The Authentication Of Documents Requirement: Barrier To Falsehood Or To Truth?

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The purpose of this article is to demonstrate that the rule requiring authentication of documents prior to admitting them in evidence, by mandating the exclusion of relevant evidence, operates as a barrier to determining the facts in issue to which those documents are relevant and, in some cases, as a barrier to determining authenticity itself.

I. The Authentication Rule

Sections 1400-1421 of the California Evidence Code together offer a typical example of the authentication rule.[1] Section 1401 states:

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1. Rule 67 of the Uniform Rules of Evidence provides: "Authentication of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authen-

"(a) Authentication of a writing is required before it may be received in evidence." Section 1400 states: "Authentication of a

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ticity or by any other means provided by law. If the judge finds that a writing (a) is at least thirty years old at the time it is offered, and (b) is in such condition as to create no suspicion concerning its authenticity, and (c) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found it is sufficiently authenticated."

Rule 601 of the ALI Model Code of Evidence provides:

> A writing, offered in evidence as authentic, is admissible, if
> (a) sufficient evidence has been introduced to sustain a finding of its authenticity, or
> (b) the judge finds that the writing
> (i) is at least thirty years old at the time it is so offered, and
> (ii) is in such condition as to create no suspicion concerning its authenticity, and
> (iii) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found.

Rule 901 of the Proposed Rules of Evidence for the U.S. District Courts and Magistrates provides:

> (a) General Provision. The requirement of 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 with the requirements of this rule:
> (1) Testimony of Witness with Knowledge. Testimony that a 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 by expert witnesses with specimens which have been authenticated.
> (4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
> (6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) 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 date compilation, in any form, is from the public office where items of this nature are kept.

writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." Among the types of evidence which can be used to authenticate writings are the testimony of witnesses to the writing,[2] admissions,[3] the testimony of persons familiar with the handwriting of the supposed writer,[4] comparisons between the writing and other examples of the supposed writer's handwriting,[5] evidence that the writing was received in response to a communication to the supposed writer,[6] and the contents of the writing itself.[7] These, however, are not the only types of evidence which can be used for authentication, and, indeed, any otherwise admissible evidence can be used for such a purpose.[8]

It should be noted that, while the court must, before admitting a writing, determine that the evidence is sufficient for the trier of fact to find it authentic, once the evidence is admitted the court does not direct the trier to find the writing authentic, and the trier is still free to find it unauthentic.[9]

II. The Barrier of Authentication

It is the central contention of this article that the authentication doctrine is an unjustifiable restriction on the admissibility of evidence, because in some cases it is superfluous and in others it operates to distort the relative persuasive force of the parties' cases. First, as will be shown, in many instances where the proponent of a writing has the burden of proving an ultimate fact in issue

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(8) Ancient Documents or Data Compilations. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, (iii) 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 Act of Congress or by other rules adopted by the Supreme Court.

2. Cal. Evid. Code § 1413 (West 1968).
3. *Id.* § 1414.
4. *Id.* §§ 1415-16.
5. *Id.* §§ 1415, 1417, 1418.
6. *Id.* § 1420.
7. *Id.* § 1421.
8. *Id.* § 1410.
9. Cal. Evid. Code §§ 402, 403 (West 1968); *see also,* Rule 8 of the Uniform Rules of Evidence; Rule 104 of the Proposed Rules of Evidence for the U.S. District Courts and Magistrates.

(UF) and has produced enough evidence of that fact to send the issue to the trier of fact, his writing will have been authenticated by the same evidence. In those cases the authentication requirement would be superfluous. (Whenever the party with the burden of proof has failed to make out a case for the UF which is sufficient in law to go to the trier of fact, the court can of course keep the issue from ever reaching the trier.) Second, in the cases where the proponent of the writing would make out a sufficient case of the UF by using the writing but does not make out a sufficient case of the writing's authenticity, exclusion of the writing will make the case of the proponent weaker in the eyes of the court (in determining sufficiency of the evidence of the UF to send the issue to the trier) and in the eyes of the trier of fact (assuming the hurdle of sufficiency is passed) than it really is. Similarly, where the proponent of the writing is not the party with the burden of proving the UF, and his evidence does not authenticate the writing, exclusion of the writing will make his case seem weaker in the eyes of the trier of fact than it really is.

Both these situations—that in which the authentication rule is superfluous and that in which it has a distorting influence on the case—will be examined below, along with the various rationales offered for the rule.

1. *The superfluity of the authentication rule in many cases where proponent can make out a legally sufficient case for the existence or non-existence of the UF.*

The probative value of any item of evidence offered to prove the UF is in part a function of the other evidence so offered. Suppose that one out of every three times we find a particular item of evidence (E_1) we find the UF. The probative value of E_1 by itself with respect to the UF is therefore 33%. The symbol $\rho\ (UF/E_1)=\frac{1}{3}$ will designate this fact. Suppose that the probative value of another item of evidence (E_2) is also 33% (i.e., $\rho\ (UF/E_2)=\frac{1}{3}$). Finally, suppose that nine times out of ten, when we find E_1 and E_2 together, we find UF (i.e., $\rho\ (UF/E_1 \wedge E_2)=\frac{9}{10}$). In such a case the probative value of E_1 (or E_2) with respect to the UF is 90% when that evidence is introduced *after* E_2 (or E_1). However, if both E_1 and E_2 had to have independent probative values of more than 50% to be admitted into evidence—i.e., if both $\rho\ (UF/E_1)$ and $\rho\ (UF/E_2)$ had to

be more than 50%—neither could be, and what would in fact be a case where a 90% probability of the UF existed could not be made out. Fortunately the law does not *usually* require that each item of evidence be sufficient in itself to prove the UF.

The probative value of some evidence, including, but surely not limited to, many writings, rests upon two conspicuous inferences: (1) the inference from the fact of the evidence to its authenticity (i.e., that it is what it purports to be), and (2) the inference from the evidence as authentic to what it purports to prove.[10]

Let us suppose, for example, that the UF to be proved in a lawsuit is that John Doe I is climbing a particular mountain. The town newspaper has received a letter signed "John Doe" announcing the author's intention to climb that mountain. There are three John Does in the town. In the absence of further information and in view of the chance of deception and other factors which might reduce the probability that one of them wrote the letter, the probability that the letter was written by John Doe I, i.e., the probability of its authenticity, is less than 33%. Let us also assume that when someone writes such a letter he does what he says he will do 75% of the time. Therefore, the probative value of the letter in proving that John Doe I is climbing the mountain, if one knows only that there are three John Does in town, is less than 25%, the product of the two probabilities. (This assumes, of course, that the letter has no probative value unless written by John Doe I, i.e., unless authentic.) In other words, the probative value of the letter is primarily a function of the probability of its authenticity and the probability of what it purports to prove if it is authentic.

It is at this point that the earlier discussion of the interdepend-

10. The term "conspicuous" is used in referring to the two inferences because it would seem that in reality all single inferences could be divided into two or more inferences. For example, the fact that a gun with defendant's name on it was found at the murder scene usually is seen as two inferences away from defendant's guilt: (1) the inference that the gun was in fact defendant's gun and (2) the inference that defendant was the guilty party. But inference (2) can be broken up into more inferences, e.g., (1) defendant brought the gun to the murder scene, (2) he brought it there at the time of the murder, (3) he used it to commit the murder. The number of such possible "inconspicuous" inferences is co-extensive with the number of facts which would destroy the inference from defendant's gun to his guilt, e.g., that he brought the gun to the scene at another time, or that someone else brought the gun there, etc. Conversely, what are usually regarded as two or more "conspicuous" inferences, e.g., from the fact of a shirt with defendant's name on it to the fact that it was defendant's shirt and from that fact to his guilt, are often treated as one inference, e.g., from an unauthenticated writing to the fact that it is offered to prove, so that the intermediate inference no longer *is* conspicuous.

ence of the probative values of evidence becomes significant. The probative value of the letter, the only other evidence being that there are three John Does in town, is, as has been indicated, less than 25%. But as we introduce other evidence into the case (e.g., John Doe I is out of town while the others are not, John Doe I is a mountain climber, a man was seen climbing the mountain in question, etc.), the probability that the UF is true increases and along with it the probative value of each item of evidence relative to the other evidence in the case. (To take the earlier example where E_1 and E_2 each established a 33% probability of the UF, but together established a 90% probability, one could say that the probative value of E_1 (or E_2) with respect to the UF is 90% given that E_2 (or E_1) exists.)

Furthermore—and herein lies one of the most telling criticisms of the authentication rule—just as the true probative value of a writing is a function of the probative value of all other evidence in the case, so too is the probability of its authenticity a function of its probative value. In other words, the probability of authenticity is a function of the probability of the UF established by the writing and all other evidence in the case.[11] For example, if all the evidence in the case of John Doe I created a 90% probability that he was on the mountain in question (the UF), the probability that the letter describing the plan to climb the mountain was sent by John Doe I and not someone else (i.e, the probability of its authenticity) might be pretty close to 90%, too. That probability, $\rho(A)$, would be established by adding:

(a) The probability that John Doe I sent the letter, given that a writing such as the one in question existed, and that John Doe I was climbing the mountain (UF)—i.e., the $\rho(A/UF)$, say, $^{8}\!/_{9}$—weighted by the probability of the UF, $\rho(UF)$, given above as 90% or $^{9}\!/_{10}$; and

(b) The probability that John Doe I sent the letter, given that the writing existed and that the man climbing the mountain was not John Doe I (NUF)—i.e., the $\rho(A/NUF)$, say, $^{1}\!/_{10}$—weighted by the probability of the NUF, $\rho(NUF)$, given as 10% or $^{1}\!/_{10}$.

11. It is quite permissible as well as logical to use the contents of a writing as evidence of its authenticity. *See*: CAL. EVID. CODE § 1421 (West 1968).

Expressed symbolically, this formula states:
$\rho(A) = [\rho(A/UF) \times \rho(UF)] + [\rho(A/NUF) \times \rho(NUF)]$.

When the figures assigned above are inserted into the formula, the $\rho(A) = [{}^{8}\!/\!_{10} \times {}^{9}\!/\!_{10}] + [{}^{1}\!/\!_{10} \times {}^{1}\!/\!_{10}] = {}^{89}\!/\!_{100}$ or 89%.

Since the higher the probability of the UF, the higher the probability of authenticity of a writing offered to prove the UF, two propositions follow regarding the authentication rule: *(1) authenticity cannot be determined before all the evidence of the UF has been offered by the proponent of the UF; (2) when the proponent has introduced sufficient evidence to have the case for the UF go to the trier of fact, he will have in many, if not most, cases introduced sufficient evidence for the trier of fact to find the writing authentic, and the authentication rule should have no effect on the evidence.* (These two propositions apply also to situations in which the proponent of the writing is not the party who has the burden of proving the UF but who has introduced enough evidence of his own *against* the existence of the UF for the trier to find that more probably than not the UF does not exist.)

There is nothing in the authentication rule, taken literally, which precludes a finding of authenticity based on all of the evidence offered for or against the UF. However, most lawyers, judges, and commentators conceive of authentication as a process involving only a small part of the evidence for or against the UF, on which evidence the determination of the admissibility of the writing is based. Thus, the procedure envisioned is for the court, in a jury trial, to decide whether a sufficient probability of authenticity is shown by the proponent's evidence before allowing the writing to be presented to the jury; and this procedure would break down if the proponent of the writing sought to introduce, at the hearing on admissibility, all of the evidence for or against the UF that he had already presented or intended to present to the jury. In a court trial there would be no need for this total duplication of the evidence; but by the same token there would be no need for a finding on the issue of authenticity, since such a finding could not be made until the close of the proponent's case, at which time the court's decision on the sufficiency of the case for the UF might well subsume its decision on authenticity. It is apparent that the process of authentication actually used in trials is not the process of authentication that was described above as being a true process of authentication, for in actual practice the evidence on the issue of authentication does not duplicate all the evidence for or against the UF. But if all of this evidence is not offered on the question of authenticity, then some documents will be excluded for which a case of authen-

ticity can be made out. This is why it can be claimed that the authentication rule (as actually used in practice) may be a barrier to authentication.

2. *The superfluity of the authentication rule in all cases in which the proponent of the writing fails to make out a legally sufficient case for the existence or non-existence of the UF and has the burden of so doing.*

Where the writing represents substantially all of the evidence of the UF that the proponent produces, his failure to establish that the writing was more probably than not authentic would likely be tantamount to failure to establish more probably than not that the UF was true. If the proponent has the burden of proving the UF, nothing is accomplished by excluding the writing, since the ruling on the sufficiency of evidence will effect the same result. The famous case of *Keegan v. Green Giant Co.*,[12] in which the plaintiff failed to authenticate the label on a can of peas, is a good example of a case where failure to authenticate and failure to make out a sufficient case of the UF (that defendant canned the peas) were really synonymous since plaintiff's evidence that defendant canned the peas consisted almost entirely of the label attached to the can. While the holding of the court was almost surely in error regarding the probability of both the UF and authenticity, the case is nonetheless illustrative of the connection of legal sufficiency of evidence and authenticity where the writing is the primary evidence of the UF.[13]

3. *The barrier to truth presented by the authentication rule where authenticity cannot be established as more probable than not, even considering all the evidence for or against the UF.*

It seems clear that true authentication is a superfluous procedure

12. 150 Me. 282, 110 A.2d 599 (Sup. Jud. Ct., 1954).

13. The court's decision was almost surely wrong because the probability of the UF, i.e., that defendant had canned the peas in question, considering the label, the fact that defendant did can peas and did use labels identical to the one in question thereon, and the fact that the grocery store from which the peas were obtained did purchase defendant's products, was surely high enough to be legally sufficient. This being true, the probability of authenticity of the label was undoubtedly sufficiently high for legal authentication, the probability of non-authenticity given that the can was defendant's being almost zero.

when it merely duplicates the determination of the sufficiency of the case for or against the UF. It is also clear that insofar as the actual practice of authentication does not entail hearing all the evidence for or against the UF, it fails in some instances to allow into evidence a document which could have been authenticated. What remains to be discussed are those situations in which the case of the proponent of the writing is legally sufficient (or else is not required to be because he does not have the burden of proof), but the case does not establish authenticity as more probable than not.

In the cases in which the proponent of a writing has the burden of proving the UF and can make out a legally sufficient case of the UF but cannot make out a legally sufficient case of authenticity, application of the authentication rule resulting in not admitting the writing has two possible consequences: (1) it may cause what was, with the writing, a legally sufficient case to become a legally insufficient case; (2) even if it does not lead to failure to make out a sufficient case, it will make the proponent's case for the UF appear weaker in the eyes of the trier of fact than it actually is. In cases in which the proponent of the writing does not have the burden of proving (or disproving) the UF and cannot establish authenticity as more probable than not, exclusion of the writing will make his case seem weaker to the trier of fact than it actually is. Indeed, since requiring him to prove the authenticity of his writing might in some instances require him to produce enough evidence to make out a legally sufficient case for or against the UF, the authentication rule could become almost as onerous as shifting the burden of proving or disproving the UF to the proponent of the writing—an undesirable result in any case but especially unfortunate if the proponent is a criminal defendant, hoping to raise but a reasonable doubt of his guilt. In view of these consequences, what is said to justify the authentication rule?

One justification that may be readily dismissed is that the document is not *relevant* unless proved to be authentic.[14] This justification rests on a mistaken assumption about what constitutes relevancy. Evidence is relevant when it tends to make the probability of the UF more likely or less likely than it is without the evidence.[15] In other words, evidence is relevant when it is probative. But an unauthenticated writing can be probative even though its probative value rests entirely on a series of inferences, one of which

14. *See,* for example, ROTHSTEIN, EVIDENCE IN A NUTSHELL 46 (1970).

15. *See,* for example, CAL. EVID. CODE § 210 (West 1968); Rule 1(2) of the Uniform Rules of Evidence; Rule 1(12) of the ALI Model Code of Evidence; Rule 401 of the Proposed Rules of Evidence for the U.S. District Courts and Magistrates; MCCORMICK, EVIDENCE 433-41 (2d ed. 1972).

is that the writing is authentic. As long as there is a chance that the writing is authentic, the writing is relevant. By itself the unauthenticated writing could not be *sufficient* to prove the UF if its proponent had the burden of proving it. But relevancy and sufficiency are not synonymous. Only if the writing would be relevant to rebutting the proof of the UF if unauthentic would the proponent offering it to prove the UF have to authenticate it to establish its relevancy to *his* case; and even if he failed to do so the writing would still be relevant to the case of his adversary.

If testing for relevancy is not an adequate justification for the authentication rule, what about protecting against forgery and other fraud?[16] Undoubtedly the authentication rule screens out some forgeries and other fraudulent writings. However, it is quite probable that even without the authentication rule, i.e., even without the ability to exclude forgeries and fraudulent writings from evidence, very few forgeries and fraudulent writings would be taken as authentic by a trier of fact. The party attempting to impeach the document could offer evidence of its forgery or fraudulent character and stress its dubious quality in argument to the trier. He also could invoke the rule allowing a negative inference from the fact that a party introduced weaker evidence when he had access to stronger, which rule should be applied to proponents of writings who have, but who do not introduce, evidence regarding the execution of the document, the handwriting on the document, or the circumstances surrounding the discovery of the document.[17] With these protections against forgeries and frauds, this particular function of the authentication rule has minimal value indeed.

Finally, Wigmore's justification for the rule must be considered:

> (1) Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A horse or a coat contains upon itself no indications of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing, and must still be supplied, is not likely to occur. There is a natural tendency to forget it. Thus

16. MCCORMICK, *supra* note 15, at 544-45; *see also*: Strong, *Liberalizing the Authentication of Private Writings*, 52 CORNELL L.Q. 284 (1966).

17. *See*, for example, CAL. EVID. CODE §§ 412, 413 (West 1968); 2 WIGMORE ON EVIDENCE §§ 278, 285 (3rd ed. 1940).

it has constantly to be emphasized by the judicial requirement of evidence to that effect.

(2) The original of a writing is usually presented to the tribunal 'in specie,' while other material objects are not required to be and seldom are brought into court (except such articles as the tools of a crime or the clothes of a victim); so that, in practice, the most common opportunity for the operation of this aberrant tendency occurs for writings, visibly in existence and mutely suggesting that they *are* all that they purport to be. Thus the mental tendency is especially forcible, frequent, and misleading where documents are involved.

For these two reasons, then, it has happened that the specific rules that have grown up concerning modes of authentication have come to relate to writings alone.

The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; *there must be some evidence of the genuineness* (or execution) of it. . . .[18] (Emphasis original.)

The upshot of Wigmore's justification is that the trier of fact may forget that the inferences from the fact of the writing to the UF include an inference of authenticity and may merely assume the writing is authentic. This is highly questionable. Indeed, since the inference of authenticity is a "conspicuous" inference, it is more probable that the trier of fact will be aware of it than that the trier will notice all the "inconspicuous" inferences which connect ordinary evidence with the UF. A trier of fact may be overwhelmed by evidence of the defendant's fingerprints at the scene of the crime, forgetting that the prints do not establish the time or circumstances of the defendant's presence. Is it more likely that the trier will forget that a writing's probative value rests on an inference of authenticity, especially with counsel for the other side stressing in argument that no direct proof of execution has been offered? Wigmore's fears, if valid, prove too much; but they are more likely highly exaggerated, especially at a time when most litigants can and do obtain assistance of counsel.

What other justifications might exist for the authentication rule? There is no requirement of admissibility that evidence generally be of any specific probative value. It need only be probative, and unauthenticated writings can be. Moreover, many unauthenticated writings are more probative of the UF than are writings which are authenticated. For example, a letter containing an admission of the UF and signed with defendant's name may be more probative of the UF than a letter written by defendant not admitting the UF and only obliquely relevant thereto, even if the former cannot be

18. 7 WIGMORE ON EVIDENCE § 2130 (3rd ed. 1940); *see also* MCCORMICK, *supra* note 15, at 544-45.

legally authenticated and the latter's authenticity is conceded, if there is any evidence at all of the former's authenticity. If the probability of the former's authenticity is 30%, which by hypothesis is not high enough for legal authentication, and the probability of the UF if the letter is authentic is 90%, the overall probative value of the former would be 27%. Provided that the latter document if authentic establishes less than a 27% chance of the UF, then the probative value of the former document, with only a 30% probability of authenticity, would be higher than the probative value of the latter, even if the latter were 100% authenticated.

Since the requirements of relevancy, the desire to prevent fraud and screen out forgeries, and the need to make triers of fact aware of all necessary inferences do not justify the authentication rule, and since there is no requirement that evidence be of any particular probative value in order to be admissible, one must conclude that the authentication rule should be abolished. Indeed, it is an anomaly in its application only to writings. Consider a criminal trial of a defendant named Joe Smith, accused of robbery. A witness for the prosecution testifies that she saw the robbery take place and that the robber wore a jacket with the name "Joe Smith" emblazoned on the back. The victim testifies that the robber dropped his knife, which the victim retrieved, and on which is engraved the name "Joe Smith." The defendant's defense is an alibi, and he presents as his witness a bartender who testifies that at the time of the robbery a man was in his bar and left his watch, on which is engraved the name, "Joe Smith." (It will be assumed that the emblazoned or engraved name on each of the three items above is put there by the manufacturer of the item for likely purchase by persons of the same name, not by the purchaser. This removes any possibility that these items come within the authentication rule.) The relevancy of each of these three items of evidence depends upon an inference very similar to an inference of authenticity, that is, an inference that the jacket, knife and watch are the possessions of the defendant and not some other person. Yet the law does not require that these items be shown to be more probably than not the possessions of the defendant as a condition of their admissibility.[19]

19. The line between writings which must be authenticated and items of evidence which do not have to be "authenticated" (whatever that would

Moreover, if it were to do so in the case of defendant's evidence, the result would be comparable (although not identical) to shifting the burden of proof of innocence to the party who theoretically has only to raise a reasonable doubt of his guilt. There is no reason for the law to take a different stance with regard to writings than it takes with regard to non-documentary evidence.

III. Summary and Recommendation

The authentication rule, followed literally, is superfluous in many cases where the proponent of the writing can make out a legally sufficient case for the existence or non-existence of the UF; for in many cases the proponent can also authenticate his writing by using all the evidence bearing on the UF. The authentication rule as actually applied in practice, however, will often operate to exclude writings which would be authenticated if all the evidence relevant to the existence of the UF were considered. In practice, therefore, the authentication rule is itself a barrier to authentication.

The authentication rule is also superfluous in all cases where even if the writing is admitted, the proponent will fail to make out a legally sufficient case and has the burden of so doing.

Where the proponent of the writing cannnot authenticate it, even using all the evidence relevant to the existence of the UF, the au-

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mean with respect to such evidence) is quite fuzzy. For example, in *Keegan v. Green Giant Co.*, *supra* note 12, it was immaterial whether defendant was the actual author of the label. What was material was whether defendant adopted the representations thereon as its representations, i.e., whether the label, by whomever written, was intended as a communication by defendant and placed on the can by defendant for that purpose. Similarly, when one buys an item such as a key ring with his name on it he usually is intending to communicate something by means of that key ring, to wit, that it belongs to him, even though he is not the "author" of the writing thereon. Moreover, the dangers of fraudulent substitution and confusion of the trier of fact (though not of forgery) exist for evidence such as the key ring and the jacket, knife and watch referred to above as well as for ordinary writings and labels. However, these dangers exist, too, for evidence that has no writing at all on it. The shape and color of a Coca-Cola bottle help identify the manufacturer of the contents almost as much as the name thereon.

What one should conclude from this discussion is not that the authentication requirement should be extended to include proof of any connection with a person as well as proof of the person's authorship as a condition of admissibility, though there is some misleading language to that effect in Wigmore. (Wigmore on Evidence, *supra* note 18, at § 2129). The evidence must be shown to be relevant, of course, which is all that Wigmore requires. It need not be shown to be connected with a certain person more probably than not, which is what authentication requires. What one should conclude is that the rule requiring authentication where it now applies should give way to the requirement merely of relevancy.

thentication rule serves as a barrier to the discovery of truth by excluding probative evidence. Moreover, the rule cannot be justified by appeals to the requirement of relevancy, to the danger of forgery and fraud, to the possible confusion of the trier of fact, to any fictitious standard of probative value, or to the practice followed with evidence similar to writings. The requirement of sufficiency of evidence, the negative inference which the law allows to be drawn from the introduction of weaker evidence when the party possesses stronger evidence, and the opportunity for opposing counsel to introduce evidence of unauthenticity and to point out in argument any lack of authentication are sufficient to accomplish any legitimate purposes which the authentication rule now serves. It is therefore recommended that the authentication rule be abolished.