Chapter 9
Authentication
Table of Contents

CHAPTER 9

AUTHENTICATION

I. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION - RULE 901

A. OFFICIAL TEXT:

(a) In General. To 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, by a witness with knowledge.

(2) *Non-expert Opinion About Handwriting*. A non-expert'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 thirty (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 Rule*. Any method of authentication or identification allowed by a statute, by the Supreme Court of this State, or by the Constitution of this State.

B. CONDITION PRECEDENT TO ADMISSIBILITY - RULE 901(a)

Under Rule 901, the question of authenticity is considered one of conditional relevance -- when an item is offered as evidence, its relevancy depends initially upon a finding that it is what the proponent says it is. Miller, 13 *Indiana Evidence* 538 § 901.101 (4th ed.).

1. Rule 901 requires only prima facie showing of genuineness

Admissibility under Rule 901 requires only enough evidence to support a finding that the item in question is what it purports to be. Davenport v. State, 749 N.E.2d 1144, 1148 (Ind. 2001). Once this standard is met, subsequent evidence that the object in question is not what the proponent claims it to be goes to weight, not admissibility. See Brooks v. State, 560 N.E.2d 49, 57 (Ind. 1990); U.S. v. Harvey, 117 F.3d 1044, 1049 (7th Cir. 1997). Evidence demonstrating a reasonable probability that the exhibit is what it is claimed to be and that its condition is substantially unchanged as to any material feature is sufficient to establish the condition precedent to admissibility. Herrera v. State, 710 N.E.2d 931, 938 (Ind. Ct. App. 1999).

a. Trial court's discretion

Calvert v. State, 177 N.E.3d 107 (Ind. Ct. App. 2021) (once a reasonable probability is shown that document is what it is claimed to be is shown for authentication purposes, any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility).

Whether a document has been properly authenticated is within the discretion of the trial judge. Williams v. Hittle, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994). The admissibility of documents as exhibits is a matter within the trial court's discretion and will be reversed only upon a showing of an abuse of that discretion. Herrera v. State, 710 N.E.2d 931, 938 (Ind. Ct. App. 1999). A lack of authentication means that the trial court is not convinced that the proposed evidence is factual. That is one of the purposes of Rule 901: to ensure that nonfactual information does not enter into evidence.

Valdez v. State, 56 N.e.3d 1244 (Ind. Ct. App. 2016) (trial court did not err in refusing to admit two exhibits supporting defendant's insanity defense because defendant did not authenticate the exhibits; defendant failed to persuade trial court that the allegations within the exhibits were factual).

b. Circumstantial or direct evidence

Authentication may be proven by either direct or circumstantial evidence. Newman v. State, 675 N.E.2d 1109, 1111 (Ind. Ct. App. 1996). Absolute proof of authenticity is not required. Wisdom v. State, 162 N.E.3d 489 (Ind. Ct. App. 2020).

2. Applies to real, not demonstrative, evidence

Real, or original, physical evidence is an item with a connection to the case, such as a gun which the State claims is the actual one used in the crime. Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 159 (2016).

Demonstrative physical evidence, as opposed to real or original evidence, illustrates, or demonstrates the witness's testimony, but itself has no historical connection with the facts of the case; it is not the actual pistol or knife used in the crime. Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 154 (2016).

3. Relationship with other rules

a. Rule 104

As a preliminary question of conditional relevance, the admissibility standard is the same as that provided by Rule 104(b). See Advisory Committee's *Note to Fed. R. Evid. 901*. If the proponent offers a foundation from which the jury could reasonably find that the evidence is what the proponent says it is, the evidence is admissible. Miller, 13 *Indiana Evidence* 538 § 901.100 (4th ed.).

b. Rules 401 and 402: relevancy depends on connection to defendant and crime

The exhibit must be shown to be relevant -- it must have a tendency to prove a material fact. Malott v. State, 485 N.E.2d 879, 884 (Ind. 1985), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32 (Ind. 1997). Before evidence is admitted there must be a showing that it is connected to the defendant and the commission of the crime. Hooper v. State, 443 N.E.2d 822, 825 (Ind. 1983).

However, the following cases address weight of the evidence rather than its admissibility: irregularities in testing procedures (Smith v. State, 702 N.E.2d 668, 673 (Ind. 1988)); uncertainty regarding specific details of a photograph (Hutchinson v. State, 515 N.E.2d 514, 515 (Ind. 1987)) and whether actual weapon used can be inferred from other evidence (Ballard v. State, 540 N.E.2d 46, 47 (Ind. 1989)).

C. READILY IDENTIFIABLE EVIDENCE

1. Foundation

Rule 901 requires that an item offered must be shown to be the same item as the one associated with the alleged crime or event. Where an object is readily identifiable, such as a gun with a unique serial number or an object which has been given a permanent identifying mark, the foundation required is:

(1) The object has a unique characteristic.

(2) The witness observed the characteristic on a previous occasion.

(3) The witness identifies the exhibit as the object.

(4) The witness's identification is based on his or her present recognition of the characteristic.

(5) As best the witness can tell, the exhibit is in the same condition as it was when he initially received the object.

Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 160 (2016); see also Warriner v. State, 435 N.E.2d 562, 564 (Ind. 1982); See Rule 901(b).

2. Positive identification not required

Positive identification is not required and may rest upon an inference from other evidence. Ballard v. State, 540 N.E.2d 46, 47 (Ind. 1989). Inconclusiveness of identification affects the weight of the evidence, not its admissibility. Brooks v. State, 560 N.E.2d 49, 57 (Ind. 1990). The proponent need only establish a "reasonable probability" that the item is what it is purported to be. Fry v. State, 885 N.E.2d 742, 749 (Ind. Ct. App. 2008).

Babbs v. State, 451 N.E.2d 655, 656-57 (Ind. 1983) (when an investigator puts marks on an exhibit at the scene of the event, the exhibit becomes unique).

D. ITEMS NOT READILY IDENTIFIABLE - CHAIN OF CUSTODY

The proponent of the evidence may need to establish a chain of custody if one of the elements of the foundation for readily identifiable evidence is missing. For example, the item may lack a unique characteristic (e.g., an unmarked, unfired round of ammunition, or a bag of contraband drugs), the witness did not observe the characteristic on the previous occasion, or the witness may not be able to presently recall the characteristic. Also, to introduce expert testimony about a scientific analysis of the object (such as a chemist's analysis of an alleged controlled substance), the proponent will be required to show that the object's condition was unchanged. In these circumstances, the proponent will be required to establish a chain of custody. Imwinkelried & Blinka, *Criminal Evidentiary Foundations* 159-60 (2016).

The purpose of the chain of custody requirement is to show the unlikelihood of tampering, loss, substitution, or mistake by demonstrating the continuous whereabouts of an exhibit from the time it comes into the possession of the police until the time it is presented at trial. Cliver v. State, 666 N.E.2d 59, 63 (Ind. 1996); Price v. State, 619 N.E.2d 582, 583 (Ind. 1993).

1. Presumption of regularity in handling of exhibits

There is a presumption of regularity in the handling of exhibits by public officers, and a presumption that public officers discharge their duties with due care. Culver v. State, 727 N.E.2d 1062, 1067 (Ind. 2000); Wrinkles v. State, 690 N.E.2d 1156, 1160 (Ind. 1997).

Bussberg v. State, 827 N.E.2d 37, 42-43 (Ind. Ct. App. 2005) (despite absence of courier who transported urine sample, a sufficient chain of custody was shown where probation officer who witnessed collection testified as well as laboratory director who testified to procedure used by his laboratory in handling the specimen).

Muex v. State, 800 N.E.2d 249, 252-53 (Ind. Ct. App. 2003) (there was no error as to chain of custody of DNA evidence despite two unaccounted days from when the evidence was shipped by private mail courier; the FBI agent signed for evidence and sealed it in a package prior to receiving it himself two days later; no signs of tampering existed). See also Staggers v. State, 477 N.E.2d 539, 542-43 (Ind. 1985).

2. State's burden in establishing chain of custody

When the defendant attacks the validity of a chain of custody, the State has the burden to show the continuous whereabouts of the evidence. The mere possibility the evidence could have been tampered with or that an alteration or substitution could have been accomplished does not make the evidence inadmissible. The State is not required to exclude every possibility of tampering. Wrinkles v. State, 690 N.E.2d 1156, 1160 (Ind.1997), *cert. den.*; Gorman v. State, 463 N.E.2d 254, 256 (Ind. 1984); Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997).

A defendant can challenge the adequacy of the foundation by cross examining witnesses and presenting evidence regarding the chain, but he must present evidence which does more than raise a mere possibility that the evidence could have been tampered with. Cliver v. State, 666 N.E.2d 59, 63 (Ind. 1996).

a. Unchanged condition

Slight alteration in the appearance of what was unquestionably the murder weapon was matter of evidentiary weight, not admissibility. Spranger v. State, 498 N.E.2d 931, 937-38 (Ind. 1986), *cert. den.*

b. Duration of chain of custody

The State need only prove the chain of custody from the time the object came into possession of the police. Mateo v. State, 981 N.E.2d 59, 67 (Ind. Ct. App. 2012). If an item is subject to testing, such as drugs, chain of custody need be shown only through the time of testing with conclusive results, rather than to the time of trial. Snow v. State, 560 N.E.2d 69, 73 (Ind. Ct. App. 1990). But if the real evidence itself is offered as an exhibit at trial, in addition to the test results, the chain from testing to trial must be completed. Mayes v. State, 318 N.E.2d 811 (Ind. Ct. App. 1974).

(1) Medical exhibits

Medical exhibits, such as specimens taken from a person at a hospital, and the results of the tests performed on specimens, requires a showing of chain of custody from the time the exhibit/specimen came into the hands of medical personnel. Baker v. State, 449 N.E.2d 1085, 1087-88 (Ind. 1983). Hospital records may not be used to establish questioned authenticity of conclusions stated in the record (presence of sperm). Id.

(2) Controlled substances

A proper chain of custody in a possession or distribution of a controlled substance case can be established through an officer's identification of the evidence and testimony that he observed the exchange between informant and defendant in its entirety with an unobstructed view. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997);

Cockrell v. State, 743 N.E.2d 799, 808-09 (Ind. Ct. App. 2001); Whaley v. State, 843 N.E.2d 1, 7-8 (Ind. Ct. App. 2006).

c. Fungible v. non-fungible evidence

With respect to fungible items such as controlled substances or bodily fluids, the chain of custody might be the only method of authentication. Where the evidence is fungible, the importance of a proper chain of custody is enhanced. Non-fungible evidence requires a less stringent foundation because any tampering with the evidence is more likely to be noticed due to the unique character of the evidence. Wrinkles v. State, 690 N.E.2d 1156, 1160 (Ind. 1997).

The degree of proof required to establish a sufficient chain of custody depends upon how essential the evidence is to prove an element of the crime for conviction. Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970).

(1) Definition of fungible

Fungible goods are regarded as interchangeable with other items of the same kind. For example, corn and wheat are fungible, while land is not. Black's Law Dictionary 698 (8th ed.). Fungible goods are difficult to identify, whereas non-fungible items are readily identifiable at any given time. English v. State, 575 N.E.2d 14, 15 (Ind. 1991).

Examples of non-fungible items properly admitted into evidence include:

Whaley v. State, 843 N.E.2d 1, 7 (Ind. Ct. App. 2006) (when dealing with fungible evidence such as bullets, the State must give reasonable assurance the property passed through the hands of the parties in an undisturbed condition).

Martin v. State, 490 N.E.2d 309, 314 (Ind. 1986) (handbag admissible as non-fungible evidence).

Henning v. State, 477 N.E.2d 547, 549-50 (Ind. 1985) (blood-stained brick admissible as non-fungible evidence).

Green v. State, 461 N.E.2d 108, 113 (Ind. 1984) (old nickels admissible as non-fungible evidence.)

Forrester v. State, 440 N.E.2d 475, 483-84 (Ind. 1982) (rust on trigger of gun admissible as non-fungible evidence.)

(2) Less stringent foundation for non-fungible

The less an exhibit is susceptible to alteration, tampering, substitution, or fungibility, the less strictly the chain-of-custody rule is applied. Sylvester v. State, 549 N.E.2d 37 (Ind. 1990).

(a) Chain need not be perfect

Non-fungible evidence, such as ballistics samples, requires a less stringent

foundation, because any tampering with the evidence is more likely to be noticed due to the unique character of the evidence. The proponent of the evidence does not have to establish a perfect chain of custody; any gaps in the chain of custody go to the weight of the evidence, not its admissibility. Wrinkles v. State, 690 N.E.2d 1156, 1160 (Ind. 1997), *cert. den*.

Donahoo v. State, 640 N.E.2d 702 (Ind. 1994) (victim's sweat suit and other items of clothing, brown trash bag, sample kit, suspect collection kit, and rape kit were not fungible and there was no need to show a perfect chain of custody).

Shepard v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997) (videotape was not a fungible item and was readily identified by witness as video of accident scene; there was no evidence indicating tampering or alteration). See also Wrinkles v. State, 690 N.E.2d 1156, 1160 (Ind. 1997), *cert. den.*

(b) Trial court has broad discretion

If the offered item possesses characteristics that are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court has broad discretion to admit it merely upon the basis of testimony that the item is what its proponent claims and that its condition is materially unchanged from the relevant event. Hough v. State, 560 N.E.2d 511, 517 (Ind. 1990).

Price v. State, 619 N.E.2d 582, 583 (Ind. 1993) (where an exhibit is a weapon, which is readily identifiable, it may be admitted based on the testimony of witness that it is recognized and in same state it had been at time it was first seen by witness).

d. Documentary evidence used to establish chain of custody

A police department's business records may assist the proponent of evidence in demonstrating the chain of custody. Reynolds/Herr v. State, 582 N.E.2d 833, 837 (Ind. Ct. App. 1991).

However, hospital records are insufficient to establish chain of a custody for fungible evidence without testimony by the persons who possessed the real evidence. Dabney v. State, 498 N.E.2d 1225, 1226-27 (Ind. 1986); Baker v. State, 449 N.E.2d 1085, 1088 (Ind. 1983).

Williams v. State, 64 N.E.3d 221 (Ind. Ct. App. 2016) (State failed to establish a chain of custody for defendant's blood sample so as to allow admission of results showing positive test for methamphetamine; State did not properly authenticate 192-page exhibit under business records exception to hearsay rule because certification contained only notary signature and did not show that the records met the requirements of Rule 803(6)(A)-(C)).

Martin v. State, 154 N.E.3d 850 (Ind. Ct. App. 2020) (trial court did not abuse its discretion in finding that State laid sufficient foundation for blood draw evidence in prosecution for operating while intoxicated).

E. EXAMPLES OF PROPER METHODS OF AUTHENTICATION - RULE 901(b)

1. Testimony of a witness with knowledge - Rule 901(b)(1)

Most frequently, the illustration contained in Rule 901(b)(1) will be used to authenticate an exhibit or an item of proof. Rule 901(b)(1) provides that a person with knowledge that an item is what it is claimed to be may testify to such facts and establish the foundation for authentication and its connective relevancy. Although the witness must have personal knowledge of the matters about which he or she is testifying under Rule 602, the witness need not be absolutely certain that the exhibit is what it is claimed to be.

The trial court must determine whether the evidence is sufficient to allow the trier of fact to decide if the item is what the proponent purports it to be, and the trial court should not weigh the evidence in this determination. Miller, 13 *Indiana Evidence* 563-64 § 901.201 (4th ed.).

United States v. Jackson, 636 F.3d 687 (5th Cir. 2011) (officer could not authenticate co-conspirator's drug ledger notebooks, offered in drug conspiracy prosecution to show quantity of cocaine distributed to defendant, because officer was not "a qualified witness"--he had no knowledge of record-keeping procedures of co-conspirator's drug cell and was unable to vouch that Rule 803(6)'s requirements had been; thus notebooks should not have been admitted under business records exception because government did not adequately authenticate notebooks).

a. Custody authentication

A records custodian or another qualified witness authenticates business records under Rule 901(b)(1). See U.S. v. Childs, 5 F.3d 1328, 1336 (9th Cir. 1993), *cert. den.* The authenticating witness or witnesses account for the precise whereabouts of the item from the time it was found in connection with the relevant facts of the case until it is offered into evidence. Where more than one person has had custody of an item, chain of custody usually must be shown.

Under Rule 901, a judge has some discretion to admit the statements of non-participants in the regular [business] activity if the facts 'remove any taint or unreliability.' Williams v. Hittle, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994) (*quoting* 4 Weinstein and Berger, *Weinstein's Evidence,* P. 803(6)[2] (1984)).

Vaughn v. State, 13 N.E.3d 873 (Ind. Ct. App. 2014) (detective testimony that the document was made in the ordinary course of business for the police department and that the entries on the document were made at or near the time of the transaction by someone authorized to make such entries and who had personal knowledge of the transaction was sufficient authentication for report to be admissible under business record exception to hearsay rule).

b. Authentication by acknowledging receipt of the document

Herrera v. State, 710 N.E.2d 931, 938 (Ind. Ct. App. 1999) (a handwritten note purportedly prepared by the defendant while in jail was properly authenticated by a witness who testified he received it from the defendant).

c. Authentication when ownership of documents is unknown

Williams v. State, 690 N.E.2d 162, 174 (Ind. 1997) (admission of two documents concerning a gang's "creed" and "commandments," where no effort was made to prove ownership of the documents, was harmless error; (1) the officer who found the documents testified only as to where and when she discovered them and as to what they appeared to be on their face; (2) this is not necessarily sufficient to meet the Rule 901(a) requirement of establishment by a witness with personal knowledge that the matter in question was what the proponent claimed it was; (3) the defendants were free to offer an alternative explanation for the documents being different from what they on their face appeared to be; and (4) in the absence of genuine dispute as to authenticity, the admission of the documents was not reversible error).

d. Fingerprint Evidence

U.S. v. Vasquez, 858 F.2d 1387, 1392-93 (9th Cir. 1988), *cert. den.* (sufficient foundation laid for fingerprint evidence; although prosecution could have offered better evidence, and officer did not testify that he personally lifted print, testimony established that two officers lifted all of prints taken and that print had to come from cocaine package seized in search).

e. Photographs

The authentication of a photograph may also be established by the testimony of a witness with personal knowledge. "The foundational witness testifies that the photograph being offered at trial is a faithful and accurate representation of the object or scene depicted. The authenticating witness [...] connects the photograph offered at trial with the relevant facts of the case where the relevant facts are related to the scene, event or object depicted." Weissenberger's *Indiana Evidence, 2004-05 Courtroom Manual,* p. 334.

f. Relationship of personal knowledge requirement to Rule 801

Rule 801 may require a higher standard of proof than the prima facie showing required to authenticate evidence under Rule 901. U.S. v. Harvey, 117 F.3d 1044, 1049-50 (7th Cir. 1997).

2. Non-expert opinion about handwriting - Rule 901(b)(2)

The relevancy of a document or instrument frequently depends upon a showing that a particular individual wrote it. Rule 901(b)(2) provides that handwriting on a document may be authenticated by a non-expert witness's opinion attributing the handwriting on an offered exhibit to a particular individual, as long as the witness has a familiarity with the person's writing that was not acquired for the current litigation.

a. Familiarity

The authenticating witness must have sufficient familiarity with the handwriting of the document's author to render a valuable opinion as to authorship. The burden is on the proponent of the document to establish that the authenticating witness has the requisite familiarity. Weissenberger's *Indiana Evidence, 2004-05 Courtroom Manual,* p. 334. This finding is a preliminary factual determination made by the trial judge.

(1) No precise definition of familiarity

Rule 901(b)(2) does not define "familiarity." Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert to give an opinion as to the genuineness of his signature or handwriting. Spencer v. State, 237 Ind. 622, 147 N.E.2d 581, 583-84 (1958).

Schiro v. State, 451 N.E.2d 1047, 1061-62 (Ind. 1983), *cert. den.* (1983) (letter allegedly written by defendant and delivered by his girlfriend to doctor who treated defendant prior to murder for his substance abuse problem was inadmissible due to lack of authenticity; doctor failed to explain how he knew the letters were actually written by defendant).

Newman v. State, 675 N.E.2d 1109 (Ind. Ct. App. 1996) (exemplar was sufficiently authenticated by defendant's co-worker, who testified that he received the note in course of conducting work-related communication and he was familiar with the defendant's handwriting because they often communicated through written notes at work).

Lockhart v. State, 671 N.E.2d 893, 902 (Ind. Ct. App. 1996) (lay witness testified that she was familiar with certain individual's handwriting because she taught him English; because lay witness did not acquire her familiarity with subject's handwriting for purposes of the litigation, her opinion was proper).

Thomas v. State, 734 N.E.2d 572 (Ind. 2000) (sufficient foundation was laid to justify admission of letter where the envelope contained defendant's address, was postmarked near his prison, was mailed during the time he was incarcerated, and the letter itself contained sufficient evidence to support a finding that defendant authored the letter).

No set minimum number of observations is required to render a witness competent to testify. However, the witness must be able to demonstrate that he observed the writings under circumstances indicating their genuineness. U.S. v. Binzel, 907 F.2d 746, 749 (7th Cir. 1990).

U.S. v. Mauchlin, 670 F.2d 746, 749 (7th Cir. 1982) (documents properly authenticated by prison official who for sixteen months had daily contact with defendant and had seen him write on approximately six occasions).

Having seen the person write on a single prior occasion may be sufficient to allow the witness to state a conclusion. See Talbott v. Hedge, 5 Ind. App. 555, 32 N.E. 788 (1892). The extent of his familiarity with the person's handwriting goes to the weight, not the admissibility, of the evidence. U.S. v. Binzel, 907 F.2d 746, 749 (7th Cir. 1990).

(2) Familiarity cannot be from litigation

U.S. v. Pitts, 569 F.2d 343, 348 (5th Cir. 1978), *cert den.* (non-expert's opinion on handwriting inadmissible where witness acquired any expertise, he arguably had for purposes of pending criminal investigation).

b. Genuineness of signature

A lay witness who is acquainted or familiar with a person's signature may testify to his opinion as to whether that person's signature on a document is genuine, although he might not have seen the person sign the document. Smith v. State, 152 Ind. App. 654, 284 N.E.2d 522, 525 (1972).

c. Handwriting comparisons not mandated

Rule 901(b) specifically contemplates the use of handwriting comparisons to authenticate written materials, and such a comparison is the preferred, but not mandatory, method. U.S. v. Harvey, 117 F.3d 1044, 1049 (7th Cir. 1997). A witness who was present at the signing may verify the signatures, handwriting, or document under Rule 902(b)(1).

PRACTICE POINTER: Methods of authenticating handwriting besides comparisons:
Rule 901(b)(4) allows evidence to be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. U.S. v. Harvey, 117 F.3d 1044,1049 (7th Cir. 1997).

A witness may base an opinion upon familiarity with handwriting acquired through regular correspondence, business intercourse, or admission or acknowledgment by the writer. Brooks v. State, 497 N.E.2d 210, 215-16 (Ind. 1986), *overruled on other grounds,* Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). One Indiana court held that a single letter or message, without further communication, is insufficient. Talbott v. Hedge, 32 N.E. 788, 790 (Ind. Ct. App. 1892).

3. Comparison by an expert witness or the trier of fact -- Rule 901(b)(3)

Authentication or identification of documents or other exhibits may be established by comparing an offered document with specimens or exemplars which have been authenticated. Rule 901(b)(3) provides that an exhibit may be identified or authenticated through comparison with authenticated specimens by the trier of fact or by an expert witness.

a. Not limited to handwriting

Rule 901(b)(3) deals with all comparisons, not just handwriting, and is frequently used in connection with a wide range of items, including ballistics, handwriting, fingerprints, and typewriting, and has been used to authenticate DNA, fibers, hair, photographs, recorded voices or sounds, tire tracks, shoe prints, and other items where the presence of sufficient common characteristics is shown. Graham, 31 *Fed. Prac. & Proc.* 64-65 § 7108 (4th Edition 2000).

b. Qualifications of expert

The trier of fact may make the comparison to determine an exhibit's authenticity without the aid of expert testimony, or by an expert witness qualified under Rule 702. A lay

witness is not qualified to render an opinion as to the similarity between the specimen or exemplar. Even where expert testimony is given, the trier of fact is not bound by it. Miller, 13 *Indiana Evidence* 31 § 901.203 (4th ed. 2016).

c. Specimens must be authenticated

Regardless of whether expert testimony is used, the specimen used for comparison must be authenticated, by either direct or circumstantial evidence under any method allowed by Rules 901 and 902. Before comparison may be made, however, the genuineness of the standard must be established. Wininger v. State, 526 N.E.2d 1216, 1218 (Ind. Ct. App. 1988); Richardson v. State, 486 N.E.2d 1058, 1062 (Ind. Ct. App. 1985).

Wininger v. State, 526 N.E.2d 1216 (Ind. Ct. App. 1988) (a witness testified that 91-year-old signed the standards in her presence; but given fact that 91-year-old had no recollection of signing, there was no proper authentication).

Cardin v. State, 540 N.E.2d 51, 54, n. 1 (Ind. Ct. App. 1989) (circumstantial evidence authenticated signature on check).

U.S. v. Hernandez-Herrera, 952 F.2d 342, 344 (10th Cir. 1991) (copy of fingerprint card authenticated by circumstantial evidence).

But see Meisberger v. State, 640 N.E.2d 716, 719-20 (Ind. Ct. App. 1994), *trans. denied* (trial court did not err in permitting dentist to identify decomposed body as that of victim by comparing teeth of body with dental x-rays which were never properly authenticated; absent some question as to accuracy of dentist's identification, it was competent for dentist to rely on hearsay information, which consisted of unauthenticated dental x-rays).

Federal cases have permitted the use of expert testimony to authenticate specimens or exemplars. See, e.g., Fagiola v. Eagle-Picher Industries, Inc., 906 F.2d 53, 58 (2d Cir. 1990).

Lockhart v. State, 671 N.E.2d 893 (Ind. Ct. App. 1996) (trial court's admission of handwriting exemplar, even if improper, did not require reversal, where jury was instructed to only use exemplar in evaluating weight of handwriting expert's testimony, and admission of exemplar and expert's testimony were cumulative).

d. Preliminary determination for trial court

As with other questions of authentication, the judge merely determines whether the proponent has presented sufficient evidence to permit the trier of fact to find that the specimen is what the proponent purports it to be; the jury ultimately decides the weight to be given to the evidence. Miller, 13 *Indiana Evidence*, Sec. 901.201 (4th ed. 2016).

The trial court still has the discretion under Rule 403 to exclude specimens when questions as to their authenticity will be confusing, prejudicial, or excessively time-consuming.

4. Distinctive characteristics and the like - Rule 901(b)(4)

Rule 901(b)(4) provides that an item may be authenticated through the item's appearance, contents, substance, internal patterns, or other distinctive characteristics, taken together with all the circumstances.

a. Contents of writings

The contents of a writing may authenticate the document when the contents reveal knowledge peculiar to the purported author.

Fry v. State, 885 N.E.2d 742, 749 (Ind. Ct. App. 2008) (although the affidavit attached to cell phone records did not purport that the records were for the cell phone numbers to which the State requested, the records contained hundreds of reference points from which it could be determined that they are the purported records for the requested cell phone numbers and are sufficiently distinctive to qualify as self-authenticating).

U.S. v. Mokol, 957 F.2d 1410, 1420 (7th Cir.1992), *cert. den.* (handwritten bribe sheets seized from codefendant's home were sufficiently authenticated by evidence that they included initials corresponding to defendant's, amounts codefendant paid him, and information conformed to information in recorded conversations among co-conspirators and to testimony at trial).

U.S. v. McMahon, 938 F.2d 1501, 1508-09 (1st Cir. 1991) (even though witness was unable to recognize handwriting on note as defendant's, note was sufficiently authenticated by evidence that defendant was observed passing note to colleague, note repeated contents of conversation between defendant and colleague overheard by a different witness only moments before, and note raised matters unique to defendant).

U.S. v. Hoag, 823 F.2d 1123, 1127 (7th Cir. 1987) (business letters written by defendant were admissible where authentication was made by evidence of the surrounding and distinctive characteristics of the proposed exhibits; employee of the defendant's company testified as to the procedure and manner in which the letters were handled; other company employees properly identified the letters; each letter was found in the appropriate file and had the typing initials of a company secretary; each letter was signed by the defendant, and the signature was identified by the witnesses as that of the defendant).

b. Location or possession

U.S. v. Smith, 63 F.3d 766, 770 (8th Cir. 1995), *cert. den.* (receipts and similar documents seized at defendant's house were sufficiently connected to defendant because it is reasonable to assume true owner or purchaser of goods would have receipts for those goods).

U.S. v. Collado, 957 F.2d 38, 39 (1st Cir. 1992) (circumstantial evidence indicating bag of powder dropped by defendant while attempting to elude arrest was bag that was introduced against him at trial).

U.S. v. McGlory, 968 F.2d 309, 329 (3d Cir. 1992) (prosecution sought to admit notes indicative of drug activity against defendant, relying on following circumstances: (1) notes were seized from trash outside defendant's residence during course of conspiracy; (2) they were torn from notebook found inside defendant's house; (3) they were contained in same trash bag as other papers identified with defendant; (4) handwriting expert testified handwriting similar to defendant's; and (5) notes were similar in form and contained similar amounts and initials of persons listed in defendant's private telephone books).

U.S. v. Harvey, 117 F.3d 1044, 1049 (7th Cir. 1997) (written materials were found next to defendant's bed in isolated and remote area where campsite was located; writings also made numerous references to the defendant's dog; these distinctive characteristics and circumstances were sufficient to support finding that materials were written by the defendant).

But see Williams v. State, 690 N.E.2d 162, 174 (Ind. 1997) (officer who found documents testified only to where and when she discovered them and what they appeared to be on their face; court determined that this testimony was not necessarily sufficient to establish "that the matter in question [was] what [the] proponent claim[ed]"; however, the defendants were free to offer alternative explanation for documents; in absence of genuine dispute as to authenticity, their admittance was not reversible error).

c. Photographs

A photograph's contents, along with other circumstantial evidence, may authenticate it sufficiently to justify its admission into evidence, even without direct testimony to lay a foundation. U.S. v. Stearns, 550 F.2d 1167, 1171 (9th Cir. 1977).

U.S. v. Englebrecht, 917 F.2d 376, 378 (8th Cir.1990), *cert. den.* (photographs of defendant posing next to marijuana plants were sufficiently authenticated, notwithstanding there was no direct evidence of when or where the pictures were taken).

d. Text messages and emails

Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009) (text messages on cell phone must be separately authenticated).

Pavlovich v. State, 6 N.E.3d 969, 979 (Ind. Ct. App. 2014) (circumstantial evidence was sufficient to authenticate texts and emails as being authored by defendant); see also In re Paternity of B.B., 1 N.E.3d 151 (Ind. Ct. App. 2013).

Rogers v. State, 130 N.E.3d 626 (Ind. Ct. App. 2019) (text messages properly authenticated by testimony of complaining witness for whom defendant had a no-contact order in place, even if the better practice would be to ask further detailed questions such as whether the message appeared altered in any way).

e. Social media posts – Facebook and Twitter

Unique characteristics of social media demand adaptation of the authenticity rules. Some appeals courts have begun examining the methods through which Facebook posts could

be authenticated by looking at guidelines established in United States v. Vayner, 769 F.3d 125 (2d Cir. 2014) as persuasive. Vayner affirmed that the standard for admissibility is not high, and that proof of authentication may be direct or circumstantial. Most of the time, authentication can occur through the testimony of a witness with knowledge, but other methods, such as through distinctive characteristics of the document itself, or through its appearance, contents, substance, or internal patterns, taken in conjunction with the circumstances.

Courts are justifiably reluctant to admit social media statements based on a "simple name and photograph." Some have looked to guidelines set out by a Texas appeals court in holding that "something more" might be necessary to adequately present a prima facie case of authentication: (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a prima facie showing of authenticity. See Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012).

The admissibility of photos or videos taken from online social media platforms such as Facebook or Instagram has not been specifically addressed in Indiana, but the Court of Appeals has concluded the authentication of social-media evidence turns on whether there is sufficient evidence to support a finding it is what the claimant purports it to be. And while the source of the evidence may sometimes be needed, authentication depends on context. Wisdom v. State, 162 N.E.3d 489 (Ind. Ct. App. 2020).

M.T.V. v. State, 66 N.E.3d 960 (Ind. Ct. App. 2016) (collectively, the State established the requisite reasonable probability that the Facebook records corresponded to M.T.V.'s and B.E.'s accounts and that M.T.V. and B.E. authored the conversations therein; therefore, juvenile court did not abuse its discretion with respect to authentication).

Strunk v. State, 44 N.E.3d 1 (Ind. Ct. App. 2015) (sufficient authentication of message defendant sent to complaining witness (C.W.) via Facebook where C.W. testified she had communicated with defendant through same profile and Facebook page on previous occasions, she recognized the profile picture on his page and had two mutual friends, including C.W.'s mother who also testified and identified the Facebook page).

Wisdom v. State, 162 N.E.3d 489 (Ind. Ct. App. 2020) (photos and videos taken from an Instagram and Facebook account were properly authenticated under Evidence Rule 901(a) where a detective testified she recognized defendant in the photos and believed other individuals in the photos were gang members who had been convicted of gang-related activities, one of the accounts was registered in defendant's name, had a gang-related nickname as a username, and photos and videos referred to gang activity).

Parker v. State, 151 N.E.3d 1269 (Ind. Ct. App. 2020) (evidence was sufficient to authenticate social media messages as being authored by defendant; photo on social media messages and BMV photo appeared to be same person, messages discussed methamphetamine and meeting at a specific gas station where defendant showed up with methamphetamine, police sergeant maintained consistent communication through Facebook messenger app until defendant's arrest, and police sergeant called social media profile after arrest and phone in defendant's possession rang).

Richardson v. State, 79 N.E.3d 958 (Ind. Ct. App. 2017) (no error in excluding insufficiently authenticated Facebook message between murder victim and a third party from evidence presented at trial; defendant did not present any evidence describing distinctive characteristics that could connect the particular statement to victim, nor did he present any other indicia of reliability establishing victim as the author of the contested statement).

Wilson v. State, 30 N.E.3d 1264, 1269 (Ind. Ct. App. 2015) (taken together, the witness testimony identifying the Twitter account as belonging to defendant and the content posted on the account, including pictures and gang references, are more than sufficient to authenticate the Twitter posts as being authored by defendant).

f. Reply doctrine

A letter or memorandum may be authenticated by the content and the circumstances indicating it was a reply to a duly authenticated letter or memorandum. U. S. v. Weinstein, 762 F.2d 1522, 1533-34 (11th Cir. 1985), *cert. den.*

U.S. v. Reilly, 33 F.3d 1396, 1403-09 (3d Cir. 1994) (radio telegrams were sufficiently authenticated by testimony of telegraph operators, contents known only by the purported source, and the reply letter doctrine).

5. Opinion about a voice - Rule 901(b)(5)

A voice ordinarily must be identified to provide connective relevancy of a statement to a speaker. Consequently, the identification of a person's voice is often crucial in criminal proceedings. Under Rule 901(b)(5), a voice, whether heard firsthand or through mechanical or electronic transmission or recording, may be identified through a witness's opinion based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

a. Familiarity with voice

Foundation for voice identification contains the following elements:

(1) At a specific time and place, the witness heard a voice.
(2) The witness recognized the voice as that of a certain person.
(3) The witness is familiar with that person's voice.
(4) The witness explains the basis for his or her familiarity with that person's voice.
(5) The person made a statement during the conversation.

Imwinkelried, *Evidentiary Foundations* § 4.05[2] (9th ed.).

Federal Rule of Evidence 901(b)(5) permits voice identification of tape recordings to be made by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. As long as the basic requirement of familiarity with the voice is met, lay opinion testimony is an acceptable means for establishing a speaker's identity. U.S. v. Magana, et al., 118 F.3d 1173, 1208 (7th Cir. 1997), *cert. den.*

The authenticating witness's familiarity with the person's voice need not be extensive and may be established by circumstantial evidence. Atkins v. State, 499 N.E.2d 1180, 1183 (Ind. Ct. App. 1986). A witness's familiarity can be based upon a very brief conversation.

Robinson v. State, 262 Ind. 463, 317 N.E.2d 850, 852 (1974) (based upon hearing only two words, witness permitted to give opinion that voice he heard was defendant's).

U.S. v. Cooper, 868 F.2d 1505, 1519 (6th Cir.1989), *cert. den.* (based upon brief conversation with defendant for "maybe longer" than 30 seconds at booking).

(1) Accuracy of identification for trier of fact

Once the proponent of the opinion testimony shows that there is sufficient evidence for the trier of fact to find that the witness heard the voice in question and has sufficient familiarity with the voice to identify it, the opinion testimony is admissible regarding identification of the voice. A witness need not be certain of the identification. Any doubt regarding the credibility of a voice identification generally goes to the weight of the evidence and not its admissibility. See Davis v. State, 598 N.E.2d 1041, 1050 (Ind. 1992), *cert. den.*

Note: Rule 901(b)(5) appears to permit an authenticating witness to become familiar with the voice for purposes of litigation, something not allowed in connection with handwriting under Rule 901(b)(2).

PRACTICE POINTER: In challenging the admissibility and accuracy of voice identifications such as voice lineups (frequently referred to as "voice spreads"), counsel should attack the witness's alleged familiarity with the defendant's voice and note the difficulties in accurately identifying a stranger's voice. See: Yarmey & Mathys, *Voice Identification of an Abductor*, 6 Applied Cognitive Psych. 367 (1992), noting identification of stranger's voice is very difficult task, and Yarmey, Yarmey & Yarmey, *Face and Voice Identifications in Showups and Lineups*, 8 Applied Cognitive Psych. 453 (1994), noting that voice showups are highly biased identification procedure. For a discussion of the factors affecting voice recognition, see Van Wallendael et al., *Earwitness Voice Recognition: Factors Affecting Accuracy and Impact on Jurors*, 8 Applied Cognitive Psych. 661 (1994).

(2) Authenticating witness need not be expert

Rule 901(b)(5) expressly contemplates lay opinion testimony; therefore, the witness authenticating a voice based on familiarity need not be qualified as an expert. See U.S. v. Cambindo Valencia, 609 F.2d 603, 640 (2d Cir. 1979).

b. Circumstances identifying voice

Rule 901(b)(5) merely provides one method of authentication and does not preclude the

use of other methods of voice identification.

U.S. v. Console, 13 F.3d 641, 661 (3d Cir. 1993) (phone conversation was sufficiently authenticated by caller's self-identification plus his disclosing knowledge of facts known peculiarly to him).

U.S. v. Miller, 771 F.2d 1219, 1234 (9th Cir. 1985) (telephone call could be authenticated by caller's reference to another call made ten minutes earlier).

c. Constitutional issues

(1) Fourth & Fifth Amendment

The U.S. Supreme Court has held that compelling a defendant to speak for the purpose of voice analysis did not violate the Fifth Amendment where the recording was to be used solely to measure the physical properties of the voice, not for the testimonial or communicative content of what was to be said. A person's voice is not protected by the Fourth Amendment. U.S. v. Dionisio, 410 U.S. 1, 35 L.Ed.2d 67, 93 S.Ct. 764 (1973).

(2) Due Process

It is improperly suggestive for police to inform a lineup observer that the suspect is in the lineup. This same reasoning would appear to apply to voice identification lineups. See Heck v. State, 552 N.E.2d 446, 450 (Ind. 1990).

U.S. v. Pheaster, 544 F.2d 353, 369 (9th Cir. 1976), *cert. den.* (the possibility of irreparable misidentification is as great when the identification is from a tape recording as when it is from a photograph or line-up, and the same due process protection should apply to either method).

d. Tape recordings - foundation

The proponent must prove that the tape is a true, accurate, and authentic recording of the conversation, at a given time, between the parties involved. Stringel v. Methodist Hospital of Indiana, 89 F.3d 415, 420 (7th Cir. 1996).

In Wallace v. State, 498 N.E.2d 961, 965 (Ind. 1986) the Indiana Supreme Court has laid out five foundational requirements for admission of a tape recording into evidence:

(1) that it is authentic and correct,
(2) that the testimony elicited was freely and voluntarily made, without any kind of duress,
(3) that all required warnings were given, and all necessary acknowledgments and waivers were knowingly and intelligently given,
(4) that it does not contain matter otherwise not admissible into evidence,
(5) that it is of such clarity as to be intelligible and enlightening to the jury.

Requirements (2) and (3) apply only in criminal cases, when the tape recording is of a statement by the accused made during a custodial interrogation such that the

requirements of Miranda v. Arizona and its progeny apply to the admission of the statement itself. Bryan v. State, 450 N.E.2d 53, 59 (Ind. 1983); Apter v. Ross, 781 N.E.2d 744, 752 (Ind. Ct. App. 2003); Lehman v. State, 730 N.E.2d 701, 703 (Ind. 2000) (three requirements); McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (three requirements).

(1) Authenticity

Sharp v. State, 534 N.E.2d 708, 712 (Ind. 1989), *cert. den.* (sufficient evidence of authenticity based upon officers' testimony identifying tapes, that conversations were monitored, and proper chain of custody).

Lawson v. State, 619 N.E.2d 964, 965-66 (Ind. Ct. App. 1993) (officers' testimony established authenticity and chain of custody of tape recordings; informant and both officers who listened to tape-recorded conversation transmitted over body transmitter testified that the tape recording was accurate and correct).

Wells v. Wells, 489 N.E.2d 972, 974-75 (Ind. Ct. App. 1986) (testimony by husband that recorded phone conversation was between himself and wife, that he recognized "bits and pieces" of conversation, and of date and time conversation occurred, was adequate to establish authenticity and accuracy of sound recording).

McAlinney v. Marion Merrell Dow, Inc., 992 F.2d 839, 842 (8th Cir. 1993) (no error to exclude recorded conversations between plaintiff and others that were largely inaudible, difficult to track, and contained numerous blank spots; serious issues arose concerning whether tapes had been altered, especially in light of plaintiff's concession that he edited tapes).

(2) Audibility

Recordings may be found to be authentic and correct if the inaudible or unintelligible portions of the tapes are not so substantial as to render the recordings as a whole untrustworthy. See, e.g., U.S. v. Powers, 75 F.3d 335, 341 (7th Cir. 1996). The standard of quality expected of recording in interrogation room cannot be used to judge recording of person wearing wire transmitter. Coleman v. State, 750 N.E.2d 370, 373 (Ind. 2001).

The trial court has the discretion to exclude portions of a tape which are inaudible or unintelligible. Hunt v. State, 459 N.E.2d 730, 732-33 (Ind. 1984).

Roller v. State, 602 N.E.2d 165, 171 (Ind. Ct. App. 1992) (audiotape was of such poor quality that, by any standard, it was error to admit it; harmless error; Court provides good discussion of law in this area). See also Lahr v. State, 640 N.E.2d 756, 761-62 (Ind. Ct. App. 1994).

Benavides v. State, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004) (trial court did not err in admitting into evidence the audiotape of robbery victim's 911 call, even though portions of call were unintelligible).

Hall v. State, 897 N.E.2d 979, 981 (Ind. Ct. App. 2008) (although challenged recording was not of perfect sound quality, it was of sufficient quality that jury was not likely to have speculated about its contents).

(3) Omissions

Tape recordings may be found to be authentic and correct if omissions are not material. Boyd v. State, 494 N.E.2d 284, 301 (Ind. 1986), *cert. den.*

(4) Recording device and capabilities of person making recording immaterial

The tape speaks for itself with regard to its audibility. If it is of adequate quality in this regard, it is immaterial how it became so; and there is no more reason for inquiring into the specifications of the device which recorded it and the capabilities of the person who operated it than there would be to make similar inquiries concerning the camera, the film, developing and printing processes and the technician who produced a photograph before admitting it into evidence. Lamar v. State, 258 Ind. 504, 282 N.E.2d 795, 797 (1972).

(5) Error to play unauthenticated tape in jury's presence

Playing a tape to a witness in open court is not a proper way to meet the foundational requirements. In re Wireman, 279 Ind. 344, 351, 367 N.E.2d 1368, 1372 (1977).

The court may grant a recess to allow authenticating witness to listen to tape outside jury's presence. Beatty v. State, 567 N.E.2d 1134, 1136 (Ind. 1991).

(6) Transcripts

Transcripts are usually needed only when portions of a tape are inaudible, or speakers are difficult to identify and should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence. Roby v. State, 742 N.E.2d 505, 507 (Ind. 2001).

Transcript of recording may be given to the jury if the tape is missing, and the transcript's accuracy is shown. Wade v. State, 490 N.E.2d 1097, 1105 (Ind. 1986).

Romo v. State, 941 N.E.2d 504, 505 (Ind. 2011) (written English translations of foreign language recordings may be admitted as substantive evidence and the recordings themselves generally should be admitted and played as well).

(a) The recording, not the transcript, is evidence

It is the tape recording of the conversation that constitutes evidence of what was said, not the transcript. Stringel v. Methodist Hospital of Indiana, 89 F.3d 415, 420 (7th Cir. 1996).

Small v. State, 736 N.E.2d 742, 748-49 (Ind. 2000) (trial court erred in admitting transcript as exhibit as opposed to serving only as aid to jury in interpreting inaudible or indistinct portions of tape-recorded statement). See also Blanchard v. State, 802 N.E.2d 14, 29-30 (Ind. Ct. App. 2004); Roby v. State, 742 N.E.2d 505, 507-08 (Ind. 2001).

PRACTICE POINTER: Whenever a tape recording with transcript is offered by the prosecution, defense should obtain a copy of the actual recording and have it transcribed by defense's own expert. Transcription of audio recordings is a difficult business. Even when the quality of the recording is good, it is often a challenge to discern what people are saying, particularly when they interrupt one another and speak over one another. Mistakes are routinely made in transcribing tapes. If the defense does not compare its own transcription with the prosecutions for purposes of objecting to misleading demonstrative evidence, any error may be waived for appeal.

(b) Foundational requirements

If accuracy is an issue, the proponent of the evidence must lay the following foundation:

(1) person who prepared transcript testifies that the person listened to the recording and accurately transcribed contents. Bryan v. State, 450 N.E.2d 53, 59 (Ind. 1983);

(2) person who has read transcript and heard tape recording testifies to accuracy, Johnston v. State, 541 N.E.2d 514, 515 (Ind. 1989); Boyd v. State, 494 N.E.2d 284, 301 (Ind.1986), *cert. den.*; or

(3) person whose voice is on tape transcribed it. Johnston v. State, 541 N.E.2d 514, 515 (Ind. 1989).

Seay v. State, 529 N.E.2d 106, 109 (Ind. 1988) (where preparer of transcripts did not testify as to their accuracy, adequate foundation was laid where officers who were present during recordings and who listened to the tapes to verify the contents of transcriptions were available at trial for cross-examination).

See also Grimes v. State, 633 N.E.2d 262, 264 (Ind. Ct. App. 1994) (police officer, who monitored the conversations from an undercover location, testified as to the accuracy of the tapes and the transcripts; he also verified the voices on the tapes as corresponding to those labeled in the transcripts).

(c) Discrepancies between transcript and tape

Tingle v. State, 632 N.E.2d 345, 355 (Ind. 1994) (no error to admit tape recording of defendant's confession, despite detective's testimony that transcript and tape were not identical; detective testified recording was authentic and that transcript was accurate, and transcript was not identical to tape only where portions were inaudible; jury was instructed to disregard transcript and focus on tape in case of any discrepancies, and defendant pointed to no specific inaccuracies or prejudice flowing therefrom).

6. Evidence about a telephone conversation - Rule 901(b)(6)

Before a witness may testify to the substance of a telephone conversation, it must (1) be properly authenticated; and (2) meet an exception to the hearsay rule.

Telephone conversations, by 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. Rule 901(b)(6).

a. Foundation

Generally, the proponent of the content of a telephone conversation must identify the participants in the conversation. Thus, the proponent must show that the voice heard over the telephone was actually the voice of the particular person it is claimed to be. Rule 901(b)(5) permits authentication by direct evidence -- the testimony of a witness who is familiar with and recognized the voice as that of a particular person. Ashley v. State, 493 N.E.2d 768, 774 (Ind. 1986).

Generally, the identities of both parties must be authenticated before admitting a telephone call. A caller's identity need not be proven beyond a reasonable doubt. Young v. State, 696 N.E.2d 386, 389 (Ind. 1998).

King v. State, 560 N.E.2d 491, 494 (Ind. 1990) (caller's identity must be established as a foundational requirement for the admission of the content of a telephone call).

Lee v. State, 916 N.E.2d 706, 707 (Ind. Ct. App. 2009) (no error in admitting taped telephone calls made by defendant from jail to the victim; investigator could testify on basis of his familiarity with victim's voice that she was the person whom defendant called from the jail).

b. 911 calls

(1) Where identity of caller not an issue

A telephone call to a 911 system may not always require identity authentication where the point of submitting the call as evidence is not to establish the identification of the caller, but, for example, to prove where the call originated and how the police discovered the crime scene. Young v. State, 696 N.E.2d 386, 389 (Ind. 1998).

(2) Where identity is at issue

A recording is not admissible unless the voices on the tape are identified. Circumstantial evidence may be used for identification purposes and is sufficient for authentication where authorities responding to 911 call confirm substantive portions of events heard during the call.

Johnson v. State, 699 N.E.2d 746 (Ind. Ct. App. 1998) (tape of eyewitness 911 call was not authenticated because there was no evidence that the voice heard on tape was the voice of the man whose name was given; however, the recording of

the victim's 911 call was properly authenticated because the hysterical caller identified herself by name and stated that she had been raped, remained continuously on the line until medical assistance arrived, and upon arrival, a member of the medical response team confirmed to the 911 operator that they had found the victim).

c. Text messages

Text messages from cell phone shown to jury during State's rebuttal closing argument did not require additional authentication because text messages were offered for same reasons as the phone itself was-- to show that the cell phone belonged to the defendant. Bennett v. State, 5 N.E.3d 498, 513 (Ind. Ct. App. 2014).

Authenticity of text messages may be established by circumstantial evidence. Proponent of evidence need only establish a reasonable probably evidence is what it is claimed to be, any inconclusiveness goes to weight, not admissibly. Pavlovich v. State, 6 N.E.3d 969, 976-78 (Ind. Ct. App. 2014); Parker v. State, 151 N.E.3d 1269 (Ind. Ct. App. 2020).

Vazquez v. State, 944 N.E.2d 10, 15-16 (Ind. Ct. App. 2011) (no error in admitting testimony regarding text messages without first authenticating those text messages).

Smith v. State, 179 N.E.3d 1074 (Ind. Ct. App. 2022) (in drug prosecution, text messages were properly authenticated with testimony by police officers concerning collection and storage of defendant's cell phone, as well as chain of custody, testimony concerning methods of recovery of phone's text messages, and by testimony of recipient of text messages that she had been texting defendant during the relevant time period).

Calvert v. State, 177 N.E.3d 107 (Ind. Ct. App. 2021) (cellphone, text, and related records were properly authenticated; evidence that the phone was registered to someone other than defendant goes to the weight of the evidence and not admissibility).

d. Authentication through circumstantial evidence

A caller's identity can be established by circumstantial evidence. Young v. State, 696 N.E.2d 386, 389 (Ind. 1998).

Note: The methods of authentication of incoming calls under Rule 901(b)(6) are not exclusive and do not preclude the use of other methods to identify a caller or recipient, such as Rule 901(b)(5) or use of the reply doctrine.

(1) Corroboration of speaker's identity

Rule 901(b)(6)(A) requires that the proponent present evidence, including self-identification, showing the person answering to be the one called. This is consistent with pre-existing Indiana law. See Epperson v. Rostatter, 90 Ind. App. 8, 168 N.E. 126 (1929).

Some federal courts have required more than self-identification by the person answering the telephone; however, when coupled with the existence of circumstances

indicating the speaker was in fact the person called, self-identification is adequate. See U.S. v. Roberts, 22 F.3d 744, 754 (7th Cir.1994), *cert. den.*

Thomas v. State, 734 N.E.2d 572, 575 (Ind. 2000) (although trial court's reliance on the defendant's pretrial admission that voice on recording was his own was improper for purposes of authenticating recording, circumstantial evidence established defendant's identity and was sufficient to authenticate recording).

(2) Examples of proper circumstantial authentication

(a) Caller's knowledge of specific matters

U.S. v. Kingston, 971 F.2d 481, 485-86 (10th Cir. 1992) (person answering phone identified himself as defendant and demonstrated familiarity with the property in question).

(b) Subsequent behavior consistent with caller's statements

U.S. v. Puerta Restrepo, 814 F.2d 1236, 1239 (7th Cir. 1987) (Authentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did). See also, Schuller v. State, 625 N.E.2d 1243, 1245-46 (Ind. Ct. App. 1993) (pre-Rule).

(c) References to prior conduct

U.S. v. Miller, 771 F.2d 1219, 1234 (9th Cir. 1985) (telephone call could be authenticated by caller's reference to another call made ten minutes earlier).

(d) Use of names and nicknames

State v. Motley, 860 N.E.2d 1264 (Ind. Ct. App. 2007) (officer's two brief conversations with the defendant, along with remarks during the telephone conversation referring to the defendant's name, nickname, and circumstances of the crime, was sufficient to establish identity of the defendant as the caller).

(e) Nature of Subject Matter

U.S. v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979), *cert. den.* (In failure to file tax returns case, phone conversation was properly authenticated by evidence that number listed in IRS agent's report was the defendant's, and personal nature of the facts made it unlikely that anyone else would have answered for defendant).

e. Court's discretion in admitting telephone calls

The judge merely determines whether the proponent has produced sufficient evidence from which the trier of fact could determine the identity of the call's recipient, and it is left to the trier of fact to weigh the evidence. Miller, 13 *Indiana Evidence* 584 § 901.206 (4th ed.).

King v. State, 560 N.E.2d 491, 495 (Ind. 1990) (disputes concerning the true identity of the caller go to weight, not admissibility).

7. Evidence about public records - Rule 901(b)(7)

Under Rule 901(b)(7), a public record or report may be authenticated by showing that it is from the public office where the law authorizes the recording of items of that nature.

a. Defining public record or report

For purposes of Rule 901(b)(7), a public report is broadly defined as either:

(1) a writing authorized by law to be recorded or filed and in fact filed in a public office; or

(2) a purported public record, report, statement, or data compilation, in any form. Dumas v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *opinion supplemented on reh'g*, 723 N.E.2d 460 (Ind. Ct. App. 2000).

b. Foundation requires authenticating witness from public office

A witness with personal knowledge, such as the police officer who prepared and signed the probable cause affidavit, need not be the actual record keeper. The officer testified he obtained the judge's signature and executed the warrant. Such testimony, in conjunction with the file-stamp of the clerk, established the exhibit was authentic. See Hardin v. State, 265 Ind. 179, 353 N.E.2d 462, 463 (1976).

A government agency cannot delegate its statutory authority to certify records to an entity unaffiliated with the agency. The BMV, not the prosecutor's office, is the custodian of driving records. Only individuals associated with the agency may be "certification deputies." Dumes v. State, 723 N.E.2d 460, 461-62 (Ind. Ct. App. 2000).

> Dumes v. State, 723 N.E.2d 460, 461-62 (Ind. Ct. App. 2000) (on rehearing; BMV provided a paralegal in the prosecutor's office with a BMV stamp and a written authorization to certify driving records; held, the prosecutor's paralegal could not authenticate BMV records; public records cannot be placed into evidence merely upon a party's offering a copy and claiming it is an accurate copy of the original).
>
> Carpenter v. State, 743 N.E.2d 326, 330 (Ind. Ct. App. 2001) (BMV can certify judgments from county courts).

c. Considerations

The court may consider the exhibit's content along with the authenticating witness's testimony in deciding whether a sufficient showing has been made that the exhibit is what it purports to be. The court may also refer to law to determine whether writings of that sort are authorized by law to be recorded or filed in the office in which the writing was found. Miller, 13 *Indiana Evidence* 588 § 901.207 (4th ed. 2016) (*citing* U.S. v. Hernandez-Herrera, 952 F.2d 342, 344 (10th Cir. 1991)).

d. Writing must satisfy original document rule (Rules 1002, 1003)

A public record or report authenticated solely under Rule 901(b)(7) must be the "original" writing within the meaning of the original documents rule. See Rules 1002, 1003.

Fax not an original document and thus was not authenticated under IRE 901(b)(7). Hightower v. State, 735 N.E.2d 1209, 1215 (Ind. Ct. App. 2000).

e. Relationship with Rule 902

Rule 901(b)(7) provides a non-exclusive method of authenticating public records or reports. Rule 902 provides several methods of self-authentication. See Rule 902(1), (2), (3), (4) and (5).

PRACTICE POINTER: Rule 901(b)(7) merely provides a method for authenticating a document. Consequently, this rule does not make public records or reports admissible. The writing itself is hearsay. Therefore, a hearsay exception must be applicable to consider the evidence for the truth of the matter asserted therein.

8. Ancient documents or data compilation- Rule 901(b)(8)

Rule 901(b)(8) provides for authentication of ancient documents by circumstantial evidence.

a. Foundation

In order to sufficiently authenticate an ancient document under Rule 901(b)(8), the proponent must demonstrate the following:

(1) a document or data compilations (i.e., data stored in computers);
(2) that is in such condition as to create no suspicion concerning its authenticity.
(3) it is in a place where it would likely be if it were authentic; and
(4) has been in existence thirty years or more at the time it is offered.

U.S. v. Kairys, 782 F.2d 1374, 1379 (7th Cir. 1985), *cert. den.* (in denaturalization proceeding, old Nazi identification card properly admitted because: (1) it matched other authenticated Nazi identification cards in form; (2) it was found in the Soviet Union archives, the depository for German SS documents; and (3) its paper fiber was consistent with that of documents of same age. (Under Federal Rule 901(b)(8) documents must be at least 20 years old, rather than the 30 years under Indiana Rule 901(b)(8)).

b. Free of suspicion

Although the rule requires that the document be free of suspicion, that suspicion does not go to the content of the document but rather to whether the document is what the proponent purports it to be. Whether the contents of an identity document correctly identify a defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility. U.S. v. Kairys, 782 F.2d 1374, 1379 (7th Cir.1985), *cert. den.*

The question of whether evidence is suspicious and therefore inadmissible is a matter of the trial court's discretion. U.S. v. Kairys, 782 F.2d 1374, 1379 (7th Cir. 1985), *cert. den.* In making a preliminary determination that an ancient document is free of suspicion, a trial court may consider "alterations, apparent interruptions of writing or page numbering, internal differences in print or ink, and other indicia of tampering." Miller, 13 *Indiana Evidence* 591 § 901.208 (4th ed. 2016).

c. Age of Document

In determining the age of the document, the trial court may consider expert testimony, testimony by a witness with firsthand knowledge, the document's content, circumstantial evidence, and, if the document was recorded in a public office, the date of the recording. Miller, 13 *Indiana Evidence* 591 § 901.208 (4th ed. 2016).

d. Not necessary to show chain of custody for ancient documents

It is not necessary to show a chain of custody for ancient documents. Rule 901(b)(8) merely requires that the document be found in a place where it would likely be if authentic. U.S. v. Kairys, 782 F.2d 1374, 1379 (7th Cir.1985), *cert. den.*

9. Evidence about a process or system - Rule 901(b)(9)

Authentication may be accomplished by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. Evid. Rule 901(b)(9). The question of authenticity arises when the probative value of the proffered evidence depends upon the accuracy and reliability of the process or system used to produce it.

a. Judicial notice

Reliability of the process or system is assumed in most cases, and Rule 901(b)(9) does not foreclose taking judicial notice of the accuracy of the process or system. Judicial notice of reliability may be appropriate. Miller, 13 *Indiana Evidence* 593 § 901.209 (4th ed. 2016); Saltzburg, et al., *Federal Rules of Evidence Manual,* Vol. 3 p. 1696 (6th Ed. 1994).

b. Types of evidence produced by process or system

(1) X-Rays

X-ray photographs are admissible if: (1) the X-ray is properly authenticated; and (2) the X-ray photographer's competence is shown. Lewis v. State, 730 N.E.2d 686, 691 (Ind. 2000).

Labelle v. State, 550 N.E.2d 752, 754 (Ind. 1990) (while it is true that generally lay witnesses will not be sufficiently acquainted with infrastructure of their anatomy to be able to confirm X-ray as true and accurate depiction of that infrastructure, here due to victim's unusual physical characteristics and first-hand knowledge of metal in and around his body, no abuse of discretion to allow him to provide foundation testimony for admission of X-ray).

The authentication requirement may be satisfied when the X-rays are identified by the treating physician under whose direction the photographs were taken, Kickels v. Fein, 104 Ind. App. 606, 10 N.E.2d 297, 300 (1937), or where the X-ray is shown to have been taken by a regular X-ray technician in a hospital. Howard v. State, 264 Ind. 275, 342 N.E.2d 604, 608-09 (1976).

Lewis v. State, 730 N.E.2d 686, 690-91 (Ind. 2000) (X-ray sufficiently authenticated because X-ray bore the defendant's name, hospital, and date on which it was taken; each of these items was corroborated by a witness who testified that he was present at the taking of X-ray, had placed the standard in the X-ray, and had identified that standard in the exhibit).

(2) Photographs and videos

The standard applicable to the admissibility of photographs applies to videotapes. Timberlake v. State, 679 N.E.2d 1337, 1340 (Ind. Ct. App. 1997).

(a) Demonstrative evidence

Photographs [videotapes, etc.] introduced in conjunction with testimony, are admitted, not as direct evidence of the scene depicted, but to assist the jury in visualizing the testimony of a witness. Shepherd v. State, 690 N.E.2d 318, 324 (Ind. Ct. App.1997). Demonstrative evidence is evidence offered for the purpose of illustration and clarification. Id.

(1) Photographs are admissible as demonstrative evidence if they illustrate a matter about which a witness has been permitted to testify. (2) The proponent of the evidence must first authenticate the photograph. Specifically, the sponsoring witness must establish that the photograph is a true and accurate representation of the things that it is intended to portray. (3) The photograph must be relevant. A photograph is relevant if it depicts a scene that a witness would be permitted to describe verbally. Timberlake v. State, 679 N.E.2d 1337, 1341 (Ind. Ct. App. 1997).

(i) Fair and accurate representation

A photograph is authenticated by evidence that it is a true and accurate representation of the things they are intended to depict. Corder v. State, 467 N.E.2d 409, 415 (Ind. 1984). Any person familiar with the scene or object depicted in the photograph may verify the photograph.

(1) The witness is familiar with the object or scene.
(2) The witness explains the basis for his or her familiarity with the object or scene.
(3) The witness recognizes the object or scene in the photograph.
(4) The photograph is a “fair,” “accurate,” “true” or “good” depiction of the object or scene at the relevant time.

Imwinkelried, Edward J., *Evidentiary Foundations* § 4.09[1] (9th ed.).

(ii) Preliminary question for trial court

The trial court makes the preliminary determination of whether there is sufficient evidence from which the trier of fact could find that the photograph is an accurate depiction of an object or scene. Once admitted, the question of accuracy is a question for the trier of fact. Russell v. State, 519 N.E.2d 549, 553 (Ind. 1988). The admission of photographs in evidence is within the trial court's discretion and will not be disturbed absent a showing of abuse. State Highway Dep't v. Snyder, 594 N.E.2d 783, 787 (Ind. 1992).

(iii) Authenticating witness equivocation

An authenticating witness need not be certain of the photograph's accuracy. Hutchinson v. State, 515 N.E.2d 514, 515 (Ind. 1987). The witness's equivocation as to whether photographs were true and accurate representations go to weight of testimony and not its admissibility. A photograph may be admitted in evidence even if the witness disagrees as to its accuracy. Russell v. State, 519 N.E.2d 549, 553 (Ind. 1988).

(iv) Magical words not required

Magical words such as "true and accurate" are not required so long as the evidence would permit the trier of fact to find that the photographs are accurate.

Bridges v. State, 457 N.E.2d 207, 209-10 (Ind. 1983) (photos admissible where witness identified property depicted in photos, although she did not state that it was true and accurate representation).

Schnitz v. State, 650 N.E.2d 717 (Ind. Ct. App. 1995), aff'd, 666 N.E.2d 919 (Ind. 1996) (State supplied sufficient foundation for admission of aerial photomap of area surrounding cocaine delivery, in support of city engineer's testimony that delivery location was 246 feet from school, although engineer did not physically measure distance or have personal knowledge about map's preparation or verification, engineer testified that he determined distance by measuring map with engineer's scale, that he physically observed area represented in map, and that observations confirmed scale and map-based distance measurement).

(v) Photographer need not authenticate

The sponsoring witness need not take the photograph or know when it was taken. Raub v. State, 517 N.E.2d 80, 83 (Ind. 1987). It is not necessary that the photographer examine the photos after developing them. See Watson v. State, 543 N.E.2d 392, 393 (Ind. 1989).

(vi) Effect of changed conditions

Discrepancies in objects shown in photographs between the date of the incident and the date the photographs were taken which are not materially

misleading may be admitted, and such discrepancies affect weight rather than admissibility. State Highway Dep't v. Snyder, 594 N.E.2d 783 (Ind. 1992). So long as there is sufficient accuracy to render the photograph relevant for its purpose and any material discrepancies or changed conditions are explained such that the trier of fact will not be misled, the photographs are admissible. See Lucas v. State, 499 N.E.2d 1090, 1097 (Ind. 1986); Garren v. State, 470 N.E.2d 719, 723 (Ind. 1984).

Baskin v. State, 546 N.E.2d 1191, 1192 (Ind. 1989) (presence or absence of other structures in the area played no part in use of photograph which may have been taken one or five years before the charged crime).

Huffman v. State, 543 N.E.2d 360, 371 (Ind. 1989), *overruled on other grounds*, 567 N.E.2d 102, *cert. den.* (disparity in foliage not prejudicial: photographs of crime scene relevant if they aid the trier of fact in orienting himself to the circumstances surrounding the crime).

Patel v. State, 533 N.E.2d 580, 583-84 (Ind. 1989) (despite discrepancies, exterior photos of crime scene admissible where witness identified and explained discrepancies). See also Jones v. State, 498 N.E.2d 395 (Ind. 1986).

Jackson v. State, 462 N.E.2d 63, 66 (Ind. 1984) (where photos of crime scene taken during day and robbery occurred at night; photos admissible to show physical layout, but not as proof of amount of light that night and how things looked that night).

(vii) Double exposure

Coleman v. State, 465 N.E.2d 1130, 1132-33 (Ind. 1984) (where other photos of car were admitted and witness testified that except for double exposure, photograph was true and accurate representation; court held photograph was not distorted such that it confused jury.)

(viii) Photograph taken considerably after crime

Holland v. State, 274 Ind. 382, 384-85, 412 N.E.2d 77, 79-80 (1980) (photos of scene taken two weeks after alleged attempted murder properly admitted).

(ix) Enhanced photo

State v. Swinton, 847 A.2d 921, 932-59 (Conn. 2004) (computer-enhanced photographs of bite marks on murder victim that were digitally overlaid with impressions of the defendant's teeth should not have been admitted because testifying expert did not have sufficient knowledge of process by which overlay was made).

(x) Downloaded photos from computer

Bone v. State, 771 N.E.2d 710, 716-17 (Ind. Ct. App. 2002) (to authenticate photos, the State did not have to show the photos included children but rather

only that the images were recovered from defendants' computer; detective's testimony that he printed copies of images exactly as he found them and that images fairly and accurately showed images that he had seen on computer he was using to examine defendants' computer was sufficient).

(b) Silent witness theory - substantive evidence

The Indiana Rules of Evidence do not address silent witnesses explicitly. Prior cases should govern.

Photographic evidence is admissible as substantive evidence under the "silent witness theory" so long as certain foundation requirements are met. Timberlake v. State, 679 N.E.2d 1337, 1341 (Ind. Ct. App. 1997). The silent witness higher standard is applied in situations where there is no one who can testify as to its accuracy and authenticity because the photograph [videotape, etc.] must "speak for itself" and because such "silent witnesses" cannot be cross-examined. Shepherd v. State, 690 N.E.2d 318, 324 (Ind. Ct. App. 1997). The line of cases that allows the admission of photographs and videos as substantive evidence under the silent witness theory was not overruled by Crawford v. Washington, 124 S.Ct. 1354, 541 U.S. 16 (2004)); Sheckles v. State, 24 N.E.3d 978 (Ind. Ct. App. 2015). Unless there is a genuine dispute concerning authenticity or possible alteration, the original recording or photograph is not required. In re J.V., 875 N.E.2d 395, 401 (Ind. Ct. App. 2007).

Bergner v. State, 397 N.E.2d 1012, 1014-19 (Ind. Ct. App. 1979) (under the silent witness theory, photographs from a regiscope camera or an automatic camera [surveillance camera] that recorded relevant events as they actually were happening may be introduced as substantive evidence, and no witness is required to testify that the photographs are accurate representations because they "speak for themselves").

Pritchard v. State, 810 N.E.2d 758, 760-61 (Ind. Ct. App. 2004) (no error in admitting testimony of two prison officials regarding what they saw in a video recording that was later destroyed; not hearsay because testimony merely recounted what they saw in recording; "silent witness theory" did not apply to case since the video was never admitted).

Flowers v. State, 154 N.E.3d 854 (Ind. Ct. App. 2020) (trial court did not abuse its discretion in admitting apartment complex's video surveillance footage as substantive evidence under silent witness theory as well as police sergeant's testimony about the videos).

Mays v. State, 907 N.E.2d 128, 131-32 (Ind. Ct. App. 2009) (video of drug transaction was admissible under "silent witness theory" even without testimony of confidential informant that video accurately represents what occurred).

Rogers v. State, 902 N.E.2d 871, 876-77 (Ind. Ct. App. 2009) (although compact disks and photographs were redacted versions of original, there is no evidence that they were altered or changed, thus CD copy of videotape surveillance footage was admissible under silent witness theory).

(i) Foundation

The foundational requirements for the admission of photographs [videos, etc.] offered as substantive evidence under the "silent witness" theory, there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result. The requirements are "rather strict." Miller 13 Indiana Evidence, § 901.209. That is, the proponent must show that the photograph or video was not altered in any significant respect, and the date the photograph or video was taken must be established when relevant. Id.; see also Wise v. State, 26 N.E.3d 137, 141 (Ind. Ct. App. 2015).

The Indiana Supreme Court has not laid down an absolute consistent foundational requirement for recordings and silent witness evidence, but it has consistently required a strong showing that the images are reliable and unaltered depictions of the events at issue. See McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005). The following guidelines have been set forth:

(1) The approximate date the photograph was taken. Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979).
(2) Evidence that material portions of the recording or photograph have not been altered. Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997). This may be proved by the opinion of an expert who has examined it, or by circumstantial evidence showing a chain of custody and proper handling of the recording so as to eliminate any realistic possibility of alteration. When automatic cameras are involved, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and (if film was used) the processing and chain of custody of the film after its removal from the camera. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).
(3) The person, place or thing depicted in the photograph or recording must be established, to a relative certainty, by a witness with personal knowledge. Groves v. State, 456 N.E.2d 720, 723 (Ind. 1983); Harrison v. State, 32 N.E.3d 240, 255 (Ind. Ct. App. 2015) (jail employee identified recording as taken at jail on relevant date; girlfriend of one of participants identified voices).

See also Kindred v. State, 524 N.E.2d 279, 298 (Ind. 1988).

Absolute certainty is not required, and a date-stamped recording from a surveillance camera may be authenticated by an employee with general knowledge about how the system works. McCallister v. State, 91 N.E.3d 554, 562 (Ind. 2018).

McFall v. State, 71 N.E.3d 383 (Ind. Ct. App. 2017) (cell-phone videos were not properly authenticated because there was no evidence the videos had not been altered in any significant respect before they were given to police; however, any error in inadequate foundation was

harmless because defendant testified later in trial identifying herself in the videos).

Knapp v. State, 9 N.E.3d 1274, 1281–82 (Ind. 2014) (witness authenticated photographs based on date and timestamp of the image files).

Stark v. State, 489 N.E.2d 43, 48 (Ind. 1986) ('silent witness' evidence admissible without a chain of custody or evidence about how the film was processed; per Shepard, J., concurring opinion, this leaves "the trial bench and the bar completely at sea on the requirements for admission of a photograph under the 'silent witness' rule).

Rogers v. State, 902 N.E.2d 871, 877 (Ind. Ct. App. 2009) (transferring images to CD and editing out portions of a surveillance recording that did not show anything relevant do not constitute "alteration or change" that would defeat the foundation).

Wise v. State, 26 N.E.3d 137 (Ind. Ct. App. 2015) (re-recording of handheld cell phone videos admissible under silent witness theory; fact complaining witness renamed videos did not mean that they had somehow been altered).

Kerner v. State, 178 N.E.3d 1215 (Ind. Ct. App. 2021) (Ind. 2022) (voice-memo recordings from cell phone were properly authenticated with corroborating cellphone records, voice-identification testimony, and distinctive characteristics and/or corroborating physical evidence; despite alteration to recordings, forensic expert testimony established that alterations were likely insignificant and minor).

See also, Tanford, J. A., *Indiana Trial Evidence Manual,* Sec. 61.03, pp. 305-06 (5th ed. 2003) (setting out factors to consider).

(ii) Authentication by surrounding circumstances

If a foundational requirement is missing, then the surrounding circumstances can be used. McFall v. State, 71 N.E.3d 383 (Ind. Ct. App. 2017). In Kindred v. State, 524 N.E.2d 279, 298 (Ind. 1988), the Indiana Supreme Court noted that surrounding circumstances could be sufficient to authenticate "silent witness" photographs.

U.S. v. Rembert, 863 F.2d 1023, 1028 (D.C. Cir. 1988) (Photographs taken by automatic teller machine were properly admitted although no foundation testimony was offered as to process by which pictures were taken. Circumstantial evidence concerning events, content of photos, and testimony concerning loading and security of film constituted sufficient identification).

(iii) Authentication by corroborating witness

Photographs or videotapes taken by automatic cameras may be authenticated

by an eyewitness's corroboration of the photograph's accuracy. Smith v. State, 491 N.E.2d 193, 196 (Ind. 1986).

Ballard v. State, 531 N.E.2d 196, 197 (Ind. 1988) (officer who handled film could not attest to film's accuracy, but store clerk identified photographs as accurate representations).

Hamilton v. State, 182 N.E.3d 936 (Ind. Ct. App. 2021) (homeowner's testimony about copy of surveillance video sufficiently established authenticity to a relative certainty which is the standard for video to be admitted under the silent witness theory; admission of copy of surveillance video not shown to be unfair).

(iv) Police officer may be able to give opinion as to identity from video or photo

Gibson v. State, 709 N.E.2d 11, 13-15 (Ind. Ct. App. 1999) (officer's opinion as to identity of perpetrator in surveillance videotape was admissible, despite defendant's argument that the admitted videotape was a silent witness; the officer had superior ability to identify the defendant than the jury, having known him since middle school; although identification of the robber was at issue, the lay opinion testimony of the officer was helpful to the jury).

Goodson v. State, 747 N.E.2d 1181, 1183-84 (Ind. Ct. App. 2001) (officer's opinion that defendant was the person in the surveillance video did not violate Rule 701).

(3) Email, text messages, websites, and social media

E-mail or text messages may be authenticated through various traditional common law methods such as the reply doctrine, distinctive characteristics, or chain of custody. To further ensure the accuracy of the message and identity of the sender a digital signature, created and verified by cryptography, may be utilized. Information obtained from a website may be authenticated similarly as may be information obtained from a social media profile page. Graham, Handbook of Federal Evidence § 901:9 (7th ed.), at 998-1001.

Bone v. State, 771 N.E.2d 710, 716-17 (Ind. Ct. App. 2002) (testimony about software program used to recover deleted files sufficiently authenticated exhibits found from images found on defendant's computer equipment).

(4) Contents of cellular telephones

As with computers, authentication of data saved inside of a cellular telephone is a condition precedent to the admission of data recordings. Hape v. State, 903 N.E.2d 977, 990 (Ind. Ct. App. 2014).

c. Computer records

Rule 901(b)(9) can be utilized to authenticate computer records.

(1) Foundation under pre-existing law

Under the pre-existing law, computerized records were authenticated by the following foundation:

(1) the electronic equipment is standard;
(2) the entries are made in the regular course of business at or near the time the transaction occurred; and
(3) the testimony regarding the creation and storage of the records is adequate to indicate their accuracy and authenticity.

Stark v. State, 489 N.E.2d 43, 47 (Ind. 1986).

PRACTICE POINTER: Foundation for admission of computer printouts under Fed. R. Evid. 901(b)(9), includes the following: evidence regarding, among other things, the source of data for the printouts, the data's accuracy, the input procedures used to feed the data into the computer, or whether the computer was working properly (Rule 901). Additionally, the proponent of admitting the printout should establish that the witness introducing the printout is qualified to establish the foundation because he is the custodian or an otherwise qualified witness, and that the printouts were made as a routine company practice (Rule 803(6)). If the printouts are summary evidence, under Rule 1006 they are inadmissible as summaries unless the documents underlying the summaries have been made available to the other side. See Zayre Corp.v.S.M. & R. Co., 882 F.2d 1145, 1149 (7th Cir. 1989). For a discussion of the foundation necessary to admit computer records, see, e.g., U.S. v. Catabran, 836 F.2d 453, 456-58 (9th Cir. 1988).

(2) Standardized equipment requirement questioned, current procedure for authenticating computer records.

The requirement that the equipment be "standard" did not survive adoption of the Evidence Rules insofar as it was a requirement of the business records exception to the hearsay rule. Shively v. Shively, 680 N.E.2d 877, 881 (Ind. Ct. App. 1997); Miller, 13 *Indiana Evidence* 559 § 901.200A (4th ed. 2016). The test of Rule 901(b)(9) is sufficiently flexible to allow authentication of business records maintained on customized computer equipment or through specially prepared software, as long as the process or system is described sufficiently to allow a finding that it produces an accurate result. Miller, 13 *Indiana Evidence* 592 § 901.209 (4th ed. 2016).

10. Methods provided by a statute or rule - Rule 901(b)(10)

Rule 901(b)(10) preserves the methods of authentication or identification provided by certain legislative provisions and by the Indiana Trial Rules adopted by the Indiana Supreme Court. A document must only be authenticated under one, not all, of the methods. Collins v. State, 415 N.E.2d 46, 54 (Ind. 1981).

Mann v. State, 754 N.E.2d 544, 547-48 (Ind. Ct. App. 2001) (meeting requirements of both IRE 901(b) and TR 44(A)(1) was sufficient to authenticate foreign court documents, notwithstanding noncompliance with I.C. 34-39-4-3, which requires attestation by clerk).

a. Trial Rule 44

Trial Rule 44, which provided a method for authentication of official records, was amended, effective Jan.1, 2004, to read, "[t]he rules concerning proof of official records are governed by the Rules of Evidence."

b. Statutory authentication method for foreign records

IC 34-39-4-1 and 3 provide for authentication for foreign states and courts.

c. Statutory authentication method for handwriting

IC 34-37-3-1 provides that in a proceeding before a court or judicial officer of Indiana in which the genuineness of the handwriting of any person is involved, any admitted or proved handwriting of the person is competent evidence as a basis for comparison by witnesses, or by the jury, court or officer conducting such proceedings, to prove or disprove the genuineness of the handwriting. The trial court must resolve the question of the genuineness of the handwriting in accordance with the statute. Miller v. NBD Bank, 701 N.E.2d 282, 285 (Ind. Ct. App. 1998).

d. Hospital records

IC 34-43-1-2 provides a method for authenticating hospital records on electronic data processing equipment:

(1) the data processing equipment is standard hospital equipment;
(2) the entries were made in the regular course of business at or reasonably near to the happening of the event or order, opinion, or other information recorded;
(3) the security of the entries from unauthorized access can be demonstrated through the use of audit trails; and
(4) records of all original entries and subsequent access to the information are maintained.

e. Chemical breath tests

The admissibility of chemical breath tests is governed by IC 9-30-6.

II. SELF AUTHENTICATION - RULE 902

A. OFFICIAL TEXT:

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 area of the United States; 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(l)(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 federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed 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 by a Federal or Indiana Statute. A signature, document, or anything else that a federal or Indiana statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification under oath of the custodian or another qualified person. 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. The original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows:

(A) the certification 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; and

(B) the signature must be certified by a government official in the manner provided in Rule 902(2).

The proponent must also meet the notice requirements of Rule 902(11).

Note: Trial Rule 44(A) formerly listed requirements for the authentication of documents. Rule 902 was amended, effective 1 January 2004 and 1 January 2005, replacing references to Trial Rule 44(A)(1) and (2) with the language formerly found in Trial Rule 44(A)(1) and (2). At the same time, Indiana Trial Rule 44 was amended to read as follows: "The rules concerning proof of official records are governed by the Rules of Evidence."]

B. GENERALLY

1. Theory of self-authentication

Because certain documents are presumed to be self-evidently genuine on their faces, Rule 902 relieves the proponent of such documents of the obligation of meeting the initial threshold test of proving that the document is authentic.

When a document is self-authenticating, the proponent need not submit extrinsic foundational evidence. The requirements for self-authentication are set out in Rule 902. L.H. v. State, 682 N.E.2d 795, 799 (Ind. Ct. App. 1997).

2. Self-authenticating documents must be admissible under other Rules

Self-authentication of documents relieves the proponent from submitting foundational testimony as to authenticity. However, authenticity alone is not enough to make a document admissible. Other issues, such as hearsay, relevancy, and the best evidence rule can still be raised when considering the admissibility of the evidence even where the evidence is

authentic." Speybroeck v. State, 875 N.E.2d 813, 819 (Ind. Ct. App. 2007); Coates v. State, 650 N.E.2d 58, 62-63 (Ind. Ct. App. 1995). Additionally, objections based on relevancy and the best evidence rule are appropriately raised even though the document is authentic. See Dumes v. State, 718 N.E.2d 1171, 1176-77 (Ind. Ct. App. 1999), *clarified by* Dumes v. State, 723 N.E.2d 460 (Ind. Ct. App. 2000).

Self-authentication under Indiana Rule of Evidence 902 does not provide an exception to the hearsay rule. State v. Lloyd, 800 N.E.2d 196, 199 (Ind. Ct. App. 2003) (breath test operator certificate was self-authenticating under Ind. Evid. Rule 902, and although hearsay, was admissible under Ind. Evid. Rule 803(8)); see also Reemer v. State, 835 N.E.2d 1005, 1007 (Ind. 2005).

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005), *reaff'd*, 827 N.E.2d 565 (Ind. Ct. App. 2005) (concluding that certification documents and a BAC ticket showing breath test results were not self-authenticating documents, but instead foundational evidence concerning their authenticity as provided in Rule 901).

3. Party may still challenge authenticity of self-authenticating documents

When an offered document is presumptively authentic under Rule 902, the opposing party may still present evidence to challenge its genuineness. 2 *McCormick on Evidence*, § 229.1, p.118-20 (7th ed.); 5 *Weinstein* 9802[01], at 902-10 (1992). A party may present evidence that the offered evidence is not authentic, or if authentic, is incorrect. Miller, 13 *Indiana Evidence* 611 § 902.100 (4th ed.).

4. Self-authentication does not violate rights of cross-examination and confrontation

Gibson v. State, 661 N.E.2d 865, 868 (Ind. Ct. App. 1996) (defendant challenged admission of court records of previous conviction that were certified by a clerk of the court's deputy who initialed the records; defendant contended inability to know the identity of the person who certified the documents infringed upon defendant's right to confront his accusers, specifically, to cross-examine the clerk; the documents were self-authenticating under Rule 902, were not inadmissible hearsay, and were properly admitted as official records).

C. DOMESTIC PUBLIC DOCUMENTS THAT ARE SEALED AND SIGNED - RULE 902(1)

Where originals or duplicates of domestic public records are proved in the manner provided, extrinsic evidence of authenticity, as a condition to admissibility, is not required. See Gibson v. State, 661 N.E.2d 865, 867-68 (Ind. Ct. App. 1996); and Dumes v. State, 718 N.E.2d 1171, 1176-77 *clarified by* Dumes v. State, 723 N.E.2d 460, 463 (Ind. Ct. App. 2000).

Authentication for the admission of an official record requires an officer having custody of the record to attest, by testimony or by certification, that it is the official original record, or a true and accurate copy thereof. Lucre Corp. v. County of Gibson, 657 N.E.2d 150, 155 (Ind. Ct. App.1995), *cert. den.*

Former Rule 44(A)(1) (now incorporated into Rule 902) is not exclusive or mandatory, but merely an alternative to other methods of authentication authorized by law. Collins v. State, 275 Ind. 86, 415 N.E.2d 46, 54 (1981), *cert. den.* Consequently, a document that fails to satisfy Rule 902(1) or (2) still may be authenticated under any other method of authentication recognized by law.

1. Indication of lack of trustworthiness

Where the source of information or the circumstances of preparation indicate a lack of trustworthiness, the documents are not self-authenticating under Rule 902(11).

Speybroeck v. State, 875 N.E.2d 813, 819-20 (Ind. Ct. App. 2007) (affidavit that certified documents, some of which were from another company and others which were dated the day after the affidavit was prepared, lacked trustworthiness; reversible error).

Walters v. State, 120 N.E.3d 1145, 1154–55 (Ind. Ct. App. 2019) (a form cover letter that did not name the document it was authenticating or include page numbers or dates and was not notarized, was not adequate to make phone records self-authenticating).

McGill v. State, 160 N.E.3d 239 (Ind. Ct. App. 2020) (defendant failed to adequately authenticate psychological assessment of defendant, and thus, assessment, which purportedly showed that defendant's IQ was significantly below average, was inadmissible under business-records exception to hearsay rule; authentication affidavit did not identify business entity or detail what routine business activity required school psychologist who performed test to perform psychological assessments, affidavit did not explain how maintenance of psychological records was necessary for business purpose, and introducing test into evidence without allowing State to examine psychologist regarding qualifications and methodology would have sidestepped safeguards ensuring only relevant and reliable expert testimony).

2. Attested by officer having legal custody of record

A party may not certify and authenticate the documents which it is introducing into evidence because doing so effectively defeats the purpose of the authentication requirement imposed by our Trial Rules, the Rules of Evidence, and Indiana Statutes. Dumes v. State, 723 N.E.2d 460, 463 (Ind. Ct. App. 2000).

Dumes v. State, 718 N.E.2d 1171, *clarified on reh'g*, 723 N.E.2d 460 (Ind. Ct. App. 2000) (although BMV provided a prosecutor's paralegal with access to driving records, a BMV stamp, and written authorization to 'certify' BMV records for use in court, the BMV could not delegate their statutory authority to an entity unaffiliated with the BMV and that the prosecutor's paralegal could not make a valid certification under Rule 902(1) and former Trial Rule 44(A)(1); see now Rule 1002). See also Speybroeck v. State, 875 N.E.2d 813, 818-20 (Ind. Ct. App. 2007).

3. Proof of legal custody: certification or seal

An official record may be evidenced by publication or copy attested by the officer having the legal custody of the record, or by his deputy. The publication or copy need not be accompanied by proof that the officer has the custody. Proof that the officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. Gibson v. State, 661 N.E.2d 865, 867-68 (Ind. Ct. App. 1996). Evidence Rule 902 (formerly, T.R. 44(A)(1)) does not require, by its terms, that the officer's authority or legal

custody of records be established by a statement under seal. McCullom v. State, 582 N.E.2d 804, 814 (Ind. 1991). It is only where proof of custody of the official record becomes an issue that the necessity for certification by authentication under seal arises. Richards v. State, 535 N.E.2d 549, 550 (Ind. 1989).

Bartlett v. State, 711 N.E.2d 497, 502 (Ind. 1999) (defendant challenged the admission of conviction and sentencing records from two other states for habitual offender status. A proper foundation was laid for their admission because the documents met with the requirements of the rule. Both were compiled and kept by public officers in their respective states, and both were authenticated by a seal of office. Both sets of documents were properly certified and self-authenticating according to Rule 902.)

Collins v. State, 275 Ind. 86, 96, 415 N.E.2d 46, 54 (1981), *cert. den.* (while rule permits proof that attesting officer is legal custodian of records, it does not require such proof).

a. Certification must be signed

A certification must be signed by an attesting public official. Keegan v. State, 564 N.E.2d 533, 535 (Ind. Ct. App. 1990). See also Rule 1002.

A signing may be accomplished in a number of ways. When a person intends for the mark or name to represent his signature on a document, it meets the requirements of the law. Gibson v. State, 661 N.E.2d 865, 868 (Ind. Ct. App. 1996). In certain instances, initials may constitute a legal signature. Gibson v. State, 661 N.E.2d 865, 868 (Ind. Ct. App. 1996).

Brewer v. State, 605 N.E.2d 181, 183-84 (Ind. 1993) (State's exhibits admitted during habitual offender proceedings of which some pages bore a certification comprised of the initials "DS" constituted a valid signature for certification).

Coates v. State, 650 N.E.2d 58, 62 (Ind. Ct. App. 1995) (a signature stamp is adequate).

b. Placement of certification

If papers appended to certified documents are not readily identifiable with those documents, they cannot be considered as being included in the certification. However, if the certification makes reference to the attached documents and causes no confusion as to the authenticity of the documents, the placement of the certificate on top, rather than at the end of the documents, does not invalidate the certification. Miller v. State, 563 N.E.2d 578, 584 (Ind. 1990); Craig v. State, 730 N.E.2d 1262, 1266-67 (Ind. 2000).

Carpenter v. State, 743 N.E.2d 326, 330 (Ind. Ct. App. 2001) (a certification that states it relates to the "attached" rather than specifying pages is proper where the documents contain references to the BMV and are not confusing).

c. Certification cannot be photocopy

While copies of public records can themselves be admissible if their authenticity is properly certified, the certifications themselves do not constitute public records and photocopies of the certification are not acceptable. Kelly v. State, 561 N.E.2d 771, 773

(Ind. 1990); Hightower v. State, 735 N.E.2d 1209, 1214-15 (Ind. Ct. App. 2000); but see Carter v. State, 479 N.E.2d 1290, 1292 (Ind. 1985) (copies of prison records properly admissible as public records even though not certified by clerk of the trial court).

However, if the Defendant fails to object to the copies of the certifications and even concedes that he has the prior convictions, the use of photocopies of the certifications is not fundamental error. Suggs v. State, 883 N.E.2d 1188, 1193-94 (Ind. Ct. App. 2008).

4. Evidence of no record

Evidence Rule 902(1) or (2) provides for the admissibility of evidence that a public officer does not have custody of a record.

5. Self-authentication of public records provided by statute

IC 34-37-1-8 sets forth an alternate method of self-authentication of public records kept in Indiana and provides for admission of copies of public records when they are attested as true and complete by the keeper of records under the seal of his office. Gilmore v. State, 275 Ind. 134, 415 N.E.2d 70, 75 (1981).

While the statute is not incorporated by Rule 902(1) and (2), Rule 901(b)(10) permits an exhibit to be authenticated by any method of authentication provided by statute, and Rule 902(10) allows self-authentication pursuant to any state law that declares a document to be presumptively or prima facie genuine or authentic.

6. Court orders of other states

An order issued by a court in another state, but not testimony taken there, may be admissible under Rule 902. See Stidham v. Whelchel, 698 N.E.2d 1152, 1156-57 (Ind. 1998).

D. DOMESTIC PUBLIC DOCUMENTS THAT ARE NOT SEALED BUT ARE SIGNED AND CERTIFIED - RULE 902(2)

E. FOREIGN PUBLIC DOCUMENTS - RULE 902(3)

Rule 902(3) provides for self-authentication of foreign official records.

F. CERTIFIED COPIES OF PUBLIC RECORDS—RULE 902(4)

G. OFFICIAL PUBLICATIONS - RULE 902(5)

Rule 902(5) provides for the self-authentication of books, pamphlets and other publications purporting to be issued by a public authority. The rule relieves the proponent of the evidence from establishing an extrinsic foundation that the publication was printed or issued by public authority.

Similar to other sections of Rule 902, Rule 902(5) simply provides a method of authentication, and does not guarantee that the publication will be admissible.

1. Examples of official publications

The following are examples of official publications found to be self-authenticating under Rule 902(5):

Indiana Statutes: see IC 34-37-1-8 and State ex rel. Colbert v. Wheeler, 172 Ind. 578, 89 N.E. 1, 2 (1909).

Case Reports: IC 34-39-1-1.

Municipal Codes: IC 36-1-5-5.

Foreign Statutes (Acts of legislatures of other states and territories): IC 34-38-2-2 and Morris v. State, 273 Ind. 614, 406 N.E.2d 1187, 1192 (1980), superseded on other grounds by Havens v. State, 429 N.E.2d 618 (Ind. 1981); IC 34-38-2-1; IC 34-38-3-1.

Government Statistical Bulletins: 5 *Weinstein* 902(5)[01], pp. 902-38 to 902-39 (1992).

Bound Reports: 5 *Weinstein* 902(5)[01], pp. 902-38 to 902-39 (1992).

Legislative Reports: 5 *Louisell & Mueller,* Sec. 533, p. 208 (1981).

Published Transcripts of Hearings: 5 *Louisell & Mueller,* Sec. 533, p. 208 (1981).

Maps and Surveys: 5 *Louisell & Mueller,* Sec. 533, p. 208 (1981).

Commissioned Studies and Reports: Liles v. Employers Mut. Ins. Of Wausaw, 126 Wis.2d 492, 377 N.W.2d 214, 220 (App. 1985).

Administrative Regulations: IC 4-22-9-3.

Governmental Warnings: Schneider v. Cessna Aircraft Co., 150 Ariz. 153, 722 P.2d 321, 330 (App. 1985).

Government websites and government-issued manuals. Wright and Miller's Federal Practice and Procedure, Evidence § 7139, at 239-40.

PRACTICE POINTER: For a more complete list of examples, 5 *Weinstein* 902(5)[01], pp. 902-38 to 902-39 (1992); 5 *Louisell & Mueller*, Sec. 533, p.208 (1981); Miller,13A *Indiana Evidence* § 902.103 (setting forth examples of official publications that have been found to be self-authenticating in other jurisdictions).

H. NEWSPAPERS AND PERIODICALS - RULE 902(6))

Rule 902(6) provides for self-authentication for official printed materials purporting to be newspapers or periodicals.

Newspaper articles are generally self-authenticating under Fed. R. Evid. 902(6), and there is no hearsay problem if they are not offered to prove the truth of the matter asserted, only that the matter was reported. Price v. Rochford*, et al.,* 947 F.2d 829, 833 (7th Cir. 1991).

Nestle Co. v. Chester's Mkt., Inc., 571 F. Supp. 763, fn 9. (D. Conn. 1983), *vacated on settlement*, 609 F. Supp. 588 (D. Conn. 1985) (various "media" articles were self-authenticating).

I. TRADE INSCRIPTIONS AND THE LIKE - RULE 902(7)

Rule 902(7) makes the doctrine of self-authentication applicable to trade inscriptions, signs, tags

or labels, as long as (1) they purport to have been affixed in the course of business and (2) are indicative of ownership, control or origin. Usually, this type of evidence will be introduced to prove ownership, control, or origin.

1. Rationale

The rationale for the rule is based on the recognition accorded to trademarks by society and the law; there is only a slight risk of forgery of items under Rule 902(7) due to the difficulty of reproduction and because trademark infringement involves serious penalties.

2. Owner's manuals not self-authenticating

Owner's manual is inadmissible under Federal Rule 902(7) [similar to Indiana Evidence Rule 902(7)] because the contents of a manual constitute more than a trade inscription and are not, therefore, self-authenticating. Whitted v. GMC, 58 F.3d 1200, 1204 (7th Cir. 1995).

J. ACKNOWLEDGED DOCUMENTS - RULE 902(8)

Rule 902(8) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to original 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.

1. Not limited to documents of title

The rule is not limited to documents of title and applies to any type of document which is properly acknowledged. 5 *Weinstein* 902(8)[01], pp. 902-45 (1992).

2. Relationship to statutory law

A certificate or instrument, either written or printed, purporting to be under a notary public's seal and signature of such notary public, constitutes presumptive evidence of the facts set forth therein. See IC 34-37-1-5.

K. COMMERCIAL PAPER AND RELATED DOCUMENTS - RULE 902(9)

Extrinsic evidence of authenticity is not required with respect to commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

IC 26-1-3.1-308(a) (authenticity of signatures).

IC 26-1-1-202 (authenticity of bill of lading, policy or certificate of insurance, official weigher's, or inspector's certificate, consular invoice).

IC 26-1-3.1-505 (certificates of dishonor).

L. PRESUMPTIONS BY A FEDERAL OR INDIANA STATUTE RULE 902(10)

Rule 902(10) provides that extrinsic evidence of authenticity is not required with respect to any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or *prima facie* genuine or authentic.

Some kinds of self-authenticating official records are covered by statute:

Medical records: IC 34-43-1-7.

Certified copies of court records showing a previous conviction for operating while intoxicated: IC 9-30-6-14.

Certified records of all courts within the United States: IC 34-39-4-1; IC 34-39-4-2; IC 34-39-4-3; IC 34-28-1-8.

State, territorial and United States printed statute books: IC 34-38-1-1; IC 34-38-2-1; IC 34-38-3-1.

Certified acts of other states or territories: IC 34-38-2-2.

Reports of common law cases from other states and territories: IC 34-39-4-2.

Documents under seal of notary public: IC 34-37-1-5.

Records of land ownership, grants and deeds: IC 34-41-1-3; IC 34-41-1-4; IC 34-41-1-5; IC 34-41-2-1; IC 34-41-7-1; IC 34-41-7-2.

Certificate of the secretary of state as to the time when an act of the general assembly was deposited: IC 34-38-1-2.

Schedules, rates, tariffs, etc., filed with the interstate commerce commission or the public service commission: IC 34-40-3-1.

Copies of laws of foreign countries: IC 34-38-2-3.

Certified copies of official bonds: IC 5-4-1-14.

Certified copies of a person's driving record obtained from the department of motor vehicles for previous conviction for operating while intoxicated: IC 9-30-6-14. However, such records are not admissible as evidence in actions arising out of a motor vehicle accident: IC 9-14-3-7. Entries in driving records showing that notice of suspension was mailed to defendant's address on record with the bureau admissible: IC 9-14-3-7.

Certificates issued by state department of toxicology relating to breathalyzer operators and equipment: IC 9-30-6-5.

Certificates of trademark registration: IC 24-2-1-5.

Certified copy of the record of child support payments under Uniform Interstate Family Support Act: IC 31-18-3-16.

M. CERTIFIED DOMESTIC RECORDS OF REGULARLY CONDUCTED ACTIVITY - RULE 902(11)

Rule 902(11) provides that certified domestic records of regularly conducted activities are self-authenticating unless the source of the information or the circumstances of preparation indicate a lack of trustworthiness.

1. Requirements of the certificate

Rule 902(11) states that, unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, extrinsic evidence of authenticity is not required with respect to the original or a duplicate of a domestic record of regularly conducted activity

within the scope of Rule 803(6)(A)-(C), as shown by a certification under oath of the records custodian or another qualified person.

Williams v. State, 64 N.E.3d 221 (Ind. Ct. App. 2016) (certification of 192-page toxicology report did not show that the records met the requirements of Rule 803(6)(A)-(C), that is, they were made at or near the time by – or from information transmitted by - someone with knowledge and that they were made and kept by the lab in the ordinary course of business).

Spreyboeck v. State, 875 N.E.2d 813, 820 (Ind. Ct. App. 2007) (affidavit by a bank employee attached to both bank and Kawasaki documents lacked trustworthiness and did not comply with Rule 902(9) (now Rule 902(11)); the Affidavit neither specified the number of pages nor identified the documents it purported to authenticate and was a boilerplate recitation unconnected to the underlying documents; some of the documents were dated one day after the Affidavit was signed).

Walters v. State, 120 N.E.3d 1145, 1154-55 (Ind. Ct. App. 2019) (a form cover letter that did not name the document it was authenticating or include page numbers or dates and was not notarized, was not adequate to make phone records self-authenticating).

When considering who qualifies as a "custodian...or another qualified person," the phrase 'other qualified witness' should be given the broadest interpretation to encourage admissibility of relevant and trustworthy evidence. Williams v. Hittle, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994).

Williams v. State, 64 N.E.3d 221 (Ind. Ct. App. 2016) (State did not properly authenticate toxicology report because the 192-page exhibit's Certificate of Authenticity contained only a notary signature as a witness, not a signature of a records custodian or other qualified person).

Smith v. State, 839 N.E.2d 780, 785-86 (Ind. Ct. App. 1995) (in affidavit attached to cell phone record, affiant confirmed that she was acting on behalf of custodian of records of Verizon Wireless or was otherwise qualified as a result of her position with business named in subpoena to make this declaration; this declaration within affidavit was sufficient to satisfy custodial element of rules of evidence absent a substantive challenge to truth of assertion).

2. Presumption accompanies admission of Rule 902(11) certified domestic records

The sponsor of an exhibit need not have personally made it, filed it, or have first-hand knowledge of the transaction represented by it. Instead, records kept in the usual course of business are presumed to have been placed there by those who have a duty to do so and have personal knowledge of the *transaction* represented by the entry, unless there is a showing to the contrary. L.H. v. State, 682 N.E.2d 795, 799-800 (Ind. Ct. App. 1997).

L.H. v. State, 682 N.E.2d 795, 799-800 (Ind. Ct. App.1997) (child challenged admission of evidence of attendance records that were self-authenticated by affidavit of custodian of the records; while the testifying custodian did not affirmatively state that he had personal knowledge of the contents of the school report, the child failed to overcome the presumption that the information in the report was placed there by someone with firsthand knowledge of the child's attendance record).

Cf. Serrano v. State, 808 N.E.2d 724 (Ind. Ct. App. 2004), *disapproved on other grounds by* Jaramillo v. State, 823 N.E.2d 1187, 1190 n.5 (Ind. 2005) (no evidence or circumstances suggested that the reporting officer had personal knowledge of child's age; thus, officer's report was inadmissible under business record).

Williams v. State, 64 N.E.3d 221 (Ind. Ct. App. 2016) (analyst with lab that completed toxicology report only partially explained how the report was created and did not address the other components of the exhibit, thus her testimony did not authenticate the exhibit).

3. Notice requirement

Even if the certificate satisfies the requirements of Rule 902(11), the rule provides that evidence will not be self-authenticating if the proponent fails to properly provide reasonable written notice to all adverse parties of the intention to offer the record, and to make the record available for inspection, sufficiently in advance of its offer into evidence to provide a fair opportunity to challenge it.

L.H. v. State, 682 N.E.2d 795, 800 (Ind. Ct. App. 1997) (complaining party cannot argue on appeal that fair opportunity to challenge exhibits was denied when complaining party has not shown how the short notice affected substantial rights. Complaining party must show prejudice from short notice).

N. CERTIFIED FOREIGN RECORDS OF REGULARLY CONDUCTED ACTIVITY - RULE 902(12)

Rule 902(12) provides that original or copies of certified foreign records of regularly conducted activities are self-authenticating if they meet the requirements of Rule 902(11).

1. Requirements of certification

Rule 902(12)(A) states that the certification 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.

2. Signature requirement

Under Rule 902(12)(B), the signature must be certified by a government official in the manner provided in Rule 902(11).

3. Notice requirement

Even if the certificate satisfies the requirements of Rule 902(12), the rule provides that the proponent must also meet the notice requirements of Rule 902(11).

III. SUBSCRIBING WITNESS'S TESTIMONY UNNECESSARY - RULE 903

A. OFFICIAL TEXT:

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

B. DEFINING SUBSCRIBING WITNESS

A subscribing witness is one who attests to the signature of the maker of the writing. Miller, 13 *Indiana Evidence* 643 §903.101 (4th ed.) (*citing Graham Handbook,* § 903:1, (6th ed. 2006)).

C. FUNCTION OF RULE

Where there is no applicable statutory or common law provision requiring testimony of a subscribing witness, authentication of a document may be established in accordance with Rules 901 or 902.

For the laws relating to requirement of attesting witnesses for wills see:

IC 29-1-5-3; IC 29-1-7-9; IC 29-1-7-10; IC 29-1-7-13.