Court's role in the operation of practice and procedure in the courts.[115.1] A statute that conflicts with the Tennessee Rules of Evidence appears to do exactly that.

Additionally, Rule 902(11) applies to records of regularly conducted activity that would be admissible under Rule 803(6). This hearsay exception requires that the record be "made at or near the time, by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the … record … ."[116]

Because the statute does not contain all of the requirements of Rule 803(6), even if the records are self-authenticating under the statute, they are not admissible under the business records hearsay exception. Arguably, the statute creates a statutory hearsay exception, independent of the Rules of Evidence. Under *Mallard*, however, the validity of this exception could be challenged.

A subsequent statute, which is a revised version of *Tennessee Code Annotated § 63-2-102*, may solve these problems. The chapter requiring a health care provider to furnish to a patient or the patient's authorized representative copies of the patient's medical records, subject to a fee for duplication costs, now contains a mechanism to satisfy the hearsay and authentication concerns under the Rules of Evidence. If the patient or patient's representative so requests, the provider must submit, along with the records, a notarized affidavit certifying that the records are true and correct copies of the records in the provider's custody.[117] The affidavit must then track the requirements of Rule 902.11, verifying that the records were made at or near the time of the occurrence by, or with information from, a person with knowledge of and a business duty to record or transmit those matters, were kept in the course of regularly conducted activity, and were made by the regularly

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[113] *Tenn. R. Evid. 902(11)(A)*.

[114] *Tenn. Code Ann. § 24-7-122*(c)(Supp. 2010).

[115] *State v. Mallard, 40 S.W.3d 473 (Tenn. 2001)*.

[115.1] *Id. at 480–481*. *See also State v. McCoy, 459 S.W.3d 1 (Tenn. 2014)* (applying *Mallard* and upholding statute governing the admissibility of video recordings, Tenn. Code Ann. § 27-4-123); *State v. Lowe, 2016 Tenn. Crim. App. LEXIS 497 (Crim. App. July 12, 2016)* (applying *Mallard* and upholding Exclusionary Rule Reform Act, *Tenn. Code Ann. § 40-6-108* (2011)).

[116] *Tenn. R. Evid. 803(6)*.

[117] *Tenn. Code Ann. § 63-2-102(c)* (Supp 2010).

conducted activity as a regular practice.[118] The statute further provides that the affidavit "shall qualify for the business records exception to the hearsay rule."[119]

[118] *Id.*

[119] *Id.*

1 Tennessee Law of Evidence § 9.03

Tennessee Law of Evidence > CHAPTER 9 ARTICLE IX. TENNESSEE LAW OF EVIDENCE—AUTHENTICATION

§ 9.03 Rule 903. Subscribing Witnesses' Testimony

[1] Text of Rule

Rule 903 Subscribing Witnesses' Testimony

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by statute.

Advisory Commission Comment:

In will contests, *T.C.A. § 32-4-105* requires calling subscribing witnesses to a will.

2010 Advisory Commission Comment

The title of the rule is changed to reflect reality. A Tennessee statute does necessitate testimony of all living witnesses in a will contest "if to be found." *T.C.A. § 32-4-105*.

[2] Testimony of Subscribing Witness

Under Rule 903, a subscribing or attesting witness generally need not be brought to court simply to authenticate a document bearing his or her signature, unless a statute requires the witness's testimony. It must be noted, however, that there are circumstances when, in order to satisfy the burden of proof, it will be necessary to present this witness, such as when forgery has been claimed. Additionally, a statute can require the testimony of the subscribing or attesting witness. For example, Tennessee law compels the appearance of all living, subscribing witnesses in a will contest, where they can be found, if they are available.[120]

End of Document

[120] *Tenn. Code Ann. § 32-4-105* (2007). *See also In re Estate of Gertrude Bible Link, 542 S.W.3d 438, 2017 Tenn. App. LEXIS 113 (Tenn. Ct. App. Feb. 22, 2017)*, appeal denied, *In re Estate of Link, ___ S.W.3d ___, 2017 Tenn. LEXIS 450 (Tenn. July 20, 2017)* (because *Tenn. Code Ann. § 32-4-105* requires a contested will to be proved by all available living witnesses, counsel had to present some satisfactory evidence that the second witness was not available or able to testify, or lose the case on a technicality, and to avoid that harsh result, the trial court allowed the first witness to testify initially regarding the second witness's availability; the testimony reflected that the second witness could not consistently produce the words he intended to produce, and thus, the trial court did not abuse its discretion in finding that the witness was not available to testify); *In re Estate of Woolverton, ___ S.W.3d ___, 2014 Tenn. App. LEXIS 36 (Tenn. Ct. App. Jan. 30, 2014)* (because a witness to a purported will did not testify at the will contest, in the absence of a finding by the trial court on whether the witness was "to be found," the Court of Appeals was unable to determine whether the statute's requirements were met and was unable to effectively review the decision; the statute required the proponent to either submit the testimony of all living witnesses to the alleged will or show that a living witness whose testimony is not proffered is not "to be found").