

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.E. 901 and 902

Proposed amendment of Pa.R.E. 901 and 902 governing authentication is being republished for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **May 17, 2019**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Committee on Rules of Evidence,

John P. Krill, Jr.
Chair

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

REPORT

Proposed Amendment of Pa.R.E. 901 & 902

The Committee on Rules of Evidence is considering amendment of Pennsylvania Rules of Evidence 901 and 902 to facilitate the authentication of evidence. The Committee previously published proposed amendments of Rule 901(a), and Rule 902(4) and (6). See 47 Pa.B. 4658 (August 12, 2017). Upon further deliberations, the Committee herein republishes the proposed amendments of Rule 901(a), and Rule 902(4) and (6), together with amendment of Rule 902(12).

Pa.R.E. 901(a)

In the most general of descriptions, authentication is the requirement of proving what the evidence is purported to be. The purpose of this requirement is to reduce the risk of forgery or deception; yet, commentators have questioned whether this safeguard is justified by the time, expense, and inconvenience of authentication. See 2 McCormick on Evid. § 221 (7th ed.).

While authentication may serve a salutary purpose in evidence of questionable origin or dubious portrayal, the mechanical application of the requirements in every instance, especially when authentication is not reasonably contested, does not serve the purpose of the Rules in eliminating unjustifiable expense or delay. See Pa.R.E. 102. To that end, the Committee wishes to signal to readers that authentication of evidence can be stipulated by the parties and, therefore, relieve the proponent of introducing authentication evidence. Accordingly, the Committee recommends that Rule 901(a) be amended to include the phrase, “unless stipulated,” and corresponding Comment language.

Pa.R.E. 902(4)

The Committee undertook review of Rule 902(4) to consider whether copies of public records can be certified and transmitted electronically.¹ This question tested whether a certificate pursuant to Rule 902(4)(B) must contain a pen-and-ink (a.k.a. “wet”) signature and whether a seal, if required, must be raised.

¹ With the increasing availability of direct access to public records via the Internet, one might question the future necessity of authenticating public records as opposed to requesting judicial notice pursuant to Pa.R.E. 201(b)(2) that a record is authentic based upon its on-line repository.

Informed by Pa.R.Crim.P. 103 (defining “signature”), the Committee concluded that a signature on a certification need not be pen-and-ink to serve its function. Additionally, technology has progressed to where wet signatures are no longer required as evidence for commerce and transactions. See, e.g., Electronic Transactions Act, Act of December 16, 1999, P.L. 971, 73 P.S. § 2260.309 (“In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”).

Concerning the necessity of a raised seal, its absence is not a foreign concept. Under the Protection From Abuse Act, a “certified copy” is defined as “a paper copy of the original order of the issuing court endorsed by the appropriate clerk of that court or an electronic copy of the original order of the issuing court endorsed with a digital signature of the judge or appropriate clerk of that court.” 23 Pa.C.S. § 6102. The definition goes further to state: “A raised seal on the copy of the order of the issuing court shall not be required.” *Id.* Further, Section 322 of the Judicial Code, insofar as it pertains to court seals, states: “A facsimile or preprinted seal may be used for all purposes in lieu of the original seal.” 42 Pa.C.S. § 322.

Accordingly, the Committee recommends amendment of Rule 902(4) to add:

A certificate required by paragraph (4)(B) may include a handwritten signature, a copy of a handwritten signature, a computer generated signature, or a signature created, transmitted, received, or stored by electronic means, by the signer or by someone with the signer’s authorization. A seal may, but need not, be raised.

This amendment is intended to facilitate the use of electronic forms of certification for copies of public records; it is not intended to prohibit the use of pen-and-ink signatures and raised seals.

The amendment is specifically limited to paragraph (B). It was drafted narrowly with the belief that copies of public records are being authenticated by certificate pursuant to 42 Pa.C.S. § 6103(a) rather than paragraph (A). Because the requirements of the certificate are governed by statute, it was believed that the certificate would fall under paragraph (B) (certificate that complies with a statute). Of course, this may be an esoteric point and practitioners are probably relying more on the appearance of a certification to satisfy the Rule rather than parsing out whether the record is certified pursuant to paragraph (A) or (B).

The absence of a raised seal and wet signature potentially raises an issue about whether the certification itself is an original or copy. Theoretically, a proponent might attempt to admit a copy of a certified copy of a public record without traditional indicators of an original certification. At that juncture, Rule 1003 permits the admissibility of a duplicate to the same extent as the original unless there is a question about the original’s

authenticity. Therefore, a copy of a certified copy of a public record would be admissible unless there was a question concerning the authenticity of the certification. *See also* Pa.R.E. 1005 (admitting a copy of the public record itself to prove content). This construct would permit a copy of a public document to be certified at one location, imaged (*e.g.*, scanned into a .pdf), and electronically transmitted to another location for use in a legal proceeding subject to the Pennsylvania Rules of Evidence.

Pa.R.E. 902(6)

Upon reviewing Rule 902(6), the Committee originally proposed removing “printed” as a condition of material purporting to be a newspaper or periodical. The Committee believed that such a term has become antiquated in an era when digital media has largely replaced print media. The fact that a newspaper or periodical is printed (or not) does not appear to serve as a hallmark of authentication.

The proposed deletion raised additional concerns. First, “printed” operated to reduce the scope of what might constitute a newspaper or periodical. Eliminating the “printed” condition may expand what material may be considered a “newspaper” or “periodical,” and allow online publications to be included under Pa.R.E. 902(6). Additionally, purely digital media that might be considered a “newspaper” or “periodical” could be at greater risk of unauthorized alteration than print media.

As background, newspaper circulation in general has declined by 40% since 1991. On a per capita basis, the decline is even more pronounced. Volume of periodicals, as measured by the USPS, reached a peak in 1990 at 10.7 billion pieces. In 2017, households only received 4.9 billion periodicals. As readers migrate to digital newspapers and periodicals, the universe of print media continues to shrink. For example, U.S. News and World Report stopped printing in December 2010; it now exists entirely digitally. Six of Duke Law’s nine student-edited law journals have been published only in digital format since 2013. A Reuters, Bloomberg, Dow Jones or AP wire story may never appear in print. While “newspapers” and “periodicals” connote a degree of professional journalism, as opposed to citizen journalism, unprinted material may still be the product of professional journalism. For example, the HuffPost (formerly Huffington Post) won a Pulitzer in 2012 in the category of national reporting and it is a digital format rather than print. Managed by Spirited Media, digital-only journalism now exists in Philadelphia with billypenn.com and in Pittsburgh with theincline.com.

Effective December 1, 2011, the Federal Rules of Evidence were restyled, adding F.R.E. 101(b)(6) as a definition to state “a reference to any kind of written material or any other medium includes electronically stored information.”

Under Rule 902(6) (*Newspapers and Periodicals*), “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating. This

includes online newspaper and periodicals, because Fed. R. Evid. 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.

Hon. Paul W. Grimm *et al.*, *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1, 28 (2017) (footnotes omitted). See also *White v. City of Birmingham, Ala.*, 96 F. Supp. 3d 1260, 1274 (N.D. Ala. 2015), *as amended* (website “news articles are analogous to traditional newspaper articles and could be found self-authenticating at trial.”). Based upon the federal approach, it could be concluded that printing no longer serves as a hallmark of authentication. While Pennsylvania did not adopt an analog to F.R.E. 101(b)(6) during its restyling, the proposal seeks to accomplish the same effect as F.R.E. 101(b)(6) albeit limited to Pa.R.E. 902(6).

Regarding the concern about a greater risk of undetected adulteration with non-printed material than with printed material, the concern appears to be multifold: 1) the source material could be maliciously altered by a third party unbeknownst to the author and parties; 2) the author could subsequently alter the source material unbeknownst to the parties; or 3) a party could retrieve the digital material, alter it, and then present the altered material in court.

Undetected third party alteration is a factor of the security of newspaper and periodical websites. The Committee lacks information about the frequency in which content has been altered on media websites. Intuitively, the Committee believes that if the websites are in the business of producing digital material (*i.e.*, a newspaper or periodical), then they have a significant interest in protecting the content against alteration.

With an author’s subsequent alteration, the Committee recognizes that an author may sometimes correct an article. It is expected that the author would follow the journalistic ethics and standards applicable to newspapers and periodicals. As discussed *infra*, the Committee proposes adding guidance that would require a newspaper or periodical to adhere to journalistic standards and ethics.

Regarding a party’s alteration, if someone were willing to alter digital material then that person would be similarly motivated to alter print material. Nonetheless, the Federal Rules of Evidence ostensibly did not view this risk as an obstacle when F.R.E. 101(b)(6) was promulgated.

Additionally, the detection of altered digital content is enhanced through the Internet Archive's Wayback Machine. See <http://web.archive.org/>. The Internet Archive is a nonprofit corporation founded in 1996 as an online library to provide access to

historical collections in digital format and “to prevent the Internet - a new medium with major historical significance - and other ‘born-digital’ materials from disappearing into the past.” Deborah R. Eltgroth, *Best Evidence and the Wayback Machine: Toward A Workable Authentication Standard for Archived Internet Evidence*, 78 Fordham L. Rev. 181, 185 - 86 (2009). The Wayback Machine is a service available through the Internet Archive that allows parties to visit digitally archived webpages. Users can type in a URL and select a date range, permitting them to browse through older versions of the given site that were posted during the designated period.

Regardless of whether the material exists in print or digitally, the proponent still has the burden of establishing that the material purports to be a “newspaper” or “periodical” - the proposal does not intend to alter that requirement. The Committee deliberated at length and concluded that “printed” is not determinative of an article’s authenticity; rather, authenticity pivots on whether the article was from a “newspaper” or “periodical.” With no definition of these terms in the Pennsylvania Rules of Evidence or Pennsylvania case law, the Committee consulted statutory definitions containing a “printed” requirement. See 45 Pa.C.S. §101(a) (definitions for the “Newspaper Advertising Act” and “any other law relating to printing or newspaper advertising”). While those definitions are instructive, their advent in 1976 predates what is colloquially called the “Internet” where digital media currently exists. See Act of July 9, 1976, P.L. 877, 45 Pa.C.S. §§ 101 *et seq.* Further, the application of those definitions appears limited to advertising. See 45 Pa.C.S. § 101(a) and § 302. Commentary directed toward F.R.E. 902(6) appeared to focus on publication at regular intervals when construing “newspaper” and “periodical.” See § 9:35 Newspapers and Periodicals, 5 Federal Evidence § 9:35 (4th ed.).

Seeking a more modern approach to digital media, the Committee considered the Pennsylvania Newsmedia Association’s criteria for “online publications,” as set forth in its bylaws. See Article 4.1.2, PNA Bylaws (revised November 2016) at <http://panewsmedia.org/docs/default-source/about-us-documents/pna-bylaws.pdf> (last visited March 5, 2019). With modification, the Committee believed the criteria can serve as a guide to determining whether a source is a “newspaper” or “periodical” under Pa.R.E. 902(6). The proposed guidance would be contained in the Comment to Pa.R.E. 902(6), which states:

Pa.R.E. 902(6) differs from F.R.E. 902(6) insofar as it does not contain “print” in reference to newspapers or periodicals. *Cf.* F.R.E. 101(b)(6) (“[A] reference to any kind of written material or any other medium includes electronically stored information.”). A newspaper or periodical should be available to the public online, digitally, or in print, be principally devoted to the dissemination of local or general news and other editorial content, be adherent to journalistic ethics and standards, and contain regularly updated

content. For online newspapers and periodicals, links to other web content may be included, but the core content must reside on a server or website.

However, a question arose whether this guidance would require extrinsic evidence, which then defeats the purpose of self-authentication. See Pa.R.E. 902 (evidence not requiring extrinsic evidence of authenticity in order to be admitted).

The Committee next considered whether the Comment to Pa.R.E. 902(6) should be further revised to provide guidance for the authentication of digital newspapers and periodicals. Initially, the Committee thought that the absence of such guidance for printed newspapers and periodicals suggested that no additional guidance was warranted for digital newspapers and periodicals. However, federal case law applying F.R.E. 902(6) suggested that guidance may be helpful to readers. See, e.g., *Ciampi v. City of Palo Alto*, 790 F.Supp.2d 1077 (N.D. Cal. 2011); *United States Security and Exchange Commission v. Berrettini*, No. 10-CV-1614, 2015 WL 5159746 (N.D. Ill. 2015) (unreported).

After much deliberation, the Committee favored additional commentary addressing both print and digital newspapers and periodicals. The proposed Comment states:

Pa.R.E. 902(6) permits both printed and digital newspapers and periodicals to be self-authenticated. Evidence purported to be an article or item from a newspaper or periodical must contain sufficient indicia of its original publication, including, but not limited to, the publication's title, the date of publication, page or volume of the article or item, and web address, if applicable, where the article or item was originally published.

Pa.R.E. 902(12)

On November 2, 2001, the Court adopted Rule 902(12) addressing the self-authentication of certified foreign records of regularly conducted activity in civil cases. See 31 Pa.B. 6381 (November 24, 2001). On February 23, 2004, the Court amended Rule 902(12) to eliminate its civil case-specific application. See 34 Pa.B. 1429 (March 13, 2004). On January 17, 2013, the Court rescinded and replaced, *inter alia*, Rule 902(12) as part of a larger restyling of the Rules of Evidence. See 43 Pa.B. 620 (February 2, 2013).

While no substantive changes to the Rules were intended as a part of the restyling, 43 Pa.B. at 652, the replacement of Rule 902(12) erroneously removed the substance of the 2004 amendment. Accordingly, the Committee has proposed correction of the text to reflect the 2004 amendment.

The Committee invites all comments, suggestions, and concerns, especially with regard to the proposed amendment of Pa.R.E. 902(6).

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or Identifying Evidence

- (a) **In General.** Unless stipulated, [T]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) **Examples.** The following are examples only – not a complete list – of evidence that satisfies the requirement:
- (1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.
 - (2) **Nonexpert Opinion about Handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
 - (3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
 - (4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
 - (5) **Opinion About a Voice.** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
 - (6) **Evidence About a Telephone Conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
 - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
 - (7) **Evidence About Public Records.** Evidence that:

- (A) a document was recorded or filed in a public office as authorized by law; or
 - (B) a purported public record or statement is from the office where items of this kind are kept.
- (8) **Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that it:
- (A) is in a condition that creates no suspicion about its authenticity;
 - (B) was in a place where, if authentic, it would likely be; and
 - (C) is at least 30 years old when offered.
- (9) **Evidence About a Process or System.** Evidence describing a process or system and showing that it produces an accurate result.
- (10) **Methods Provided by a Statute or a Rule.** Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

Comment

Pa.R.E. 901(a) is **substantively** identical to F.R.E. 901(a) and consistent with Pennsylvania law. The authentication or identification requirement may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connection. See *Commonwealth v. Hudson*, [489 Pa. 620,] 414 A.2d 1381 (Pa. 1980); *Commonwealth v. Pollock*, [414 Pa. Super. 66,] 606 A.2d 500 (Pa. Super. 1992). **The proponent may be relieved of this burden when all parties have stipulated the authenticity or identification of the evidence. See, e.g., Pa.R.C.P. No. 212.3(a)(3) (Pre-trial Conference); Pa.R.C.P. No. 4014 (Request for Admission); Pa.R.Crim.P. 570(A)(2) & (3) (Pretrial Conference).**

In some cases, real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases, the party offering the evidence must also introduce evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. See *Commonwealth v. Hudson*, [489 Pa. 620,] 414 A.2d 1381 (Pa. 1980).

Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict. See *Nyce v. Muffley*, [384 Pa. 107,] 119 A.2d 530 (Pa. 1956).

Pa.R.E. 901(b) is identical to F.R.E. 901(b).

Pa.R.E. 901(b)(1) is identical to F.R.E. 901(b)(1). It is consistent with Pennsylvania law in that the testimony of a witness with personal knowledge may be sufficient to authenticate or identify the evidence. See *Commonwealth v. Hudson*, [489 Pa. 620,] 414 A.2d 1381 (Pa. 1980).

Pa.R.E. 901(b)(2) is identical to F.R.E. 901(b)(2). It is consistent with 42 Pa.C.S. § 6111, which also deals with the admissibility of handwriting.

Pa.R.E. 901(b)(3) is identical to F.R.E. 901(b)(3). It is consistent with Pennsylvania law. When there is a question as to the authenticity of an exhibit, the trier of fact will have to resolve the issue. This may be done by comparing the exhibit to authenticated specimens. See *Commonwealth v. Gipe*, [169 Pa. Super. 623,] 84 A.2d 366 (Pa. Super. 1951) (comparison of typewritten document with authenticated specimen). Under this rule, the court must decide whether the specimen used for comparison to the exhibit is authentic. If the court determines that there is sufficient evidence to support a finding that the specimen is authentic, the trier of fact is then permitted to compare the exhibit to the authenticated specimen. Under Pennsylvania law, lay or expert testimony is admissible to assist the jury in resolving the question. See, e.g., 42 Pa.C.S. § 6111.

Pa.R.E. 901(b)(4) is identical to F.R.E. 901(b)(4). Pennsylvania law has permitted evidence to be authenticated by circumstantial evidence similar to that discussed in this illustration. The evidence may take a variety of forms including: evidence establishing chain of custody, see *Commonwealth v. Melendez*, [326 Pa. Super. 531,] 474 A.2d 617 (Pa. Super. 1984); evidence that a letter is in reply to an earlier communication, see *Roe v. Dwelling House Ins. Co. of Boston*, [149 Pa. 94,] 23 A. 718 (Pa. 1892); testimony that an item of evidence was found in a place connected to a party, see *Commonwealth v. Bassi*, [284 Pa. 81,] 130 A. 311 (Pa. 1925); a phone call authenticated by evidence of party's conduct after the call, see *Commonwealth v. Gold*, [123 Pa. Super. 128,] 186 A. 208 (Pa. Super. 1936); and the identity of a speaker established by the content and circumstances of a conversation, see *Bonavitacola v. Cluver*, [422 Pa. Super. 556,] 619 A.2d 1363 (Pa. Super. 1993).

Pa.R.E. 901(b)(5) is identical to F.R.E. 901(b)(5). Pennsylvania law has permitted the identification of a voice to be made by a person familiar with the alleged

speaker's voice. See *Commonwealth v. Carpenter*, [472 Pa. 510,] 372 A.2d 806 (Pa. 1977).

Pa.R.E. 901(b)(6) is identical to F.R.E. 901(b)(6). This paragraph appears to be consistent with Pennsylvania law. See *Smithers v. Light*, [305 Pa. 141,] 157 A. 489 (Pa. 1931); *Wahl v. State Workmen's Ins. Fund*, [139 Pa. Super. 53,] 11 A.2d 496 (Pa. Super. 1940).

Pa.R.E. 901(b)(7) is identical to F.R.E. 901(b)(7). This paragraph illustrates that public records and reports may be authenticated in the same manner as other writings. In addition, public records and reports may be self-authenticating as provided in Pa.R.E. 902. Public records and reports may also be authenticated as otherwise provided by statute. See Pa.R.E. 901(b)(10) and its Comment.

Pa.R.E. 901(b)(8) differs from F.R.E. 901(b)(8), in that the Pennsylvania Rule requires thirty years, while the Federal Rule requires twenty years. This change makes the rule consistent with Pennsylvania law. See *Commonwealth ex rel. Ferguson v. Ball*, [277 Pa. 301,] 121 A. 191 (Pa. 1923).

Pa.R.E. 901(b)(9) is identical to F.R.E. 901(b)(9). There is very little authority in Pennsylvania discussing authentication of evidence as provided in this illustration. The paragraph is consistent with the authority that exists. For example, in *Commonwealth v. Visconto*, [301 Pa. Super. 543,] 448 A.2d 41 (Pa. Super. 1982), a computer print-out was held to be admissible. In *Appeal of Chartiers Valley School District*, [67 Pa. Cmwlth. 121,] 447 A.2d 317 (Pa. Cmwlth. 1982), computer studies were not admitted as business records, in part, because it was not established that the mode of preparing the evidence was reliable. The court used a similar approach in *Commonwealth v. Westwood*, [324 Pa. 289,] 188 A. 304 (Pa. 1936) (test for gun powder residue) and in other cases to admit various kinds of scientific evidence. See *Commonwealth v. Middleton*, [379 Pa. Super. 502,] 550 A.2d 561 (Pa. Super. 1988) (electrophoretic analysis of dried blood); *Commonwealth v. Rodgers*, [413 Pa. Super. 498,] 605 A.2d 1228 (Pa. Super. 1992) (results of DNA/RFLP testing).

Pa.R.E. 901(b)(10) differs from F.R.E. 901(b)(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law.

There are a number of statutes that provide for authentication or identification of various types of evidence. See, e.g., 42 Pa.C.S. § 6103 (official records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office); 42 Pa.C.S. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S. § 3368 (speed timing devices); 75 Pa.C.S. § 1106(c) (certificates of title); 42

Pa.C.S. § 6151 (certified copies of medical records); 23 Pa.C.S. § 5104 (blood tests to determine paternity); 23 Pa.C.S. § 4343 (genetic tests to determine paternity).

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013; **adopted _____, 2019, effective _____, 2019.**

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the _____, 2019 amendment of paragraph (1) published with the Court's Order at 48 Pa.B. _____ (_____, 2019).

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

- (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
- (B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed But Are Signed and Certified. A document that bears no seal if:

- (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
- (B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may for good cause, either:

- (A) order that it be treated as presumptively authentic without final certification; or

- (B) allow it 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 a copy of a document that was recorded or filed in a public office as authorized by law– if the copy is certified as correct by:
- (A) the custodian or another person authorized to make the certification; or
 - (B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.

A certificate required by paragraph (4)(B) may include a handwritten signature, a copy of a handwritten signature, a computer generated signature, or a signature created, transmitted, received, or stored by electronic means, by the signer or by someone with the signer's authorization. A seal may, but need not, be raised.

- (5) **Official Publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) **Newspapers and Periodicals.** [Printed material] Material purporting to be a newspaper or periodical.
- (7) **Trade Inscriptions and the Like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) **Acknowledged Documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) **Commercial Paper and Related Documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) **Presumptions Authorized by Statute.** A signature, document, or anything else that a statute declares to be presumptively or *prima facie* genuine or authentic.
- (11) **Certified Domestic Records of a Regularly Conducted Activity.** The original or a copy of a domestic record that meets the requirements of

Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with Pa.R.C.P. No. 76. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

- (12) **Certified Foreign Records of a Regularly Conducted Activity.** [In a civil case, the] **The** original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).
- (13) **Certificate of Non-Existence of a Public Record.** A certificate that a document was not recorded or filed in a public office as authorized by law if certified by the custodian or another person authorized to make the certificate.

Comment

This rule permits some evidence to be authenticated without extrinsic evidence of authentication or identification. In other words, the requirement that a proponent must present authentication or identification evidence as a condition precedent to admissibility, as provided by Pa.R.E. 901(a), is inapplicable to the evidence discussed in Pa.R.E. 902. The rationale for the rule is that, for the types of evidence covered by Pa.R.E. 902, the risk of forgery or deception is so small, and the likelihood of discovery of forgery or deception is so great, that the cost of presenting extrinsic evidence and the waste of court time is not justified. Of course, this rule does not preclude the opposing party from contesting the authenticity of the evidence. In that situation, authenticity is to be resolved by the finder of fact.

Pa.R.E. 902(1), (2), (3)₁ and (4) deal with self-authentication of various kinds of public documents and records. They are identical to F.R.E. 902(1), (2), (3)₁ and (4), except that Pa.R.E. 901(4) eliminates the reference to Federal law **and does not require the certificate to include a pen-and-ink signature or raised seal for the self-authentication of public documents.** These paragraphs are consistent with Pennsylvania statutory law. See, e.g. 42 Pa.C.S. § 6103 (official records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office).

The admission of a self-authenticating record of a prior conviction also requires sufficient evidence, either direct or circumstantial, to prove that the subject of the record is the same person for whom the record is offered in a proceeding. See, e.g., *Commonwealth v. Boyd*, 344 A.2d 864 (Pa. 1975).

Pa.R.E. 902(4) differs from F.R.E. 902(4) insofar as the rule does not require the certificate to include a pen-and-ink signature or raised seal for the self-authentication of public documents.

Pa.R.E. 902(5)[, (6) and (7) are] is identical to F.R.E. 902(5)[, (6), and (7)]. There [are] is no corresponding statutory provisions in Pennsylvania; however, 45 Pa.C.S. § 506 (judicial notice of the contents of the Pennsylvania Code and the Pennsylvania Bulletin) is similar to Pa.R.E. 902(5).

Pa.R.E. 902(6) differs from F.R.E. 902(6) insofar as it does not contain “print” in reference to newspapers or periodicals. Cf. F.R.E. 101(b)(6) (“[A] reference to any kind of written material or any other medium includes electronically stored information.”). A newspaper or periodical should be available to the public online, digitally, or in print, principally devoted to the dissemination of local or general news and other editorial content, adherent to journalistic ethics and standards, and updating its content on a regular basis. For online newspapers and periodicals, links to other web content may be included, but the core content must reside on a server or website.

Pa.R.E. 902(6) permits both printed and digital newspapers and periodicals to be self-authenticated. Evidence purported to be an article or item from a newspaper or periodical must contain sufficient indicia of its original publication, including, but not limited to, the publication’s title, the date of publication, page or volume of the article or item, and web address, if applicable, where the article or item was originally published.

Pa.R.E. 902(7) is identical to F.R.E. 902(7).

Pa.R.E. 902(8) is identical to F.R.E. 902(8). It is consistent with Pennsylvania law. See *Sheaffer v. Baeringer*, 29 A.2d 697 (Pa. 1943); *Williamson v. Barrett*, 24 A.2d 546 (Pa. Super. 1942); **[21 P.S. §§ 291.1-291.13 (Uniform Acknowledgement Act);]** 57 Pa.C.S. §§ 301-331 (Revised Uniform Law on Notarial Acts). An acknowledged document is a type of official record and the treatment of acknowledged documents is consistent with Pa.R.E. 902(1), (2), (3), and (4).

Pa.R.E. 902(9) is identical to F.R.E. 902(9). Pennsylvania law treats various kinds of commercial paper and documents as self-authenticating. See, e.g., 13 Pa.C.S. § 3505 (evidence of dishonor of negotiable instruments).

Pa.R.E. 902(10) differs from F.R.E. 902(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law. In some Pennsylvania statutes, the self-authenticating nature of a document is expressed by language creating a “presumption” of authenticity. See, e.g., 13 Pa.C.S. § 3505.

Pa.R.E. 902(11) and (12) permit the authentication of domestic and foreign records of regularly conducted activity by verification or certification. Pa.R.E. 902(11) is similar to F.R.E. 902(11). The language of Pa.R.E. 902(11) differs from F.R.E. 902(11) in that it refers to Pa.R.C.P. No. 76 rather than to Federal law. Pa.R.E. 902(12) differs from F.R.E. 902(12) in that it requires compliance with a Pennsylvania statute rather than a Federal statute.

Pa.R.E. 902(13) has no counterpart in the Federal Rules. This rule provides for the self-authentication of a certificate of the non-existence of a public record, as provided in Pa.R.E. 803(10)(A).

Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; amended February 23, 2004, effective May 1, 2004; rescinded and replaced January 17, 2013, effective March 18, 2013; amended November 7, 2016, effective January 1, 2017; amended June 12, 2017, effective November 1, 2017; amended _____, 2019, effective _____, 2019.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 amendments adding paragraphs (11) and (12) published with Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the February 23, 2004 amendment of paragraph (12) published with Court’s Order at 34 Pa.B. 1429 (March 13, 2004).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court’s Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the November 7, 2016 addition of paragraph (13) published with the Court’s Order at 46 Pa.B. 7436 (November 26, 2016).

Final Report explaining the June 12, 2017 amendment of the Comment published with the Court’s Order at 47 Pa.B. **3491 (June 24, 2017).**

Final Report explaining the _____, 2018 amendment of paragraphs (4), (6), and (12) published with the Court's Order at 49 Pa.B. (_____, 2019).