LIBRARY

Rivera v. Baldisari
Amusement Parks, Inc.

February 2004

WALKER ON EVIDENCE IN THE FRANKLIN COURTS (3d ed. 2004)

The Requirement of Authentication[1]

Franklin Rule of Evidence (FRE) 901(a) provides the standard for authenticating exhibits and other forms of nontestimonial evidence. It establishes an across-the-board rule that something is properly authenticated by "evidence sufficient to support a finding" that it is "what the proponent claims." Unless an exhibit is self-authenticating, formal proof of authenticity must be offered before the evidence can be admitted or even shown to the jury. Frequently, authentication is a formality to which the parties agree before trial, but, if counsel do not agree on authenticity, then authentication will have to be done at trial.

Authentication is a separate and distinct issue from *production* of the evidence. Before evidence can be authenticated, it must be brought to court either voluntarily or by compulsion of process, such as subpoena or other authorized statutory method. The provisions by which production at trial can be compelled are found in the Franklin Code of Civil Procedure (FCCP).

The preliminary showing of authenticity required by FRE 901(a) necessarily depends on the nature of the thing in question, and often a single exhibit can be authenticated in several different ways. The traditional steps to authenticate an exhibit are the following: (1) having the exhibit physically in court; (2) having the exhibit marked for identification; and (3) authenticating the exhibit by the testimony of a witness (called a "sponsoring witness") unless the exhibit is self- authenticating.

By far, the most common method of authenticating documents and other physical evidence is to have the sponsoring witness, either a custodian of the evidence or other possessor of it, appear in court and testify that the evidence is what the proponent claims it to be. However, certain types of evidence, such as those specified in FRE 902, are "self-authenticating" so that extrinsic evidence of authenticity is not necessary. The Franklin Code of Civil Procedure sets forth additional procedures for production and authentication of certain business records. These types of records can be submitted under seal with a supporting affidavit, thus avoiding the need for live testimony about authenticity. These shortcuts save judicial and trial time, and the principle is that the materials are unlikely to be anything other than what they appear to be and that, for the convenience of the parties and the court, they should be admitted without the requirement of extrinsic authenticating evidence.

[1] This section contains excerpts and paraphrasing from Mueller & Kirkpatrick, *Evidence* (1995).

Franklin Rules of Evidence

Rule 901. Requirement for Authentication or Identification

(a) General Provisions

The requirement for authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that the matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity,

(B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by the laws of the State of Franklin or by other rules prescribed by the Franklin Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

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

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* * * *

(4) *Certified copies of public documents.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed or actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by a certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the State of Franklin or rule prescribed by the Franklin Supreme Court.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* * * *

(8) *Acknowledged documents.* * * *

(9) *Commercial paper and related documents.* * * *

(10) *Presumptions under the laws of the State of Franklin.* * * *

(11) *Domestic records of regularly conducted activity accompanied by affidavit.* The original or duplicate of a record of a regularly conducted activity that would be admissible under Franklin Code of Civil Procedure § 1991.

(12) *Certified foreign records of regularly conducted activity.* * * *

* * * *

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate.

* * * *

§ 1984. Subpoena; notice to produce party or agent; method of service; production of books and documents

(a) In the case of the production of a party to any civil action or of a person for whose immediate benefit an action is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such party or person as a witness is not required if written notice requesting the party or person to attend at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person.

(b) The notice specified in subsection (a) may include a request that the party or person bring with him or her books, documents, or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. The procedure provided in this subsection is an alternative to the procedures specified in § 1985 but not to those specified in § 1986.

§ 1985. Subpoena defined; affidavit for *subpoena duces tecum;* issuance of subpoena in blank

(a) The process by which the attendance of a custodian is required is the subpoena. It is a writ or order directed to a person requiring the person's attendance at a particular time and place to testify as a custodian. It may also be a *subpoena duces tecum* and require a custodian to bring any books, documents or other things under the custodian's control that the custodian is bound by law to produce.

(b) An affidavit shall be served with a *subpoena duces tecum* issued before trial specifying the exact matters and things desired to be produced and stating that the custodian has the desired matters or things in his or her possession or under his or her control.

(c) The clerk, or a judge, shall issue a subpoena or *subpoena duces tecum* signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service. Alternatively, an attorney at law who is the attorney of record in an action or proceeding may sign and issue a subpoena or *subpoena duces tecum* to require attendance or to produce matters or things described in the subpoena, before the court in which the action or proceeding is pending or at the trial of an issue therein. The subpoena in such a case need not be sealed.

§ 1986. Employment records; notice to employee of subpoena; motion to quash or modify subpoena

(a) Not less than 15 days prior to the date called for in a *subpoena duces tecum* for the production of employment records, the subpoenaing party shall either (1) obtain a written authorization signed by the employee to release the records, or (2) serve or cause to be served on the employee whose records are being sought a copy of the *subpoena duces tecum,* the affidavit supporting the issuance of the subpoena, and the notice described in subsection (c). This service shall be made to the employee personally or at his or her last known address.

(b) Prior to the production of the records, the subpoenaing party shall serve or cause to be served upon the custodian an attestation of compliance with subsection (a).

(c) Every copy of the *subpoena duces tecum* and affidavit served upon an employee in accordance with subsection (a)(2) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) employment records about the employee are being sought from the custodian named on the subpoena; (2) the employment records may be protected by a right of privacy; (3) if the employee objects to the custodian furnishing the records to the party seeking the records, the employee shall file papers with the court prior to the date specified for production on the subpoena; and (4) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the employee's interest in protecting his or her rights of privacy, including the right to bring a motion to quash or limit the subpoena.

* * * *

§ 1990. Compliance with *subpoena duces tecum* for business records of non-parties

(a) When a *subpoena duces tecum* is served upon a custodian of records of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian, within 15 days after the receipt of the subpoena in any civil action, delivers by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of the court together with the affidavit of the custodian stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records and has authority to certify the records.

(2) The copy is a true copy of all the records described in the *subpoena duces tecum.*

(3) The identity of the records.

(b) The copy of the records shall be separately enclosed in an inner envelope, sealed, with the title and number of the action and date of the subpoena clearly inscribed thereon; the sealed envelope shall then be enclosed in an outer envelope, sealed, showing the number and title of the action, and directed to the clerk of the court.

(c) The copy of the records shall remain sealed and shall be opened only at the time of trial, upon the direction of the judge in the presence of all parties who have appeared in person or by counsel at the trial.

§ 1991. Affidavit laying the foundation for admission of business records of non-parties

If the affidavit specified in § 1990(a) contains statements that (1) the records were prepared by the personnel of the business in the ordinary course of business at or near the time of the action, condition, or event, (2) it was the regular practice of that business activity to make the record, (3) describe the mode of preparation of the records, and (4) the original business records would be admissible in evidence if the custodian had been present and testified to the matters stated in the affidavit, then the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated in the affidavit and is sufficient to meet the requirements of Rule 902(11) of the Franklin Rules of Evidence.